

Occupational Health  
and Safety Tribunal Canada



Tribunal de santé et  
sécurité au travail Canada

Ottawa, Canada K1A 0J2

**Citation:** Lower Lakes Towing Ltd., 2013 OHSTC 14

**Date:** 2013-04-09  
**Case No.:** 2012-89  
**Rendered at:** Ottawa

**Between:**

Lower Lakes Towing Ltd, Applicant

**Matter:** An Application for a stay of a direction

**Decision:** The stay of the direction is denied

**Decision rendered by:** Mr. Michael McDermott, Appeals Officer

**Language of decision:** English

**For the Applicant:** Mr. Walter Stewart, Engineering Superintendent, Lower Lakes Shipping Ltd.

Canada

## REASONS

[1] This decision concerns an application brought under subsection 146(2) of the Canada Labour Code (the Code) for a stay of a direction issued by Health and Safety Officer David Loudon (HSO) on November 23, 2012, pursuant to subsection 145(1) of the Code. The applicant is Lower Lakes Towing Ltd. of Port Dover, Ontario. There is no respondent.

### Background

[2] The subject direction was issued by the HSO following an inspection of a work place operated by the applicant employer. More specifically, the work place is the Motor Vessel (M.V.) Manitoba moored at the time of the inspection at a grain terminal in Thunder Bay, Ontario. The HSO concluded that certain provisions of the Code were being contravened and pursuant to paragraph 145(1)(a) directed the employer to terminate the contraventions no later than March 15, 2013.

[3] Only the second of the three part direction has been appealed. That contravention reads as follows:

**Paragraph 125(1)(a) of Part II, section 10(b) of the MOHSR and Part X, section 224(1) of the Hull Construction Regulations**

The crew accommodation in the Forecastle deck does not have the required two separate means of escape. The removed stairway between the Forecastle deck and the Texas deck is to be re-installed, or an alternative arrangement to be installed. The use of port holes as a means of escape does not meet the requirements of the regulations.

For reference, paragraph 125(1)(a) of the Code reads as follows:

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 that is 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,

- (a) Ensure that all permanent and temporary buildings and structures meet the prescribed standards;

Subsection 10(b) of the Maritime Occupational Health and Safety Regulations (MOHSR), regulations under the enabling authority of the Code, reads as follows:

10. The employer must ensure that the design and construction of every structure on a vessel meets the applicable requirements set out in one or more of the following regulations:

- (b) Hull Construction Regulations;

Subsection 224(1) of the Hull Construction Regulations (HCR) reads:

224(1) All accommodation spaces and spaces in which the crew is normally employed, other than machinery spaces, shall have at each deck level at least two separate means of escape that comply with the following requirements:

- (a) the two means of escape shall be separated as far from each other as is practicable so as to minimize the possibility that both means of escape could be blocked at the same time as a result of one incident;
- (b) at least one means of escape shall be independent of watertight doors;
- (c) in the case of decks below the uppermost continuous deck, one means of escape shall be a stairway and the other means of escape shall be either a trunk or a stairway and both means of escape shall give direct access to a means of escape to on the deck above;
- (d) in the case of the uppermost continuous deck and decks above that deck, each means of escape shall either be a stairway, a door or a combination of both and both means of escape shall give direct access to an open deck and thence to lifeboats or liferafts; and
- (e) where stairways are used as a required means of escape, they shall be of sufficient width having regard to the number of persons who have access to such stairways for escape purposes.

[4] The M.V. Manitoba is described as a Great Lakes cargo vessel built in 1966 and as having previously been in service under different names and different owners since that time. Apparently Rand Logistics acquired the vessel in 2011 and operates her through its subsidiary Lower Lakes Towing Ltd., the employer for purposes of the Code. The specific matters that led the HSO to issue the direction under appeal concern the Forecastle deck that provides access through an external door to crew accommodation, cabins and sleeping quarters, where he reports he found “ signs that an internal stairway had been fitted, leading up to the next deck (the Texas deck).” With the stairway removed the HSO concluded that the Forecastle deck no longer had the required two means of escape. It is that stairway that the direction under appeal requires “to be re-installed, or an alternative arrangement to be installed.” It appears that HSO Louden first raised the matter with the employer’s representatives following inspection visits to the vessel in November and December 2011, and that discussions concerning possible assurances of voluntary compliance did not bear fruit with respect to the means of escape issue. It was after a subsequent inspection visit on November 22, 2012, during which the HSO found the port holes to be of insufficient diameter to serve as means escape, that the direction was issued.

[5] The direction was appealed on December 19, 2012, within the thirty day limit for an application pursuant to subsection 146(1) of the Code. However, the appeal application was not accompanied with an application for a stay and the latter was not received by the Tribunal until March 28, 2013, after the date set by the HSO for compliance with the direction. Despite a clear indication in the HSO's covering letter to the direction that an appeal does not relieve the appellant from complying with a direction unless so ordered by an appeals officer pursuant to subsection 146(2), it appears that the employer assumed that a stay was automatic once the appeal was lodged. In any event, the Tribunal Registrar responded to the application by providing the employer immediately with details of the criteria used by appeals officers in the exercise of their discretion to grant a stay of execution of a direction. The three criteria are as follows:

- 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 it would suffer significant harm if the direction is not stayed.
- 3) The applicant must demonstrate that in the event that a stay is granted, measures will be put in place to protect the health and safety of employees or any person granted access to the work place.

[6] A telephone conference hearing on the application was held on Thursday, April 4, 2013. Mr. Walter Stewart represented the employer. I asked HSO Loudon to join the call and to be prepared assist if points of clarification were required. I emphasized that the conference hearing was with regard to the stay application and not to address the merits of the appeal.

### **Applicant's Submission**

[7] Mr. Stewart's main points focussed on the vessel's history of having successfully passed annual safety inspections and of having received operating approval each sailing season. He referred in particular to an inspection report regarding M.V. Manitoba issued to Lower Lakes Towing by Transport Canada's Marine Safety and Security Ontario Region on August 29, 2012. At my request Mr. Stewart has provided a copy of the document. It is actually a response to a request from M.V. Manitoba's owners for enrolment in Transport Canada's Delegated Statutory Inspection Program (DSIP) that he argues would not have been agreed to if outstanding safety issues were identified. Mr. Stewart also cites correspondence that he had with Mr. Michael Dua the official who signed the DSIP letter. Responding on January 30, 2012, to Mr. Stewart's e-mail request for advice of January 23, 2012, Mr. Dua indicated: [T]he vessel was surveyed in May 1982 for compliance with the Cartiercliffe Hall recommendations Annex B. At that time the Owners were instructed by TC to fit grab bars in way of cabin sidelights which were to be used as the second means of escape. The item can be removed from the deficiency notice." These inspection reports and assurances lead Mr. Stewart to conclude that the

employer is “being asked to defend an issue that was already resolved 30 years ago and again re-verified barely one year ago.”

[8] A short explanation of the Cartiercliffe Hall recommendations is perhaps needed. I understand that the reference is to recommendations made by an Inquiry into a fire in 1979 aboard the Great Lakes bulk carrier Cartiercliffe Hall that destroyed crew living accommodations and resulted in fatalities.

[9] With respect to the significant harm that could be suffered by the employer if a stay is not granted, it was argued that responding to the direction would involve complex alterations involving major construction costs that, in the event the employer’s appeal was upheld, would not have needed to be incurred. Further, with the shipping season open, the vessel would not be able to operate and revenue would be lost.

[10] On the third criteria, the employer’s position reflects the information outlined in paragraph seven above. It maintains that the vessel has been certified as safe and fit for sailing over a number of years and that the issue of secondary means of escape had not been raised since the 1982 survey referred to in the correspondence with Mr. Dua until HSO Loudon identified it in 2011. In effect it is being argued that, if a stay is granted, measures to protect health and safety are already in place and that no additional measures are required.

### **Analysis**

[11] I have no difficulty accepting that this application is neither frivolous nor vexatious. The employer believes that it has not contravened the Code, the MOHSR or the HCR with respect to the means of escape issue for the M.V. Manitoba. Understandably, it has taken comfort in the advice received from the Marine Safety and Security Ontario Region that the issue can be removed from the deficiency notice. It became clear during the telephone hearing that Mr. Stewart only recently became aware that exchanges had continued within Transport Canada about the applicability of the MOHSR and HCR provisions cited to vessels the age of M.V. Manitoba. Some consideration had apparently also been given to the existence or otherwise of a “grandfather” provision. As a result of these discussions it appears fair to say that the advice given to the employer earlier is at the least now in doubt.

[12] I also accept that the employer will incur significant harm by way of costs and loss of operating revenue if a stay is not granted. I also note that some jobs would likely be affected. It is unfortunate that the stay application was not made sooner when the winter months could have allowed for the process to have been commenced during the navigation lay-up.

[13] It is the third criterion that causes me concern in this application. Whatever the status of internal discussions at Transport Canada is or was, the HSO has given no indication that he regards his inspection finding and consequent direction to the employer to have been made in error. The direction still stands. I have reviewed the results of the

DSIP report sent by Marine Safety and Security to Lower Lakes Towing on August 29, 2012. As I understand it, the inspections concerned are those performed under the general authority of the Canada Shipping Act (CSA) and its relevant regulations. They are not performed under the authority of the Code or the MOHSR. While they deal in some detail with the adequacy and proper functioning of fire prevention, fire detection and firefighting equipment that obviously have implications for employee safety, they do not address the requirements of MOHSR and HCR with respect to crew accommodation spaces and means of escape.

[14] Subsection 146(2) of the Code is an exceptional measure. Its text reads as follow:

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

Of the criteria applied by appeals officers when considering stay applications it is the third criterion that relates most specifically to the purpose of the Code, that is the prevention of accidents and injury arising out of, linked with or occurring in the course of employment. In this context I do not find reliance on the CSA based inspections, positive though they are, to demonstrate adequate assurance that, if a stay is granted, the measures in place will protect the health and safety of employees or any person granted access to the work place with respect to the means of escape issue that is in question in this appeal. Other than in effect claiming that such protection is already provided, the employer has not presented any further mitigating measures and does not appear to have explored any alternative arrangements as implicit in the wording of the direction.

[15] I cannot accept at this stage a general assurance that all is well on this issue in the face of a duly appointed health and safety officer's ruling to the contrary. That ruling reflects a finding that employees would not have access to the alternative means of escape that they should be provided with in accordance with the regulations. Applicability of the provisions identified by the HSO to the circumstances of the M.V. Manitoba and the validity of his findings are issues of fact and merit. In effect, the HSO has found a contravention of the Code and its relevant regulations that the employer maintains is unwarranted, a difference that must be heard on its merits at a full hearing.

**Decision**

[16] All three criteria described in paragraph five above must be met before a stay of a direction may be granted. I have found that the third criterion has not been met. The application for the stay of a direction issued by the HSO on November 23, 2012, is denied.

Michael McDermott  
Appeals Officer