Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: The St. Lawrence Seaway Management Corporation, 2012 OHSTC 42

Date: 2012-11-13
Case No.: 2011-63
Rendered at: Ottawa

Between:

The St. Lawrence Seaway Management Corporation, Appellant

Matter:	Appeal under subsection 146(1) of the *Canada Labour Code* of a direction issued by a health and safety officer
Decision:	The three directions are rescinded
Decision rendered by:	Mr Michael Wiwchar, Appeals Officer
Decision language:	English
For the appellant:	Mr Patrick Essiminy, Counsel, Stikeman Elliott LLP

Canada

REASONS

[1] This matter concerns an appeal brought under subsection 146(1) of the *Canada Labour Code* (the Code) of three directions issued by Mr Paul Danton, Health and Safety Officer (HSO), with the Labour Program of Human Resources and Skills Development Canada (HRSDC), to the employer, The St. Lawrence Seaway Management Corporation (SLSMC), on November 7, 2011.

Background

[2] On February 28, March 9 and 26, 2011, hazardous occurrences involving contracted employees of Rankin Construction Inc. took place on the property of the employer. Rankin Construction Inc. is a contractor company hired by SLSMC to perform work on its property.

[3] On March 28 and 29 2011, HSO Danton met with SLSMC employer and employee representatives to discuss SLSMC's adopted practice of not investigating hazardous occurrences of its third party contractors.

[4] At the conclusion of these meetings, a letter dated April 6, 2011, was sent to the employer detailing their obligations when investigating a hazardous occurrence which involves a contractor while that contractor is on the site of the federally regulated employer, SLSMC.

[5] The aforementioned letter to the employer had attached to it a document titled Assurance of Voluntary Compliance (AVC) dated March 29, 2011. The AVC was attached to provide the employer an opportunity to make a commitment to HSO Danton that it would comply voluntarily to correcting the alleged described violations.

[6] On November 7, 2011, HSO Danton issued three directions as a result of the employer's failure to return the completed AVC.

[7] The first direction was issued pursuant to paragraph 125(1)(c) of the Code and paragraph 15.4(1)(a) of the Canada Occupational Health and Safety Regulations (the Regulations). This direction concerns SLSMC's failure to appoint a qualified person to investigate the hazardous occurrences of February 28, March 9 and March 26, 2011, that affect SLSMC employees in the course of their employment, which reads as follows:

> CANADA LABOUR CODE
>
> 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,

(*c*) investigate, record and report in the manner and to the authorities as prescribed all accidents, occupational diseases and other hazardous occurrences known to the employer.

CANADA OCCUPATIONAL HEALTH AND SAFETY REGULATIONS

15.4 (1) Where an employer becomes aware of an accident, occupational disease or other hazardous occurrence affecting any of his employees in the course of employment, the employer shall, without delay,

(*a*) appoint a qualified person to carry out an investigation of the hazardous occurrence.

[8] The second direction was issued pursuant to paragraph 135(7)(e) of the Code, and paragraph 15.4(1)(b) of the Regulations. In light of the hazardous occurrences in question, this direction concerns SLSMC's failure to notify the SLSMC work place health and safety committee of the hazardous occurrences and the name of the person appointed to investigate them, which reads as follows:

CANADA LABOUR CODE

135(7) A work place committee, in respect of the work place for which it is established,

(*e*) shall participate in all of the inquiries, investigations, studies and inspections pertaining to the health and safety of employees, including any consultations that may be necessary with persons who are professionally or technically qualified to advise the committee on those matters.

CANADA OCCUPATIONAL HEALTH AND SAFETY REGULATIONS

15.4 (1) Where an employer becomes aware of an accident, occupational disease or other hazardous occurrence affecting any of his employees in the course of employment, the employer shall, without delay,

(*b*) notify the work place committee or the health and safety representative of the hazardous occurrence and of the name of the person appointed to investigate it; [...]

[9] The third direction was issued pursuant to paragraph 125(1)(y) of the Code and paragraph 19.5(1)(d) and subsection 19.5(2) of the Regulations. In light of the hazardous occurrences in question, this direction concerns SLSMC's failure to implement a preventative maintenance program that involves the investigation of work patterns and methods that could result in a hazard to SLSMC employees, which reads as follows:

CANADA LABOUR CODE

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,

(*y*) ensure that the activities of every person granted access to the work place do not endanger the health and safety of employees.

CANADA OCCUPATIONAL HEALTH AND SAFETY REGULATIONS

19.5 (1) The employer shall, in order to address identified and assessed hazards, including ergonomics-related hazards, take preventive measures to address the assessed hazard in the following order of priority:

(*d*) administrative procedures, such as the management of hazard exposure and recovery periods and the management of work patterns and methods.

[...]

19.5 (2) As part of the preventive measures, the employer shall develop and implement a preventive maintenance program in order to avoid failures that could result in a hazard to employees.

[10] On April 17, 2012, a teleconference was held for the purpose of allowing me to obtain additional background information regarding the three aforementioned hazardous occurrences that took place on February 28, March 9 and March 26, 2011. Both HSO Danton and counsel for SLSMC, Mr Essiminy, participated in this teleconference. During this conference call, I requested that HSO Danton send to me and Mr. Essiminy copies of the three hazardous occurrence reports, which he did in the minutes following the call.

Issues

[11] To dispose of this appeal, I must decide whether HSO Danton was founded in his decision to issue the three direction s in question. More specifically, I must decide whether:

i. The employer has an obligation to appoint a qualified person to investigate the hazardous occurrences of February 28, March 9 and March 26, 2011.

ii. The employer has an obligation to notify the SLSMC work place health and safety committee of the hazardous occurrences in question and the name of the person appointed to investigate them.

iii. In light of the hazardous occurrences in question, the employer has failed to implement a preventative maintenance program that involves the investigation of work patterns and methods that could result in a hazard to SLSMC employees.

Appellant's submissions

[12] The appellant argued that neither the Code nor the Regulations support the HSO's finding of an obligation of the employer to appoint a qualified person to investigate the hazardous occurrences of February 28, March 9 and March 26, 2011. For the same reasons the appellant argued that it was under no obligation to notify the work place committee or the health and safety representative of either, the hazardous occurrences in question, or of the name of the person appointed to investigate them.

[13] It is recognized by the appellant that paragraph 125(1)(c) of the Code requires the employer to investigate and report any hazardous occurrence brought to its knowledge "in the manner and to the authorities as prescribed" and that "prescribed" as it is used in this context means "prescribed by regulation of the Governor in Council", pursuant to subsection 122(1) of the Code.

[14] Consequently, the appellant argued that according to the wording of paragraph 15.4(1)(a) of the Regulations, an employer's obligation to investigate hazardous occurrences only concerns occurrences "affecting any of his employees in the course of employment". The appellant thereby submitted that because the hazardous occurrences affected only the employees of its contractors, SLSMC was under no obligation to investigate.

[15] The decision rendered in *Canada (Public Works and Government Services and Public Service Alliance of Canada,* [1999] C.L.C.R.S.O.D. No. 18 is cited by the appellant as upholding the principle that where a hazardous occurrence takes place on the premises of a federally-regulated agency or institution, but exclusively involves a provincially-regulated employee, the federally-regulated entity is under no obligation to investigate.

[16] Thus, the appellant argued that because none of SLSMC employees were involved in the hazardous occurrences in question, these occurrences are not to be considered as affecting SLSMC employees. On these grounds the appellant argued that neither paragraphs 125(1)(c) of the Code, nor 15.4(1)(a) of the Regulations were violated, and that the first direction issued by the HSO should therefore be rescinded.

[17] In keeping to its reasons as to why direction no. 1 should be rescinded, the appellant argued that direction no. 2 should also be rescinded. In particular, the appellant submitted that because it was under no obligation to appoint a person to investigate the accidents that occurred on February 28, March 9 and March 26, 2011, in the first place, SLSMC never had an obligation to notify the SLSMC work place health and safety

committee of the hazardous occurrences and the name of the person appointed to investigate them.

[18] Concerning direction no. 3, the appellant argued two alternative grounds for rescinding this direction. The first ground is that direction no. 3 was issued without a sufficient evidentiary basis, was drafted in vague and ambiguous language and is also not sufficiently specific for the appellant to understand how it has not complied with the cited Code provisions and Regulations. The alternative ground for rescinding this direction is that the SLSMC has already implemented a preventative maintenance program that is in compliance with the Code and the Regulations.

[19] Regarding the first ground that was submitted, the appellant argued that this direction should be rescinded because the HSO did not provide any evidence in his Appeal Report or the correspondence attached thereto that the SLSMC has not implemented a preventative maintenance program that involves the investigation of work patterns and methods that could result in a hazard to SLSMC employees.

[20] Further to this point, the appellant submitted that the description of the violation cited in direction no. 3 is drafted in terms that are vague, ambiguous and not specific enough for the employer to understand how it has failed to comply with paragraph 125(1)(y) of the Code and paragraph 19.5(1)(d) and subsection 19.5(2) of the Regulations. In support of this argument, the appellant cites *1260269 Ontario Inc. (Sky Harbour Aircraft Refinishing and Tracy Chambers,* (October 4, 2006), Decision No. 06-032 (Appeals Officer) at paragraphs 34-35 [*Sky Harbour*].

[21] The *Sky Harbour* decision is referenced as supporting the principle that directions must be rescinded if they are not specific enough for the employer to understand either, how it has not complied with the Code or Regulations, or what aims need to be realized in order for compliance to be recognized.

[22] The alternate ground for the rescinding of direction no. 3 is that SLSMC has already implemented a preventative maintenance program which complies with the Code and the Regulations.

[23] In support of this alternate ground, the appellant provided as evidence a copy of SLSMC's current Accident Reporting & Investigation Procedures (the Procedures) which the appellant submitted have been implemented since November 2, 2010. The Procedures are said to outline the investigative responsibilities of SLSMC employees, supervisors, managers, health and safety committees and the health and safety officer. This evidence ultimately used to ground the argument that pursuant to 125(1)(y) of the Code and paragraph 19.5(1)(d) and subsection 19.5(2) of the Regulations, SLSMC did have a preventative maintenance program which included "the investigation of work patterns and methods that could result in a hazard to SLSMC employees" at the time of the hazardous occurrences referenced in direction no. 3. For these reasons the appellant argued that direction no. 3 should also be rescinded along with direction nos. 1 and 2.

Analysis

[24] For the reasons that follow, I am of the opinion that the three directions under appeal must be rescinded.

Concerning direction no. 1 and direction no. 2

[25] Central to the disposal of the appeal of the first two directions is the question of whether the hazardous occurrences in question can be considered to affect any of the employees of SLSMC, specifically within the meaning of subsection 15.4(1) of the Regulations. This section reads as follows:

> 15.4(1) Where an employer becomes aware of an accident, occupational disease or other hazardous occurrence **affecting any of his employees** in the course of employment, the employer shall, without delay (my emphasis added)

[26] Before providing my analysis of this provision in relation to how the present appeal concerns the employees of SLSMC, I will first provide a brief outline of the circumstances of the three hazardous occurrences in question. The details that follow have been taken from the hazardous occurrence reports sent to me and Mr Essiminy by HSO Danton following our teleconference on April 17, 2012.

[27] The first hazardous occurrence took place on February 28, 2011. On this day, an employee subcontracted by Rankin Construction Inc. (a company which at the time was doing work it was contracted to undertake on the property of SLSMC), fell 25 feet from a raised structure while placing metal decking on steel beams. The worker, who was wearing a fall-protection harness, lost his balance and fell to the ground as he had unhooked his lanyard from a beam clamp anchor point and continued working. The fall resulted in him receiving a fractured wrist and facial lacerations. An investigation determined that this accident resulted from the worker's failure to observe the fall-protection safety procedures on which he had been trained and of which he was well aware. Ontario's Ministry of Labour did its own investigation into the incident and provided further safety recommendations.

[28] The second hazardous occurrence took place on March 9, 2011. On this day, a worker of Rankin Construction Inc. (a company which at the time was doing work it was contracted to undertake on the property of SLSMC) slipped on a sloped surface and hit his head while carrying an air hammer on his shoulder. The sloped surface, used to aid the completion of a tie-up wall pile repairs project, had been covered in uneven rocks (typically placed by Rankin employees on the slope to stop erosion on surfaces of this sort), making the surface slippery. The worker ended up receiving a bump on the head, and the fall caused him to lose consciousness for approximately one minute. Ontario's Ministry of Labour was called in and conducted an investigation.

[29] The third hazardous occurrence took place on March 26, 2011. On this day, a worker of Sutherland-Schultz (a company which at the time was doing work it was contracted to undertake on the property of SLSMC) was landing a vertical base pump over four anchor studs. The base quickly dropped down over the studs and caught the worker's middle finger under the plate. This resulted in the worker having the middle finger on his right hand severed off from the knuckle. An internal investigation determined that the injury had occurred because of the worker's improper finger positioning due to his use of the wrong tool (a nylon sling) for the completion of the particular task. The company, Sutherland-Schultz, has reportedly undertaken measures to install handles to align pumps and also to increase training of workers responsible for this task.

[30] Having carefully reviewed the documents provided for me regarding the hazardous occurrences in question, I am of the opinion that none of these unfortunate incidents can be construed as affecting any of the appellant's employees within the meaning of subsection 15.4(1) of the Regulations.

[31] My conclusion in this regard is not based on the simple reasoning that because none of SLSMC's employees were directly involved or injured in the incidents, its employees cannot be said to be affected by the hazardous occurrences. Rather, my assessment of the record does not persuade me that it can be reasonably said that any of SLSMC's own employees could be touched by the particularity of the hazardous incidents in question.

[32] The first and third of the hazardous occurrences took place as the result of particular mistakes made by the different subcontractors' workers during those workers' undertaking of very specialized work that falls outside of the nature of SLSMC's course of business. These errors took place as a result of the improper use of equipment (the fall-protection system in one incident, and a nylon sling in the other) which are very specific to the subcontracted workers' tasks. The record submitted to me strongly suggested that the work being done when the injuries occurred would not normally be undertaken by any SLSMC employees as part of their usual employment duties, and that such employees would not be within what I would call the normal impact horizon of work of this sort. I am inclined to think that this is most likely why these specialized technical services were subcontracted out by SLSMC to third party companies in the first place.

[33] In other words, I am of the opinion that nothing in the file before me allows me to reasonably conclude that in the normal course of their employment, SLSMC employees could be directly or indirectly touched by the first or third of the hazardous occurrences. This is because these incidents occurred in particular circumstances, due to the misuse of particular tools that are specific to the nature and function of the injured subcontracted employees' work.

[34] In summary, my review of the record indicates to me that the first and third incidents occurred as a result of subcontractors employees' errors that only in a most remote sense could be said to affect any of SLSMC's employees. I am of the opinion that stretching the meaning of "affecting" in subsection 15.4(1) of the Regulations, so as to

make it apply to the circumstances of the first and third hazardous occurrences in question, would be to stretch it beyond its reasonable limits. Without more on file to suggest that SLSMC's employees face or faced a reasonable possibility of being more immediately touched by the first or third occurrences, I am not persuaded that subsection 15.4(1) of the Regulations applies in these circumstances.

[35] Similar to the first and third hazardous occurrences, the second of the incidents occurred as a result of the very conditions the subcontractor created for the completion of the work it was outsourced to do.

[36] The record before me indicates that the slope on which the employee slipped and injured himself (in the second hazardous occurrence) was placed there specifically for the purpose of facilitating the completion of the work that the subcontracting company had been engaged to perform. Because the slope appears to have been set up as an integral part of the work SLSMC had subcontracted to Rankin Construction Inc., it strikes me as highly unlikely that in the normal course of their employment, any of the appellant's employees would find themselves using or working around the slope on which the subcontracted employee fell and injured himself.

[37] At this point, I find the analogy of scaffolding erected on the side of a building to provide a useful, albeit imperfect, parallel of the second hazardous occurrence. What I mean by this is that it would take clear and pointed evidence to reasonably characterize a hazardous occurrence involving contracted workers on such scaffolding as "affecting" employees of the company that occupies the building, which is within the meaning of subsection 15.4(1) of the Regulations. Similar to that analogy, I am of the opinion that the record that I have before me concerning the second hazardous occurrence does not provide me clear or pointed facts that would allow me to reasonably conclude that the incident can fairly be ruled as "affecting" SLSMC's employees as the word is to be understood in the context of subsection 15.4(1) of the Regulations. As far as the submitted documents reveal, this slope solely served the subcontracted company's purpose of working on the tie-up wall pile repairs project. Thus, in my assessment, the hazardous occurrence related to this slope cannot be said to affect employees.

[38] For the above reasons, I am of the opinion that the first two direction s should be rescinded.

Concerning direction no. 3

[39] Finally, the third direction being appealed was issued by HSO Danton on the basis that SLSMC had failed to implement a preventative maintenance program that involves the investigation of work patters and methods that could result in a hazard to SLSMC employees. This is pursuant paragraph 19.5(1)(d) and subsection 19.5(2) the Regulations.

[40] Upon careful review and assessment of SLSMC's submitted documents and records concerning its work place hazard prevention policies, as well as a record of some past

instances of SLSMC's implementation of these policies in the two most recent years, I am of the opinion that this direction should also be rescinded.

Decision

[41] For the above reasons, I hereby rescind the three directions issued by HSO Danton to The St. Lawrence Seaway Management Company on November 7, 2011.

Michael Wiwchar
Appeals Officer