Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Date: 2014-10-03
Case No.: 2013-11

Between:

Bell Canada, Appellant

and

Unifor, Respondent

Indexed as: *Bell Canada* v. *Unifor*

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. Olivier Bellavigna-Ladoux, Appeals Officer
Language of decision:	English
For the Appellant:	Ms. Maryse Tremblay, Borden Ladner Gervais LLP
For the Respondent:	Mr. Joel Carr, Unifor
Citation:	2014 OHSTC 19

REASONS

[1] This decision concerns an appeal brought by Bell Canada (Bell or "the employer") under subsection 146(1) of the *Canada Labour Code* (the Code) of a direction issued by Health and Safety Officer (HSO) Chris Wells on January 23, 2013. The direction arises out of a work place investigation conducted by HSO Karina Sacco on September 17, 2012, in Bell's Newmarket area, further to a complaint of a health and safety concern by Bell Canada employee Doug Dutton.

Background

[2] In 2006, union members on the Corporate Health and Safety Committee asked the employer to re-train technicians who work on telecommunications poles on pole-top rescue, as it had been 10 years since the last training. Bell then sought an opinion from what was then Human Resources and Skills Development Canada (HRSDC). Then-HSO Jacques Maltais returned an opinion stating that only those employees who were not alone working on poles or elevated surfaces needed training on pole-top rescue pursuant to subsection 8.10(3) of the *Canada Occupational Health and Safety Regulations* (the Regulations). While there was already an agreement within the Corporate Health and Safety Committee that employees working in pairs would receive rescue training - this remains Bell's official policy - the union now asks that *all* Bell technicians who work on top of joint-use (electrical and telecommunications) poles receive training on rescue.

[3] After receiving Mr. Dutton's complaint, HSO Sacco met with the parties and received from Bell the accident prevention procedures (APPs) and the power point presentation on pole-top rescue as requested.

[4] Ms. Sacco discussed the interpretation of subsection 8.10(3) of the Regulations over email with many colleagues at HRSDC: Kenneth Manella, Technical Advisor; Todd Campbell, Program Advisor; and Rob Miles, Program Advisor. All of these HRSDC colleagues agreed that the regulation applies to technicians who work alone, that it included the concept of self-rescue, and that the 2006 opinion letter by Mr. Maltais is not the correct interpretation of the regulation.

[5] When HSO Wells took over the file, he relied on Ms. Sacco's notes and met with Mr. Manella to reach his decision, which is the direction on appeal:

> IN THE MATTER OF THE *CANADA LABOUR CODE*
> PART II – OCCUPATIONAL HEALTH AND SAFETY
>
> DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)
>
> On September 17, 2012, the undersigned health and safety officer conducted an investigation in the work place operated by THE BELL CANADA COMPANY OR BELL CANADA, being an employer subject to the *Canada Labour Code*, Part II, at 444 Millard Avenue, Newmarket, Ontario, L3Y 2A3, the said work place being sometimes known as Bell Canada.

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)(q) – Canada Labour Code Part II,
Subsection 8.10(3) – Canada Occupational Health & Safety Regulations

No employee shall work on any pole or elevated structure referred to in subsection (1) unless he has been instructed and trained in the rescue of employees who may be injured in the course of the work.

The employer has failed to provide employees with the required instruction and training in the rescue of employees who may be injured in the course of the work.

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 March 29, 2013.

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 Toronto, this 23th day of January, 2013.

[signed]
Chris Wells
Health and Safety Officer
[…]

To: THE BELL CANADA COMPANY OR BELL CANADA
444 Millard Avenue
Newmarket, Ontario
L3Y 2A3

[6] HSO Wells was entirely satisfied with the training given to Bell's Newmarket area pole technicians in order to comply with the direction.

[7] In its response to the complaint, Bell relied on the 2006 legal opinion obtained from then-HSO Jacques Maltais. Bell acknowledged that a technician who works in close contact with at least one other colleague and has visual contact with them most of the time would reasonably be someone who does not work alone. However, it stated that currently all of Bell's pole-top technicians, including those who share a vehicle, work alone and therefore do not require training as stated in the Regulations.

Issue

[8] The issue raised by the present appeal is whether HSO Wells' direction that identified a contravention of paragraph 125(1)(*q*) of the Code and subsection 8.10(3) of the Regulations is well founded.

Submissions of the Parties

A) Appellant's submissions

[9] Bell presented the following witnesses at the hearing: Ms. Stacy Aimola, Mr. Jacques Maltais, Mr. David Robichaud, and Mr. Larry North.

[10] Ms. Stacy Aimola, Manager, Health and Safety and Environment (Ontario) at Bell, testified about her meetings with HSO Sacco and Mr. Dutton before the transfer of the file to HSO Wells. She arranged for compliance with the direction. Ms. Aimola also stated that she received no replies to her emails sent to HSO Wells in March, April, and May 2013.

[11] Mr. Maltais, who was an HSO in 2006 and authored the opinion letter that instruction and training in the rescue of injured employees prior to working on a pole does not apply to those pole technicians who work alone, testified for the appellant. He stated that an employee who injures himself on a pole could not rescue himself. Also, he testified to neither seeking employee feedback nor investigating Bell's work place practices before issuing his 2006 opinion letter.

[12] Mr. David Robichaud, Bell's Manager, Health and Safety and Environment (Quebec), testified that except for when a new technician receives on-site training from an experienced colleague for four to six weeks, all pole technicians work alone. Other than technicians on the network conditioning project, each Bell technician has his own vehicle provided by the employer. He stated that even technicians who travel to their job sites together perform their tasks alone and generally do not have visual sight of each other.

[13] Mr. Robichaud also spoke to the variety of trainings a technician receives and the APPs in place to promote safety at Bell. He said that technicians for the network conditioning project simply carpool to job sites but do not "work together," nor do they have sight of each other while working.

[14] Mr. Robichaud also explained in detail the contents of Bell's pole-top training program. He said there has never been an instance where pole-top rescue would have prevented injury or assisted a technician. Finally, he said that if a technician becomes unconscious and cannot call 9-1-1 or anyone for assistance, either someone on the street will phone 9-1-1 or Bell will check up on its inactive employee; all technicians must report back every two hours and a delay of 40 minutes in doing so will result in Bell attempting to locate the missing employee. This tracking and monitoring of employees is part of Bell's Employee Safety Protection Plan

[15] Mr. Larry North, Maintenance Cable Manager in Newmarket, attended the pole-top training session conducted to comply with the direction and explained it in detail. He said the technicians who report to him work alone and he consistently reminds them to keep their mobile

phones with them and call 9-1-1 in case of an emergency, which is Bell's standard procedure. He said that in 34 years, he has never encountered a situation requiring a pole-top rescue. He stated that he could delegate another technician to locate a technician who had not checked within the required time, and follow employees via GPS.

[16] In its written submissions, counsel for the appellant expressed that the HSO's investigation was wholly inadequate, in particular the lack of probing into Bell's actual procedures, equipment the technicians use, and the HSOs' inabilities to describe what self-rescue measures in which Bell could train its employees.

[17] With respect to its emergency procedures, Bell stated that its policy is for all technicians to call 9-1-1 in the event of an emergency. Bell is a large telecommunications company and provides its employees with mobile phones. Bell chose this policy because emergency services are professionals and have the authority to ask for electrical power interruptions when required.

[18] Bell submitted that if an employee becomes unconscious and cannot call 9-1-1 or anyone else for emergency assistance,

> [T]here are two possibilities. Either someone on the street will phone 911 or the absence of activity in the tracking system will alert Bell that the employee must be located and may require assistance.

[19] The appellant also asserted that since all emergency departments in Quebec it contacted confirmed their abilities to rescue someone from a confined space, and that since rescuing someone from a confined space is more difficult than someone on a pole, that it is "implicit that the same or better emergency response would be provided for rescuing a victim working on a pole."

[20] Counsel for the appellant states that interpretation of subsection 8.10(3) of the Regulations must align with Driedger's Modern Principle, and that guidance on the ordinary sense of words comes from common usage as well.

[21] Bell repeatedly submitted that subsection 8.10(3) is related to the dangers of electricity and not heights, and included the original 1973 version of the regulation that is now subsection 8.10(3) of the Regulations, stating that nothing significant has changed since the Governor-in-Council amended the legislation. Part XII of the Regulations covers regulations for fall protection systems, and therefore precludes the consideration of dangers while working at heights in informing the interpretation of subsection 8.10(3).

[22] The appellant also relied on dictionary definitions of rescue to advance the notion that subsection 8.10(3) does not entail self-rescue, but only rescuing another person. It also presents a series of examples from the Regulations that make it clear when the legislator seeks to apply a section to the same employee, and that subsection 8.10(3) was accordingly not drafted to entail the concept of self-rescue. To support this perspective, the appellant relied on the testimonies of Messrs. Robichaud, Dutton, and Wells that the regulation only covers rescuing another

employee; HSO Wells testified that Bell's training for pole-top rescue of another employee met the requirements to comply with his direction.

[23] In its submissions, Bell referred to the November 20, 2013 decision of HSO Perrault with respect to a complaint against Bell affiliate Bell Technical Solutions Inc. In that decision, which was not appealed to this Tribunal, the HSO specified that subsection 8.10(3) was not compatible with the notion of self-rescue "given the presence of the notion of injury which is found in that section."

[24] Finally, in *BC Tel and Telecommunications Workers Union*, [1998] CLCRSOD No 9, Bell submitted that the Tribunal has in the past accepted that subsection 8.10(3) involves at least two persons and not self-rescue.

B) Respondent's submissions

[25] Mr. Dutton was Unifor's only witness. In addition to the circumstances leading up to and surrounding the complaint, he also testified that those technicians who drive bucket trucks have been made aware that they may be called to assist in an emergency because their vehicles have hydraulic lifts designed to carry individuals, as noted in APP 253. He stated that because of this and other work place realities (e.g. taking lunch breaks together, working in proximity, possibly helping each other, etc.) technicians are never truly isolated from their colleagues and are in effect not working alone. Furthermore, in the case of the network conditioning project, Mr. Dutton testified that technicians do have at times sight of each other.

[26] Regarding the 2006 opinion letter, Mr. Dutton testified that Mr. Maltais did not consult with or contact the union or any pole technician. Also, the employer did not consult with employees before requesting the opinion from HRSDC.

[27] Mr. Dutton testified to minutes from a September 2010 meeting in which there was mention of an agreement between Bell and the union to train network conditioning project employees on pole-top rescue because of their large-group works. Unifor submitted that this supports the idea that technicians trained in rescue could be expected to take action in the event of such an emergency.

[28] The respondent disagreed that HSO Sacco's investigation was inadequate, submitting that she had numerous conversations with the parties since the first complaint. HSO Sacco also indicated that attaching a ladder to a strand or the pole makes it part of the pole itself, which goes to show the breadth of the applicable training. It also submits that HSO Wells simply took over an already-investigated file.

[29] Unifor submitted that the internal communications of HRSDC personnel have no bearing on the direction being appealed. The respondent restated many of the statements made by the HRSDC personnel as being a true reflection of the Government of Canada's interpretation of subsection 8.10(3), and that Mr. Maltais' interpretation is not correct. Adopting the perspective of Mr. Manella, Unifor submitted that if there are technicians working in relatively close proximity and one needs rescuing, it is beneficial to have the colleagues trained to assist in the matter.

[30] Unifor claimed that "working alone" is too vague a term. It maked a distinction between "working alone" and "working in isolation," the latter being highly unlikely given that technicians often assist each other, work within short distances of each other, and can see each other. Moreover, it claimed that it is absurd to equate individualized tasks to isolation. Bell can track its vehicles and employees through GPS at any time. Unifor referred back to the appellant's own witness, Mr. North, who said he could delegate the nearest technician to locate a missing technician who has not checked in.

[31] The respondent argued that self-rescue is a "sub-variant of [rescue]." It added that since all technicians must have first-aid certificates, they already engage in aspects of self-rescue. Moreover, the respondent repeatedly referred to the facility of adding self-rescue to the training, that it would be ideal to have it, and that Bell has not demonstrated that such training is a burden.

[32] The respondent submitted that adopting a strictly textual approach to subsection 8.10(3) would mean that at least two technicians would need to be possibly injured since the legislation says "he has been instructed and trained in the rescue of employees who may be injured in the course of the work." [Underlining added]

[33] The respondent does not contest that the danger in question is electric and not due to heights. It also mentioned the "Hazard Assessment Pole Top Work" training that was designed and rolled out in the aftermath of a cable repair technician's electrocution. The respondent did acknowledge the electrical danger awareness training Bell provides in APP 6.

[34] Unifor also claimed that Bell's policy that requires all technicians keep the cell phone Bell provides on them at all times is not available in any APP, practice, or other official document.

[35] It also submitted that Bell has not conducted an inventory of which emergency services can actually execute a pole-top rescue if needed. More generally, the respondent stated that while calling 9-1-1 is important and appropriate in an emergency situation, Bell is not relieved of its obligation under subsection 8.10(3) to provide training.

[36] In light of its submissions, the respondent asserted that Bell is obliged to train its pole-top technicians of the rescue of colleagues and self-rescue and that the HSO's direction is well-founded.

C) Reply

[37] Bell repeated that technicians on the network conditioning project work alone, do not have sight of each other while working, and only share a vehicle for transportation purposes, which is why they do not receive training.

[38] While Bell does not have its mobile phone emergency policy in any written official document, it maintained that it is a well-established labour relations principle that a policy need not be in writing in order to require compliance by employees.

[39] Bell stated that bucket trucks were previously used by pairs of technicians. Since Bell no longer has any pole-top technicians in pairs or teams, bucket trucks are now only for transportation and conducting pole-top work as individuals and not part of rescue processes.

[40] Bell submitted that there is a large difference between conducting some level of first-aid on oneself and engaging in self-rescue, which it maintains the regulation does not cover.

[41] While Bell acknowledged that a pole-top technician may be asked to check on a colleague who has not reported back to Bell in the required two hours, it added that Bell may instead send an employee who is not a technician.

Analysis

[42] Having paid due attention to all of the parties' submissions, I will now assess the issue of whether or not HSO Wells' direction was indeed well-founded.

[43] Paragraph 125(1)(*q*) of the Code says:

> 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, […]
>
> > (*q*) provide, in the prescribed manner, each employee with the information, instruction, training and supervision necessary to ensure their health and safety at work

The English version of subsection 8.10(3) of the Regulations states:

> No employee shall work on any pole or elevated structure referred to in subsection (1) unless he has been instructed and trained in the rescue of employees who may be injured in the course of the work.

[44] The matter at hand turns on the nature of the obligation contained in subsection 8.10(3) of the Regulations. This will elucidate what obligations the regulation imposes on an employer and the scope of those obligations.

[45] At the onset, I express my agreement with both parties that Part VIII of the Regulations, which includes subsection 8.10(3), is indeed concerned with electrical dangers. Bell specifically restricted its consideration of dangers to electrical ones. However, to discount the hybrid - and thus augmented - nature of the dangers present while working on a pole or elevated structure carrying electrical equipment would be to take a far too narrow and non-purposive approach to subsection 8.10(3). The danger of experiencing electric shock at a height, and the corresponding potential rescue, is indeed more perilous in nature than on the ground. This reality necessarily prevails in the interpretation of the regulation.

[46] As is well established in Canadian law, Dredger's Modern Principle governs statutory interpretation.

> [T]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. (*Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, para 21)

[47] An ordinary and grammatical reading makes it clear that there is a default prohibition on work on any pole or elevated structure: "No employee shall work on any pole or elevated structure…" and « Il est interdit à un employé de travailler sur un poteau ou une construction élevée […] » That prohibition may be overcome only if the employee receives instruction and training in the rescue of employees who may be injured in the course of the work. In other words, the Governor-in-Council has made rescue training a *mandatory prerequisite* to any employee working on a pole.

[48] For emphasis, I note here that the French version of the regulation:

> 8.10(3) Il est interdit à un employé de travailler sur un poteau ou une construction élevée visés au paragraphe (1) à moins d'avoir reçu une formation et un entraînement sur la façon de secourir les personnes blessées au cours d'un travail de ce genre.
>
> [Underlining added]

It states that "employees are prohibited" (Il est interdit […]) to work on a pole or other elevated structures unless they have received the training mentioned in the regulatory provision ([…] à moins d'avoir reçu une formation […]).

[49] I will now turn to the interpretation of "work," "rescue," and "employees who may be injured" in order to give the subsection a complete meaning that sustains the legislator's intention.

[50] Bell argued that the application of subsection 8.10(3) to its technicians is subject to the factual reality of how it organizes pole-top labour,

> [W]hen a single technician is working on a pole, the notion of rescuing another person is absent and therefore section 8.10(3) cannot apply. That is the case in respect of Bell technicians. (Appellant's submissions paragraph 102)
>
> [Underlining added]

Thus, Bell argued that the application of the regulation is based on the employer's operational decisions, and not vice versa.

[51] The respondent argued that "employees are forbidden to climb [the] pole, unless they have been instructed and trained in the rescue of employees […] There is no prerequisite that work needs to be performed in pairs or a group the section to apply.".

[52] Neither the Code nor the Regulations provide a prevailing definition for "work." I therefore have recourse to section 12 of the *Interpretation Act*, R.S.C., 1985, c. I-21:

> Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[53] In subsection 122.1 of the Code, Parliament has clearly stated that the legislation governing occupational health and safety at federally regulated employers "is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment." The Tribunal is therefore concerned with prevention and the physical protection of workers in the always-expanding range of work places in which they work.

[54] Such an interpretation must be generous and broad, but must not encompass a meaning the word cannot ordinarily bear. A fair, large, and liberal interpretation of "work" must be consistent with both appearances of the word in the subsection. In subsection 8.10(3), "work" appears as both a verb and a noun, and a plain reading of the provision reveals that the noun "the work" at the end of subsection 8.10(3) refers *back* to the verb "[to] work on any pole or elevated structure referred to in subsection (1)."

[55] The Governor-in-Council has deemed instruction and training on rescuing of employees who may be injured in the course of work on a pole or elevated structure that is used to carry electrical equipment as the mandatory prerequisite *regardless of how the employer organizes the work*. I agree with the respondent that there are no qualifiers as to whether the employee functions as a complete single unit or as part of a larger coordinated team. Moreover, there are no indicators as to what that "work" entails.

[56] As this Tribunal has often noted, the Code and Regulations must apply to a broad range of federally-regulated employers. It is each individual employer who defines the specific content of the work employees do. The employer must do so while upholding the letter and the spirit of occupational health and safety legislations. Subsection 8.10(3) establishes a very simple and clear rule that the employer's obligation to provide training must be fulfilled before an employee can perform work on a pole or elevated structure. It could not be clearer. To try to restrict the application of the provision to narrower circumstances would be contrary to the nature and purpose of Part II of the Code. It is not appropriate for the Tribunal to apply limitations to a clearly written regulation.

[57] "Employees who may be injured" generated an interesting argument from Bell. It argued that there must be the possibility of an employee injured in the course of the work on a pole in order for subsection 8.10(3) to apply and "the injury must result from the presence of the electrical equipment supported by the pole or elevated structure." In the case of Bell's pole-top technicians, counsel submitted that such a situation is not possible since they work alone and therefore have no one to potentially rescue. Moreover, if an employee can descend himself, he will not need rescuing. If he cannot come down himself, he will not be able to self-rescue and will need emergency help.

[58] The respondent argued by analogy that a pole-top technician is only working alone as much as someone in an office cubicle. Because technicians may travel together, work in relative proximity, or have to check up on each other, the possibility of an employee who may be injured does practically exist. Effectively, it argued that equating a one-technician-per-pole assignment policy to working in isolation is absurd.

[59] The wording of the regulation calls for a possibility of injury that must be applied in a practical and not farfetched manner. However, a narrow interpretation like Bell's cannot uphold the spirit of legislation with a focus on prevention and protection. If the Governor-in-Council wished for the regulation to only apply to employees working with at least one other person on the same assignment as the *only* context in which an "employee who may be injured" could be contemplated, it would have formulated the regulation accordingly. To think that fellow technicians working in relative proximity on different poles, or technicians called upon by the employer to check on a colleague, are outside the range of "employees who may be injured" is an extremely narrow view of legislation focused on prevention of injury and protection of workers and cannot be adopted.

[60] Moreover, the regulation does not make a distinction between the potential injuries being due to electrical or non-electrical causes. Regardless of whether or not the potential injury is non-electrical in nature, the pole-top technician requiring assistance remains at risk of an electrical danger.

[61] Therefore, in keeping with the fair, liberal, and large interpretation required by the *Interpretation Act*, and keeping the legislative intent of prevention in mind, I conclude that "employees who may be injured" must encompass a broad range of rescue situations, and is not limited by employees assigned to individual poles.

[62] Regarding the definition of "rescue," counsel for the appellant submitted that "rescue" has an inherent third-party nature of rescuing *someone* and that it cannot apply to oneself. The appellant provided dictionary definitions of "rescue" such as, "to bring (someone or something) out of danger; to free (a person) from legal custody by force" (Collins English Dictionary, 2005 7th Edition). For "secourir," the appellant provided definitions like, « porter assistance à; assister, défendre » (Le Petit Larousse Illustré, 2005 100ième Edition).

[63] The respondent replied that "self-rescue" could be included in training packages and that the appellant never considered this possibility.

[64] The regulation provides the verb "rescue" with its object, which in this case is "employees." Therefore, the Governor-in-Council has necessarily circumscribed the meaning of rescue to encompass only the assistance or saving of the employee's colleague(s) conducting similar work. The regulation is therefore clear that a pole-top technician must be trained in the rescue of a colleague working on a pole of elevated structure carrying electrical equipment. Contrary to the respondent's assertion, the notion of "self-rescue" is therefore absent from the term "rescue" in subsection 8.10(3).

[65] I approach this case from my perspective as an appeals officer as well as a mechanical engineer specializing in safety issue assessments and investigations for over 20 years. I interpret the legislation as requiring the technician working on a pole or elevated structure as contemplated by the regulation to have the knowledge on how to rescue another employee doing similar work. A technician is still required to have that instruction and training even if he or she has the possibility to use this knowledge on rare or infrequent occasions. Training is always beneficial to professional who operate in dangerous work places, such as electrical poles. The legislator would not impose such a requirement on a dangerous profession without contemplating that such emergency training would be of practical use to pole-top technicians. Bell appears to agree, given that all employees in the Newmarket area who received pole-top rescue training also received a pole-top rescue kit to install in their trucks.

[66] With respect to the appellant's argument that 1973 and 1985 regulations on electrical safety while working on a pole or elevated structure has not changed significantly, I must make one element clear. The legislator does not speak in vain and amendments to legislation must carry a meaning beyond a restatement of previous enactments (*Bell ExpressVu Limited Partnership* v. *Rex*, 2002 SCC 42). Therefore, the newest version of the regulation does indeed mean something different in substance than the 1973 regulation.

[67] In 1973, the subsection 23(3) of the *Canada Electrical Safety Regulations* read:

> No employer shall permit an employee to work, and no employee shall work, on any pole or elevated structure referred to in subsection (1) unless he has been instructed and trained in the rescue of persons who may be injured in any such work.

And the definition of a pole or elevated structure was:

> Any equipment, device, apparatus, wiring, conductor, assembly or part thereof that is employed for the generation, transformation, transmission, distribution, storage, control, measurement, or utilization of electrical energy and that has an ampacity and voltage that is dangerous to employees.

[68] The Governor-in-Council amended the regulation to:

> No employee shall work on any pole or elevated structure referred to in subsection (1) [used to support electrical equipment] unless he has been instructed and trained in the rescue of employees who may be injured in the course of the work.

And the definition of "electrical equipment" now means "equipment for the generation, distribution or use of electricity."

[69] In the current legislation, the ampacity and voltage of the electrical equipment is no longer a consideration as to whether training must take place. If on the pole there is electrical equipment for the purposes of generation, distribution or use of electricity, then there must be training *before* an employee may work on the pole. The Governor-in-Council has taken a broader and more purposive approach to an employee's health and safety while working near or with electricity while elevated.

[70] I note here that the parties presented ample submissions on Bell's emergency policy to call 9-1-1 in all instances. As the foregoing analysis makes clear, the crux of subsection 8.10(3) is a matter of training and instruction, not what an employer actually does in the event of an emergency. Therefore, I do not need to consider the parties' submissions on Bell's emergency policies.

[71] Finally, in its written submissions, the respondent introduced evidence of an unrelated direction against Bell Technical Solutions by HSO Manon Perrault dated June 10, 2014. The respondent argued this direction supports its interpretation of subsection 8.10(3) of the Regulations. The appellant replied stating that the respondent attempted to improperly introduce the evidence after the hearing and its admission would prejudice the appellant. I agree with the appellant and accordingly dismiss the parties' submissions on the HSO Perrault's direction to Bell Technical Solutions.

Application to this case

[72] First, while the parties disagree as to the adequacy of HSO Sacco's and HSO Wells' investigations, including the emails from colleagues at the then-HRSDC, this Tribunal has often reiterated that, "an appeals officer's task is to make such a determination in a *de novo* manner, i.e. on the basis of the evidence presented at the hearing, whether or not that evidence was presented or available to the health and safety officer in the course of his investigation." (*VIA Rail Canada Inc.* v. *Mulhern*, 2014 OHSTC 3, paragraph 111).

[73] Moreover, subsection 145.1(2) of the Code endows an appeals officer with the same authorities as an HSO, in addition to appellate powers outlined in section 146.2. The *de novo* appeal process gives both parties a complete opportunity to present their facts, evidence, and arguments such that it remedies any perceived prejudice due to any element of an HSO's investigation. This would also include the non-binding consultative roles of an HSO's colleagues within the public service.

[74] Bell assigns pole-top tasks to each individual technician. They are to work "alone" and not as part of an officially organized team or unit. Bell agreed that if employees did work in pairs or teams, it would conduct pole-top rescue training. Technicians may travel to their worksites in company vehicles as a form of office carpooling, but their work assignments do not overlap. Bell asserted that the technicians have no visual sight of each other. The appellant submitted that those who work on the network conditioning project *generally* have no sight of each other.

[75] As I have already mentioned, the regulation only speaks to work on poles or elevated structures carrying electrical equipment. It does not in any way qualify the mandatory prerequisite of instruction or training with a requirement that pole-top technicians work in pairs or teams. Regardless of how an employer elects to distribute work amongst employees, the minimum standards laid out in the Code and Regulations always apply unless there is a clear direction to the contrary, which is not the case here.

[76] In the alternative, were I to accept Bell's interpretation of subsection 8.10(3) of the Regulations, I find on the facts that Bell has not demonstrated that its pole-top technicians work in an isolated manner and that therefore the regulation should not apply in this case.

[77] In its submissions, Bell said technicians *generally* do not have sight of each other. In addition, I found the testimony of Mr. Dutton particularly convincing that pole-top technicians *do* have at times sight of each other. Included with evidence that pole-top technicians may travel together, work in relative proximity, and even have lunch together, it cannot be said that they truly work "alone."

[78] Both parties agreed that in the event a technician has not remotely checked in with their supervisor, that a fellow pole-top technician in the general vicinity may be called to check in on a "missing" technician. Simply because pole-top technicians receive individual assignments and are not working on the same pole together does not mean that they are entirely isolated from each other.

Decision

[79] For these reasons, I confirm the direction issued by HSO Wells on January 23, 2013.

Olivier Bellavigna-Ladoux
Appeals Officer