Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Canada (Human Resources and Skills Development) v. Canada Employment and Immigration Union, 2013 OHSTC 6

Date: 2013-01-31
Case No.: 2012-26
Rendered at: Ottawa

Between:

Human Resources and Skills Development Canada, Appellant

and

Canada Employment and Immigration Union, Respondent

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 varied.
Decision rendered by:	Mr. Michael McDermott, Appeals Officer
Language of decision:	English
For the appellant:	Caroline Engmann, Counsel, Treasury Board of Canada Secretariat
For the respondent:	Jean-Rodrigue Yoboua, Representation Officer, Public Service Alliance of Canada

Canada

REASONS

[1] This decision concerns an appeal brought under subsection 146(1) of the *Canada Labour Code* (the Code) against a direction issued by Health and Safety Officer Kelly Parkin on March 28, 2012, pursuant to paragraphs 145(2)(a) and (b) of the Code. The appellant is Human Resources and Skills Development Canada (HRSDC) and the respondent is the Canada Employment and Immigration Union (CEIU), a component of the Public Service Alliance of Canada (PSAC).

Background

[2] The direction was issued by the Health and Safety Officer (HSO) following investigation of an accident that occurred in the workplace on March 23, 2012, resulting in injury to and hospitalisation of an employee at the Service Canada File Management Centre located at 17412 – 116 Avenue, Edmonton, Alberta. Although the HSO identified the employee by his name in her narrative report, the appellant citing privacy concerns, has identified him as Mr. "A" and I have adopted the same approach for purposes of this decision.

[3] The scene of the accident was a power assisted mobile high density file bay system that saves space by collapsing rows of shelving or file bays together somewhat concertina style and then allows particular file bays to be opened up when specific files are required. According to the HSO's synopsis of the hazardous occurrence, at approximately 9:30 am on March 23, 2012, Mr. "A" "was travelling through a file bay aisle when another Employee closed the aisle in order to access an alternate file bay carriage". Mr. "A" succeeded in gaining attention to his situation by banging on the file bay which was closing in on him. The other employee heard the banging, ran out and, using the control mechanism, attempted unsuccessfully to stop the bay aisle from closing and pinning "Mr. A". Once the file bay carriages closed the control mechanism was used to re-open the aisle. Mr. "A" was located about halfway down the aisle. He was conscious; he indicated that he had lowered himself to the floor level but that the file bay carriages had closed to within eight inches of each other. He complained of pain in his left side ribs and requested an ambulance to be called. Mr. "A" was transported to the hospital and at approximately 1:30 pm on Friday, March 23, 2012, the employer was informed that he had bruising but no broken bones. At approximately 3:00 pm on Monday, March 26, 2012, the employer reported that Mr. "A" had remained in hospital over the weekend and was now deceased.

[4] HSO Parkin who is based in Calgary was informed on March 26, 2012, by the Occupational Health and Safety Regional Manager that Mr. "A" who had been reported on March 23, 2012, as having suffered a disabling injury was now being reported as deceased. The HSO together with a colleague proceeded to Edmonton to conduct an investigation that commenced on the afternoon of March 27, 2012. On March 28, 2012, after identifying contraventions of the Code and concluding that the performance of an activity constitutes a danger while at work, HSO Parkin issued a verbal direction to the employer under paragraph 145(2)(a) of the Code to alter the activity immediately and

under paragraph 145(2)(b) to not operate the mobile shelving units until the direction has been complied with. The verbal direction was confirmed in writing on March 28, 2012, and attached to a covering letter handed by the HSO to the employer's representative on March 29, 2012. At the same time a danger tag was posted at the entrance to the file bay management area. The text of the direction reads as follows:

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

DIRECTION TO THE EMPLOYER UNDER PARAGRAPHS 145(2)(a) and (b)

On 28 March 2012, the undersigned health and safety officer conducted an investigation of a hazardous occurrence that resulted in the fatality of an employee in the work place operated by Human Resources and Skills Development Canada, being an employer subject to the *Canada Labour Code*, Part II, located at 17412 – 116 Avenue, Edmonton, Alberta, T5S 2X2, the said work place being sometimes known as Service Canada – File Management Centre.

The said health and safety officer considers that the performance of an activity constitutes a danger to an employee while at work:

On 23 March 2012 an employee was pinned by a mobile shelving unit which resulted in hospitalisation for his injuries. On 26 March 2012 the employee passed away.

The Employer has failed to ensure that the health and safety of the employees is protected while using mobile shelving units in the file management centre. The Employer has not identified and assessed the hazards; implemented adequate control measures to address the assessed hazards; conducted a job safety analysis of the work activities that include the development of safe work procedures related to the mobile shelving units or developed a documented training program for employees.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(a) of the *Canada Labour Code*, Part II, to alter the activity that constitutes the danger immediately.

You are HEREBY FURTHER DIRECTED, pursuant to paragraph 145(2)(b) of the *Canada Labour Code*, Part II, to not operate the mobile shelving units, in respect of which the notice of danger no. 2284 has been affixed pursuant to subsection 145(3), until this direction has been complied with.

Issued at Edmonton, this 28th day of March, 2012.

Signed

Kelly Parkin
Health and Safety Officer

[5] The rationale for the direction in the HSO's report indicates that her "investigation revealed that the employer did not have any documented procedure or policies dealing with persons granted access to the file management bay that outlined the process for identifying existing and foreseeable safety hazards." The report notes that there were "no documented training records to demonstrate what, or if, training in use (of the file system) and known hazards had taken place." Further, although documented and undocumented information provided to the HSO during her investigation "related to incidents involving the file bay carriages being moved and closing aisles on Employees working in the area […] there were no investigation documents into these incidents."

Issue

[6] The appellant's appeal seeks a variation to the first paragraph of the direction such that the words, "that resulted in the fatality of an employee" be removed from its text. The issue therefore is whether or not the appellant's request is justified.

Submissions of the parties

Note: In an initial response dated August 1, 2012, the appellant requested that the matter be dealt with by way of a paper hearing. The parties were informed by the Tribunal on August 3, 2012, that it had been decided to proceed by way of written submissions.

Appellant's submissions

[7] In its August 1st initial response the appellant submits that "there was no medical evidence to definitively establish the cause of death therefore the statement that the hazardous occurrence 'resulted in the fatality of an employee' is not supported by the facts that were before the HSO." After referring to the comprehensive investigatory powers listed in subsection 141(1) of the Code and citing subsections 141(4) and 145(1) and (2), the appellant concludes that "the HSO has no jurisdiction to make any civil or criminal findings of liability or responsibility." For the appellant, the impugned words in the first paragraph of the direction appear to draw a legal conclusion regarding liability, something which it is argued the HSO lacks jurisdiction to do and the direction should be varied accordingly.

[8] In a further response dated August 20, 2012, the appellant re-states its position in the following terms:

> The issue to be determined in this appeal is whether a Health and Safety Officer ("HSO") designated under Part II of the Canada Labour Code ("CLC") has the authority to make findings of civil or criminal liability. We respectfully submit that the HSO does not have authority to make findings of causation or liability either directly or indirectly. To the extent that the HSO's direction in this case purported to assign causation, it was in error and ought to be rectified.

[9] Elaborating on this position, the appellant argues that "the HSO's role in the scheme of the Code is to conduct factual investigations, make factual findings and to issue directions and orders as appropriate to address harmful or hazardous working conditions; however, the HSO does not have the statutory mandate to make findings of civil or criminal liability." It is argued that the second part of this sentence is supported by the wording of subsection 144(1) of the Code that precludes the HSO from being required to give testimony in a civil suit with regard to information obtained in the course of carrying out her duties, except with the written permission of the Minister. The appellant claims that support is also found in paragraph 26 of *Gaignard v. Canada*[1] where, citing section 131 of the Code, the Judge stated that the statute does not provide HSOs with authority to award compensation to employees who suffer injuries. Lastly, the Appeals Officer's comments in *Employees and Amalgamated Transit Union v. Laidlaw Transit Ltd.*[2], at paragraph 39, with regard to the Code not authorizing HSOs to require employees to submit to medical tests or to consult physicians, are offered as confirmation that the HSO has no authority to make findings of liability or causation.

Respondent's Submissions

[10] At the outset it is argued that the HSO did have authority to make a finding that the hazardous occurrence to which Mr. "A" was subjected resulted in his death. In support of its position the respondent cites the Appeals Officer's decision in *Royal Bank of Canada*[3] (*Royal Bank*) and the wording and intent of subsection 141(4) the Code and section 15.5 of the *Canada Occupational Health and Safety Regulations* (the Regulations). Subsection 141(4) of the Code requires an HSO to "investigate every death of an employee that occurred in the workplace or while the employee was working, or that was the result of an injury that occurred in the workplace or while the employee was working." Section 15.5 of the Regulations requires an employer to report to an HSO the details of any accident, occupational disease or other hazardous occurrence that has one of a list of results which includes at the top of the list the death of an employee. The respondent argues that "these two provisions work together to allow an HSO to be notified of a death in the workplace, investigate the death and conclude whether it was related to the hazardous occurrence." Paragraph 27 of the *Royal Bank* decision is quoted extensively as reflecting this procedural sequence. The first sentence of the quotation reads as follows:

> The scheme and purpose of the Code place a duty on the HSO to endeavour to determine the cause of death, to consider whether or not occupational health and safety concerns are involved and, if so, what remedial measures might be recommended.

[11] Addressing directly the wording of the direction that the appellant requests be deleted, the respondent maintains that the HSO's statement that she "conducted an

[1] *Gaignard v. Canada (Attorney General)*, (2002) 218 DLR (4th) 562.
[2] *Employees and Amalgamated Transit Union v. Laidlaw Transit Ltd. – Para Transpo Division*, Decision No. 01-018.
[3] *Royal Bank of Canada*, 2012 OHSTC 5.

investigation of a hazardous occurrence that resulted in the fatality of an employee in the workplace" was accurate. It is argued that the HSO "only made a statement of fact" that "does not qualify the level of responsibility of the employer and does not state whether (Mr. "A's") death was a direct or indirect result of the accident." At base, the respondent submits that no conclusions respecting liability can be found in the statement.

[12] The respondent points to the de novo aspect of an Appeals Officer's functions citing *Martin v. Canada* [4] (*Martin*) and other relevant jurisprudence on the same subject. It is argued that it is not enough to conduct a review based solely on information gathered by an HSO and that, in this case, it is not known if the information contained in the HSO's report was the only information collected during her investigation. The respondent submits that, given that a death occurred, any review of the HSO's findings should consider any and all documents related to the death, including those that were not available to her at the time of her investigation.

[13] The respondent concludes its submissions arguing that the Appeals Officer has no jurisdiction to hear the appeal because "the appellant is not appealing the Directions themselves but rather the preamble to the Directions". Noting that the employer informed the HSO by letter on May 17, 2012, of its compliance with the direction and quoting subsection 146(1) of the Code, the respondent submits that the subsection explicitly states that only a party who feels aggrieved by a direction issued by an HSO can appeal that direction. The Federal Court decision in *Sachs v. Air Canada*[5] is cited here with respect to their being "no implicit right of appeal." The respondent argues that the words which the appellant seeks to have removed do not form part of the direction because they do not compel the appellant to do anything with respect to the hazard within the workplace. In support of its argument the respondent cites a definition of from the Concise Oxford Dictionary that defines "direction" as being "an order or instruction".

Appellant's Reply Submissions

[14] The appellant refutes the respondent's argument that the HSO did not exceed her jurisdiction when she concluded that that the hazardous occurrence to which the employee was subjected resulted in his death. The appellant argues that the HSO's statement equates to a finding of civil liability that constitutes a legal conclusion which she was not entitled to draw and that is *ultra vires.* It is submitted that the respondent's reliance on *obiter dicta* in the *Royal Bank* case is without merit since the "facts and issues in that case are clearly distinguishable from those in the underlying appeal." The appellant maintains that the *Royal Bank* case addressed reporting requirements under the Code, requirements which the employer has respected and that it did not deal with any substantive finding made by the HSO.

[15] The appellant submits that the "focus of an HSO's investigation or inquiry into a workplace hazardous occurrence is the occupational health and safety of employees at

[4] *Martin v. Canada (Attorney General)*, 2003 FC 1158 and 2005 FCA 156.
[5] *Sachs v. Air Canada*, [2006] F.C.673.

work and remedial measures required to fix such hazards or dangers." Citing *Swinimer v. Canada*[6] (*Swinimer*) it is noted that Parliament recognizes that circumstances investigated by an HSO may also form the basis of a civil suit and it is suggested that subsections 144(1) and (2) are as a consequence included in the Code. The subsections preclude HSOs and Appeals Officers from being required to give testimony in a civil suit with regard to information obtained when carrying out their duties. The Federal Court's finding in *Canadian Freightways Ltd. v. Canada*[7] with respect to a defence of due diligence having no relevance to an appeal of a direction issued by an HSO, whereas it would be relevant in criminal prosecutions under the Code, is put forward to illustrate the appellant's claim of differences between the processes. In the same vein *Gilmore v. Canadian National Railway*[8] is cited with respect to limitations on a safety officer's authority, in this case with respect to an HSO's lack of remedial powers to address disciplinary measures taken by an employer allegedly by reason of an employee's exercise of rights under Part II of the Code. The appellant submits that this and the other cases referred to support the logical conclusion that "the HSO has no authority under the legislation to make any findings of criminal or civil liability."

[16] In further support of its position the appellant argues "from a purposive and contextual, reading of the statutory provisions that the HSO is not authorized by Parliament to make findings of civil liability." The point is illustrated by a description of the complexities of any civil suit dealing potentially with multiple parties and issues with the implication that an HSO would not have the ability to handle them or be required to do so. The decision in *Employees and Amalgamated Transit Union v. Laidlaw Transit Ltd.*, referred to in paragraph nine above, is cited as an example. The Appeals Officer found that an HSO is not authorized under the Code to require employees to submit to medical tests or to consult a physician or an environmental or occupational health and safety medicine specialist in order to confirm their illness is linked to the workplace.

[17] With specific respect to the respondent's argument that the HSO only made a statement of fact which does not attribute a level of responsibility of the employer (see paragraph 11 above) the appellant argues that she made a finding. Quoting the Oxford English Dictionary definition of "result" as: "to arise as a consequence, effect, or outcome of some action, process or design; to occur as a result to; to end or conclude in a specified manner", it is submitted that the HSO's statement "communicates to the reader that the 'fatality' arose as a consequence, effect or outcome of the hazardous occurrence".

[18] As to the issue of a *de novo* hearing, the appellant submits in the first instance that the barrier it claims must prevent an HSO from making a finding of civil liability also applies to an Appeals Officer's authority. In further argument the appellant describes the relief being sought as preserving the essence of the HSO's direction and that the summary nature of the appeal process as described in subsection 146.1(1) does not require a full blown hearing.

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[6] *Swinimer v. Canada (Minister of National Defence)*, [2005] N.S.J. No. 95.

[7] *Canadian Freightways Ltd. v. Canada (Attorney General)*, [2003] 231 F.T.R. 306.

[8] *Gilmore v. Canadian National Railway*, [1995] F.C.J. No. 1601.

[19] The appellant submits that the respondent's argument concerning the Appeals Officer's lack of jurisdiction to hear the present appeal has no merit adding that if, as the respondent maintains, the preamble is not part of the direction it serves no useful purpose and there should be no objection to its entire deletion. Pointing to the Appeals Officer decision in *Public Works and Government Services Canada and Indian and Northern Affairs Canada*[9] (*Public Works* case), paragraphs 90 and 91 where a direction was varied by substituting a different statutory reference "without any impact on the essence of the direction", the appellant submits that the remedy it seeks in the present appeal is similar to the approach taken in that case and that the words "that resulted in the fatality of an employee" can and should be deleted from the preamble.

Analysis

[20] In paragraph six above I have phrased the issue to be decided in a literal fashion, that is whether or not I find merit in the appellant's request to have the words "that resulted in the fatality of an employee" removed from the text of the direction. The request and the arguments of the parties in support or rejection of it raise questions which I must consider in the process of reaching a decision. I see questions as follows:

- Jurisdiction, does the Appeals Officer have the jurisdiction to hear this appeal?
- Authority, did the HSO have authority to make a finding as to the result of the hazardous incident investigated by her in March 2012?
- Justification, is the result determined by the HSO justified by the evidence gathered or available to her before the direction was issued?

Jurisdiction

[21] The respondent argues that the impugned phrase "does not form part of the direction because it does not compel the Appellant to do anything, with respect to the hazard in the workplace." It is submitted that subsection 146(1) provides that only a direction of an HSO can be appealed with the implication that what is not part of an HSO's direction cannot be appealed. As indicated in paragraph 13 above, *Sachs v. Air Canada* is cited in support of there being "no implicit right of appeal". The appellant finds no merit in the respondent's position arguing that if the preamble does not form part of the direction it serves no useful purpose and there should therefore be no objection to removing it. Submitting that subsection 146.1(1) provides an Appeals Officer with the authority to vary a direction issued by an HSO, the appellant cites the *Public Works* case referred to in paragraph 19, above. The subsections referred to read as follows:

> 146(1) An employer, employee or trade union that feels aggrieved by a direction issued by a health and safety officer under this Part may appeal

[9] *Public Works and Government Services Canada and Indian and Northern Affairs Canada*, OHSTC 10-001.

> the direction in writing to an appeals officer within thirty days after the date of the direction being issued or confirmed in writing.
>
> 146.1(1) If an appeal is brought under subsection 129(7) or section 146, the appeals officer shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it and may
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> a) vary, rescind or confirm the decision or direction; and
> b) issue any direction that the appeals officer considers appropriate under subsection 145(2) or (2.1).

[22] While I appreciate the case references given to me by the parties on this matter, I find that the fact situations they reflect are somewhat different from the present case. For example, *Sachs v. Air Canada* concerns a situation where a direction had not been issued by an HSO and where an attempt was made to appeal an assurance of voluntary compliance or AVC. The Appeals Officer's decision that there was no right of appeal in such circumstances was upheld by the Federal Court. Those circumstances differ from the present case in which the HSO did issue a direction. The *Public Works* case involved a direction issued by an HSO pursuant to subsection 145(2) of the Code whereas the Appeals Officer found that it should have been properly issued pursuant to subsection 145(1). The Appeals Officer varied the statutory references but, as the appellant points out, otherwise maintained the text of the direction.

[23] A direction provided for by the Code is not defined in the statute. The respondent quotes the Concise Oxford Dictionary definition of "direction" as "an order or an instruction". Fine as far as it goes but I also note in the Collins English Dictionary (Third Edition, Updated 1994) a second meaning of direction as "management, control or guidance". The last of these three words strikes me as particularly appropriate with respect to directions issued by HSOs and in line with the purpose of the Code as described in section 122.1 that reads as follows:

> 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.

[24] While a direction can certainly include cessation and correction of contraventions among its aims, I find that intent and purpose of the Code also envisage a direction having informational and educational purposes in the interests of prevention. In my view subsection 145(5) fits with this approach to the Code's purpose clause.

> 145(5) If a health and safety officer issues a direction under subsection (1) or (2) or makes a report in writing to an employer on any matter under this Part, the employer shall without delay
>
> a) cause a copy or copies of the direction or report to be posted in the manner the officer may specify; and
> b) give a copy of the direction or report to the policy committee and a copy to the work place committee or health and safety representative.

The subsection provides for making parties concerned aware of the circumstances of contraventions and hazardous occurrences thus offering opportunities for future guidance and prevention. As the record shows, HSO Parkin's covering letter of March 29, 2012, to which the direction of the previous day was attached, makes reference to subsection 145(5).

[25] In the light of this broader purpose of issuing directions I find it reasonable that a direction should contain context and that the HSO is left with reasonable discretion as to what should be included in that context. Taken to, its extreme which I do not believe was the respondent's intention, a bare order such as that pursuant to paragraph 145(2)(a) in the direction issued by HSO Parkin on March 28, 2012, simply requires the employer "to alter the activity that constitutes a danger immediately." The employer and those intimately involved in circumstances leading to the direction might find this sufficient to determine the necessary remedial follow up; although why leave room for misunderstanding? Others, including other employees of the employer with a less direct involvement but nevertheless with justified interest in the matter, might be left puzzled by the lack of specifics and the informational, educational and preventive purposes of the direction would be compromised. Background is needed to make sense of such an order and I am of the view that it should reasonably include in cases of this kind a description of the hazardous occurrence, its timing and location, such factual details as are reliably available to the HSO as to its cause and outcome and a narrative indication of the contraventions addressed by the direction. As such, I find the full text of the direction issued by HSO Parkin on March 28, 2012, to constitute a direction that is subject to appeal pursuant to subsection 146(1) and that as the Appeals Officer assigned to this case I have jurisdiction to hear this appeal.

Authority

[26] The appellant's base argument is summarized in the quotation from its written submission of August 20, 2012, included in paragraph eight above. It is submitted that an HSO does not have authority under the Code to make findings of civil or criminal liability and that the HSO in this case "does not have authority to make findings of causation or liability either directly or indirectly. To the extent that the HSO's direction in this case purported to assign causation, it was in error and ought to be rectified." The appellant buttresses its position with references to: subsection 144(1) of the Code, that precludes health and safety officers being required to give testimony in civil suits; to sections 142 and 143 that require persons at the workplace to assist an HSO in carrying out their duties and prohibit obstruction and the giving of false testimony; and, to the broad investigatory powers that an HSO has under subsection 141(1). These provisions it is submitted "support the view that the HSO is not called upon to make any findings akin to civil liability." Case law referred to in the appellant's final and reply submissions and summarized above is put forward as similarly supportive of its arguments.

[27] The respondent's submission that the HSO did have authority to make the disputed finding relies in part on the Appeals Officer's decision in the *Royal Bank* case

and the intent of subsection 141(4) of the Code and section 15.5 of the Regulations that it argues the decision confirms.

> 141(4) A Health and Safety Officer shall investigate every death of an employee that occurred in the work place or while the employee was working, or was the result of an injury that occurred in the work place or while the employee was working.
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> 15.5 The employer shall report to a health and safety office, by telephone or telex, the date, time, location and nature of any accident, occupational disease or other hazardous occurrence referred to in section 15.4 that had one of the following results, as soon as possible but not later than 24 hours after becoming aware of that result, namely,
>
> a) the death of an employee;

For the respondent these two provisions combine to give an HSO authority to investigate a death in or related to an employee's workplace and the jurisdiction to make the findings included in the direction. With respect to these latter findings and particularly to the words that the appellant seeks to have removed, the respondent argues that they do not establish a level of liability and that the HSO "was merely stating the facts as she found them."

[28] I have considered the parties' respective submissions on this matter and find that I am in agreement with the appellant's contention that an HSO is not authorized to make a finding of civil liability. However, I do not regard liability as synonymous with causation as the appellant appears to do in the passage quoted in paragraphs 8 and 26 above where it is submitted that "the HSO does not have authority to make findings of **causation** or liability either directly or indirectly." (My emphasis). I find that the respondent's counter argument in this respect has some merit. As indicated in paragraph 27 above, the respondent argues that subsection 141(4) of the Code and section 15.5 of the Regulations provide an HSO with authority to make findings of cause and result. The respondent goes on to claim that this authority justifies the HSO including the disputed wording in her direction describing that wording as "merely stating the facts". I shall return to the latter aspect below and simply address the principle involved here.

[29] The operative words of subsection 141(4) require an HSO to investigate every death of an employee that occurs in the work place or while the employee was working and most pertinent in this case "**or that was the result of an injury that occurred in the workplace or while the employee was working.**" (My emphasis). In line with the requirement of section 15.5 of the Regulations the employer reported "Mr. A's" death to an HSO and triggered a requirement for an HSO to investigate its circumstances. In addition to citing the legislation the respondent quotes paragraph 27 of the *Royal Bank* decision almost in its entirety. The first sentence of that quote, reproduced in paragraph ten above, gives a rationale for the investigation indicating "a duty on the HSO to endeavour to determine the cause of death, to consider whether or not occupational health and safety concerns are involved and, if so, what remedial measures might be recommended."

[30] I issued the *Royal Bank* decision and have re-read it. While I agree that the factual background is different I consider my conclusions on the purpose and rationale of subsection 141(4) of the Code and section 15.5 are relevant to the present appeal. The statute required HSO Parkin to investigate the circumstances of "Mr. A's" death regardless of whatever plans she or a colleague may have already have made with respect to investigating the hazardous occurrence that resulted in injury to him and that required his hospitalization. In line with the rationale put forward in the *Royal Bank* decision, the HSO had authority to inquire into the cause of the death and into whether or not it was the result of a hazardous occurrence that occurred in the workplace or while the employee was working.

[31] The purpose and intent of the Code frequently require the outcome of investigations to be reported and available for use under the Code's authority. Subsection 141(6) specifically requires an HSO to provide copies of any written report to the employer and the work place committee or health and safety representative within ten days of its completion. To restrict the inclusion of valid findings of cause and result in the content of a report made or a direction issued by an HSO would compromise their utility under the Code and negate the educational and preventive objectives implicit in the statute. Hazardous occurrences can happen, as in the present case, while quite routine duties are being performed. Recording their outcomes can alert employees to the potential for danger no matter how routine the tasks involved and promote vigilance and prevention. In short, I find that the legislative scheme of the Code provides the HSO with authority to make findings of cause and result of the hazardous occurrence investigated by her in late March 2012.

Justification

[32] Having authority to make findings as to cause or result is one thing, having justification for making them is another. During her investigation of the hazardous occurrence of March 23, 2012, HSO Parkin obtained factual evidence from persons who had witnessed the incident or had reliable knowledge of its outcome. For example, she was informed of "Mr. A's" telling colleagues of the pain in his left side ribs and of his request to call an ambulance. She was also informed that he had remained in the hospital over the weekend and that he had died in hospital. There is, however, no indication that she obtained authoritative information as to the cause of the death; no exploration of the presence of other primary or secondary causes of the fatality is recorded. It appears that, given the short time that elapsed between the hazardous occurrence and the death, the HSO made what some might argue is a logical assumption that the one led to the other. Logical or not it was an assumption that was not backed by authoritative evidence.

[33] In the *Royal Bank* case, for example, the HSO went through quite lengthy administrative steps necessary to obtain the police report into the sudden death of an employee, a report that contained medical assessments as to cause. He also pursued the matter with the Coroner's Office which did not grant him access to the Coroner's report but eventually and somewhat grudgingly informed him orally that the death was the result of a medical condition. There is no indication that the HSO Parkin took similar steps or

otherwise sought authoritative opinion or rulings as to the cause of death before urgently issuing her verbal ruling and follow-up written direction on March 28, 2012. As such I find her attribution of the fatality to the hazardous occurrence in the direction's wording lacks justification. However, as indicated in the previous paragraph, she had obtained reliable evidence regarding the hazardous occurrence in so far as it resulted in injury to "Mr. A" and in his hospitalization, factors that I take into account when considering the need for and nature of a variation to the direction.

[34] Serious employee safety issues faced the HSO in late March, 2012, that justified her moving urgently to address the situation considered to constitute a danger while, as indicated in her report, the investigation continued. I have considered the value of my proceeding further to inquire into the cause of "Mr. A's" death. This appeal is of the direction issued by the HSO on March 28, 2012, and the variation sought by the appellant entails the removal of words from its text that I find, on the evidence gathered or readily accessible at the time, were not justified. As argued by the appellant, the overall substance of the direction would remain intact. The date, location and nature of the hazardous occurrence are recorded. The specifics of the activity constituting a danger are identified. The fact that the injury incurred by the employee led to his hospitalisation is stated as is the temporal proximity of the hazardous occurrence to the employee's death. The appellant is not challenging these elements of the direction's text neither is it questioning the remedial action prescribed. In sum, even if I proceeded and succeeded in gathering authoritative information that either confirmed or negated the impugned phrase, the impact on the primary intent of the direction and the purpose of the Code, that is the protection of employee safety and prevention of accidents and injury to their health, would be minimal.

Conclusion

[35] I have concluded that the HSO had ample information and evidence that the hazardous occurrence resulted in injury to the employee. I have the same information and that will be reflected in the variation I order.

Decision

[36] For the reasons given above and pursuant to paragraph 146.1(1)(a) of the Code, I hereby vary the direction issued by the Health and Safety Officer on March 28, 2012, by deleting the word " fatality" in the second line of the first paragraph and substituting the word "injury" in its place.

Michael McDermott
Appeals Officer

Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

APPENDIX

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

DIRECTION TO THE EMPLOYER UNDER PARAGRAPHS 145(2)(a) and (b)

On 28 March 2012, Health and Safety Officer Kelly Parkin conducted an investigation of a hazardous occurrence that resulted in the injury of an employee in the work place operated by Human Resources and Skills Development Canada, being an employer subject to the *Canada Labour Code*, Part II, located at 17412 – 116 Avenue, Edmonton, Alberta, T5S 2X2, the said work place being sometimes known as Service Canada – File Management Centre.

The said health and safety officer considers that the performance of an activity constitutes a danger to an employee while at work:

On 23 March 2012 an employee was pinned by a mobile shelving unit which resulted in hospitalisation for his injuries. On 26 March 2012 the employee passed away.

The Employer has failed to ensure that the health and safety of the employees is protected while using mobile shelving units in the file management centre. The Employer has not identified and assessed the hazards; implemented adequate control measures to address the assessed hazards; conducted a job safety analysis of the work activities that include the development of safe work procedures related to the mobile shelving units or developed a documented training program for employees.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(a) of the *Canada Labour Code*, Part II, to alter the activity that constitutes the danger immediately.

You are HEREBY FURTHER DIRECTED, pursuant to paragraph 145(2)(b) of the *Canada Labour Code*, Part II, to not operate the mobile shelving units, in respect of which the notice of danger no. 2284 has been affixed pursuant to subsection 145(3), until this direction has been complied with.

Varied as identified in underlined text above, in Ottawa, Ontario, this 31st day of January, 2013.

Michael McDermott
Appeals Officer

Canada