Decision No. 93-106

CANADA LABOUR CODE
PART II
OCCUPATIONAL SAFETY AND HEALTH

Review under section 146 of the Canada Labour Code, Part II
of two directions issued by a safety officer

Applicants:	Auto Haulaway Inc. Oakville, Ontario Represented by: Mr. Douglas C. McTavish, Q.C.
	and
	MCL Motor Carriers Limited Oshawa, Ontario Represented by: Mr. Dean Saul, Counsel
Interested Parties:	Teamster Union - Local 938 Represented by: Mr. David Philp Business Agent Oshawa, Ontario
	and
	Mr. Ray Hill Business Agent Mississauga, Ontario
Mis en Cause:	Mr. Wm. H. Grealis Safety Officer Human Resources Development (Labour)
Before:	Mr. Serge Cadieux Regional Safety Officer Human Resources Development (Labour)

Oral hearings were held separately for both companies in Toronto, Ontario on December 1 and 8, 1993 respectively. Since almost identical directions were given to both companies by the same safety officer, the representatives of the applicants, as well as the representatives for the interested parties, requested that a single decision be given, by the Regional Safety Officer, for both cases. The submissions of the parties being essentially the same, in the instant cases, I agree with the applicants that a single decision would satisfy the requirements of the review process for these two cases.

Background

Safety officer Wm. H. Grealis conducted separate inspections, on different dates, of the work places operated by Auto Haulaway Inc. and MCL Motor Carriers Limited. The safety officer observed drivers, at both work sites, loading and unloading vehicles from a truck and trailer unit specifically designed for the carriage of new and used vehicles. Measurements and photographs were taken which show that, at two specific positions i.e. above the cabin of the truck and at an adjacent platform position on the trailer, the drivers were working from both unguarded sites at a distance greater than 2.4 meters above the nearest permanent safe level. In the instant cases, the nearest permanent safe level is the ground.

The safety officer concluded that both companies were in contravention of the Canada Labour Code, Part II and the pursuant Canada Occupational Safety and Health Regulations (Regulations). Both companies were directed, under subsection 145(1) of the Code, to stop contravening provisions of the legislation by specific dates.

In the case of MCL Motor Carriers Limited, the safety officer noted, in the direction issued on June 24, 1993, the following:

> "The said Safety Officer is of the opinion that the following provisions of the Canada Labour Code, Part II are being contravened.
>
> Paragraph 124 of the Canada Labour Code, Part II and paragraph 12.10(1),(a)(i) of the Canada Occupational Safety and Health Regulations.
>
> e.g. persons working more than 2.4 meters above the nearest permanent safe level are not being guarded from falling.
>
> Therefore, you are HEREBY DIRECTED, pursuant to [1]paragraph 145.(2) of the Canada Labour Code, Part II to terminate the contraventions no later than September 30, 1993."

and, in the case of Auto Haulaway Inc., the safety officer noted, in the direction issued on July 22, 1993, the following:

> "The said Safety Officer is of the opinion that the following provisions of the Canada Labour Code, Part II are being contravened.
>
> Paragraph 124 of the Canada Labour Code, Part II and paragraph 12.10(1),(a),(i) of the Canada Occupational Safety and Health Regulations.
>
> e.g. persons working more than 2.4 meters above the nearest permanent safe level are not being guarded from falling.

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[1] The applicants stated at the hearing that they do not intend to make an issue of the typographical error which found its way in the last paragraph of the direction and which should read "subsection 145(1)" instead of "paragraph 145.(2)" as indicated in the direction. The error will nevertheless be corrected if the direction is not rescinded.

Therefore, you are HEREBY DIRECTED, pursuant to [2]paragraph 145.1 of the Canada Labour Code, Part II to terminate the contraventions no later than October 30, 1993."

Submissions for the Applicants

The joint submissions of the applicants were initially presented in writing to the Regional Safety Officer. While slight variations were discussed at the hearings, the thrust of the arguments are the same. The applicants and the interested parties reiterated verbally their request to have a single decision given, for both cases, on the basis of the following "Essential Submission".

The "Essential Submission" of the applicants cover two specific points. They are:

1. A guardrail or other devices are not required as a matter of law and the Section of the Canada Occupational Safety and Health Regulation SOR/86-304, as amended (the "Regulations"), referred to in the Direction does not apply to a trailer designed for the carriage of new and used motor vehicles.

2. These requirements, if imposed, are positively unsafe and a hazard to the involved employees because a guardrail in the affected area is an obstacle which actually impedes the safe performance of the work and because the fall protection devices actually interfere with the safe performance of the work.

To substantiate each point, the applicants analyzed the provisions of the Regulations referred to or relied upon in the directions to demonstrate their inappropriateness in the circumstances. Those provisions are [3]subparagraph 12.10(1)(a)(i) of Part XII (Safety Materials, Equipment, Devices and Clothing) and [4]section 2.10 of Part II (Building Safety) of the Regulations.

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[2] The applicants repeated at the hearing that they do not intend to make an issue of the typographical error which found its way in the last paragraph of the direction and which should read "subsection 145(1)" instead of "paragraph 145.1" as indicated in the direction. The error will nevertheless be corrected if the direction is not rescinded.

[3] 12.10 (1) Where a person, other than an employee who is installing or removing a fall-protection system in accordance with the instructions referred to in subsection (5), works from

(a) an unguarded structure that is

(i) more than 2.4 m above the nearest permanent safe level,or

the employer shall provide a fall-protection system."

[4] 2.10 (1) Every guardrail shall consist of

(a) a horizontal top rail not less than 900 mm and not more than 1100 mm above the base of the guardrail;

(b) a horizontal intermediate rail spaced midway between the top rail and the base; and

(c) supporting posts spaced not more than 3 m apart at their centres.

(2) Every guardrail shall be designed to withstand a static load of 890 N applied in any direction at any point on the top rail."

In support of the "Essential Submission", point no.1, the applicants submit the following five (5) comments, which I have summarized for the purpose of clarity and conciseness:

Comment 1: A trailer designed for the carriage of motor vehicles is not a "structure".

Comment 2: A detailed reading of the CSA Standards referred to in Section 12.10(2) of the Regulations demonstrates their inapplicability to this circumstance.

Comment 3: In this context, a guardrail is not appropriate.

Comment 4: The guardrail provision appears in a Part of the Regulations entitled "Building Safety" which suggests strongly that it was not intended to apply to mobile equipment such as the trailers in question here.

Comment 5: The fall-protection requirements imposed by the Regulations do not apply to other forms of transportation

In support of the "Essential Submission", point no.2, the applicants express some safety concerns resulting from the requirement to provide a guardrail or any other protection device that could be required by subsection 12.10(1) of the Regulations. These concerns are based essentially on a videotape and an engineering report which have been submitted for the review process. The "essential point is that a guardrail in the affected area is an impediment to a driver climbing or descending a ladder or opening and closing the affected car doors or affixing or detaching the locking mechanisms on the motor vehicles."

The applicants noted that "the safety of the workers in this dynamic environment is best met by careful ladder and handhold placement, which has been done and is in place on the affected pieces of equipment."

On the basis of the "Essential Submission", the applicants are asking that both directions be rescinded.

Submissions for the Employees

Mr. David Philp and Mr. Ray Hill share the employers' joint position in these cases. They have consulted numerous drivers regarding the directions given by the safety officer. The consensus is that a guardrail is totally inappropriate, in the instant cases, since the drivers cannot exit the vehicles with ease and without damaging the vehicles. They also believe that the fall-protection systems prescribed do not apply in these cases as they create more "danger" to the employee who would, in all likelihood, strike the sides of the trailer and injure himself/herself during a fall. They would prefer not to be hindered by such systems and suggest they are in a better position to control a fall on their own if and when an incident of this kind occurred.

Given the above, Mr. Philp and Mr. Hill also request that the directions be rescinded and that only one decision be given.

Decision

The issue to be resolved in the instant cases is, in my view, whether subparagraph 12.10(1)(a)(i) of the Regulations has been contravened. If so, I have little choice but to confirm the directions of the safety officer. If that provision has not been contravened or that it does not apply in the instant cases, I will look at the circumstances that gave rise to the directions and either vary or rescind the directions, as the situation may require. In doing so, I will determine whether subsection 12.10(1) of the Regulations, or any other provision, is appropriate to protect an employee working above 2.4 meters on the truck and trailer units described above.

Before ruling in this matter, an assumption that was made by the applicants, when discussing the first issue of the "Essential Submission", should be clarified. It was stated that "We assume it is agreed therefore that these are the only potentially relevant Sections." This restriction is clearly self-serving as no such agreement was or would ever be made. The role of the Regional Safety Officer acting under subsection 146(3) of the Code is, in part, to vary a direction whenever the situation warrants it. To do so, the Regional Safety Officer must look at all the provisions of the Code and the pursuant Regulations in light of the circumstances that gave rise to the direction and, where necessary, vary, rescind or confirm the direction accordingly. The parties were given the opportunity to look at the legislation in a more enlightened fashion but opted to remain on their initial positions.

The "Essential Submission" of the applicants dealt with two points.

> The first point of the "Essential Submission" provides as follows:
>
> 1. A guardrail or other devices are not required as a matter of law and the Section of the Canada Occupational Safety and Health Regulation SOR/86-304, as amended (the "Regulations"), referred to in the Direction does not apply to a trailer designed for the carriage of new and used motor vehicles.
>
> **Note**: It understand that, along with the directions, a copy of section 2.10 of the Regulations was given by the safety officer to the applicants. This action has evidently, and regrettably, led the applicants to assume that a guardrail was required at the two positions under consideration in the instant cases. I explained, at the hearing, that this was not the case and allowed the parties to reconsider their positions. After consideration, the parties decided not to change their initial submissions.

To substantiate the first point of the "Essential Submission", the applicants made five (5) comments which I reported earlier in the text. I will respond to the comments in the following manner:

Comment 1: A trailer designed for the carriage of motor vehicles is not a "structure".

In the absence of a definition of the word "structure" in the legislation, as opposed to the expression "temporary structure" which is specifically explained in [5]section 3.1 of the Regulations, the common meaning of the dictionaries applies. While the dictionaries make ample reference to buildings in general, they also refer to the following more general definition: "A set of interconnecting parts of any complex thing;" (The Concise Oxford Dictionary, Edition 1990). This definition is all inclusive and, in my view, applies to the expression "unguarded structure" which is non specific and therefore, of wide application.

It should be noted that section 12.10 of the Regulations is found in Part XII (Safety Materials, Equipment, Devices and Clothing) of the Regulations. Therefore, Part XII and, consequently, section 12.10 of the Regulations, applies to all pertinent provisions of sections 125, 125.1, 125.2 and 126 of the Code as stipulated by [6]section 1.3 of the Regulations. It is therefore appropriate to use the most general definition of the dictionaries in the instant cases. Consequently, I am of the view that the trailers used for the carriage of vehicles are structures as contemplated by section 12.10 of the Regulations.

Comment 2: A detailed reading of the CSA Standards referred to in Section 12.10(2) of the Regulations, by their own terms, demonstrates their inapplicability to this circumstance.

The applicants are assuming that the CSA standards referred to in subsection 12.10(2) of the Regulations are the only standards which must be complied with. I disagree with this assumption. The CSA Standards incorporated by reference in subsection 12.10(2) of the Regulations establish minimum requirements for any fall-protection system. Attentive reading of the first sentence of subsection 12.10(2) of the Regulations, which provides as follows:

> 12.10(2) The components of a fall-protection system shall meet the following standards:

leads me to conclude that the individual components of a fall-protection system must only meet the requirements of the CSA standards referred to by that provision. I interpret that provision to mean that any fall-protection system would be acceptable as long as its individual components satisfy and comply with the requirements of the relevant CSA Standards. Furthermore, the titles of the standards, which describe the individual components of a fall-protection system, should not mislead an employer in limiting the application of the those fall-protection systems to the type of industries referred to in that provision.

Therefore, the above noted provision should not be interpreted in such a restrictive manner that it limits the ability of the employer to consider other types of fall-protection systems. A more flexible approach is envisaged by subsection 12.10(2) of the Regulations. Consequently, the

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[5] 3.1 This Part applies to portable ladders, temporary ramps and stairs, temporary elevated work bases used by employees and temporary elevated platforms used for materials.

[6] 1.3 These Regulations are prescribed for the purpose of sections 82, 82.1, 82.2, and 83 [now sections 125, 125.1, 125.2 and 126].

applicants are advised that they are mistakenly restricting the application of subsection 12.10(2) of the Regulations to those fall-protection systems described by that provision and to the industries referred to by those standards.

Comments 3 and 4: References to "guardrail" in general and as specified in section 2.10 of Part II (Building Safety) of the Regulations.

The parties were advised at the hearings that the reference to an "unguarded structure" in paragraph 12.10(1)(a) of the Regulations should not be equated to the requirement to install a guardrail which meets the requirements of section 2.10 of the Regulations as this interpretation would be too restrictive. The word "unguarded", which means the absence of a guard, applies to all types of guards. Also, since the word guard is not defined in the legislation, the common definition of the dictionaries would apply. The word "guard" is defined by The Concise Oxford Dictionary to mean "a thing that protects or defends" or also "a device fitted to a machine, vehicle, weapon,etc., to prevent injury or accident to the user." A guardrail is only one type of device which can prevent injury or accident to the user.

If a guardrail was installed on the trailer, it could be argued that it would not have to meet the requirements of the Regulations since guardrails appear in Part II of the Regulations under Building Safety. However, this is not an issue to be resolved in the instant cases.

In reading subsection 12.10(1) of the Regulations, it may not be evident that this provision requires the structure to be guarded or that other safety measures must be taken to protect the employees at work. However, the directions of the safety officer specifically refer to the employer's general obligation under section 124 of the Code "to ensure that the safety and health at work of every person employed by him is protected." In my view, when read concurrently, these two provisions require that the employer also direct his/her attention, in terms of the safety measures to be taken, to the employees working on the structure, to the various guards or other safety devices that could be adapted to the structure or to the distance between the structure and the permanent safe level. Requiring the employer to take measures to protect his/her employees is reasonable and, I believe, most appropriate in the instant cases given that the current situation has gone unresolved for several years. Surely, affirming that the fall-protection systems prescribed do not apply in the instant cases does not relieve the employer from the responsibility to take other measures to protect his/her employees at work.

Consequently, the comment "A guardrail or other devices are not required as a matter of law..." cannot be supported in view of the general responsibility of the employer under section 124 of the Code. Any safety device would be acceptable as long as it protects the employee from falling. Failure to protect the structure results in the mandatory obligation for the employer to provide a fall-protection system that meets the requirements of the relevant CSA Standards. Non-compliance with that obligation constitutes a contravention of subparagraph 12.10(1)(a)(i) of the Regulations which is authorized by paragraphs 125(j), (t) and (u) of the Code.

As to whether the guardrail is appropriate in the circumstances of these cases is a matter of interpretation. Granted a guardrail may cause some inconvenience to the employee exiting or entering the vehicle. However, it does achieve its purpose which is to protect the employee

working on the structure from falling. In fact, were it not for the distance between the guardrail and the vehicle on the trailer, the guardrail would be an appropriate protective device.

The applicants referred to ladders and hand holds in their submissions. Positioning similar ladders and hand holds at the specific sites under issue in the instant cases may offer a solution.

Comment 5: The fall-protection requirements imposed by the Regulations do not apply to other forms of transportation (for example, shipping, air and rail - Section 1.4).

The applicants argued that subparagraph 12.10(1)(a)(i) of the Regulations does not apply to this interprovincial road transportation industry. I disagree with the applicants on this point and I further disagree with them that other modes of transport are not subject to fall-protection requirements in their industry. Notwithstanding the above, interprovincial road transportation, which is captured by paragraph 2(b) of the Code, is covered by the general Canada Occupational Safety and Health Regulations (the Regulations). Other modes of transport are covered by industry specific regulations. The requirements prescribed under those regulations, or the absence of requirements similar to those found under the general Regulations, have no bearing on interprovincial road transportation. The wording of section 12.10 of the Regulations is sufficiently general to apply to interprovincial road transportation and, therefore, section 12.10 of the Regulations applies to this industry.

The second point of the "Essential Submission" provides as follows:

2. These requirements, if imposed, are positively unsafe and a hazard to the involved employees because a guardrail in the affected area is an obstacle which actually impedes the safe performance of the work and because the fall protection devices actually interfere with the safe performance of the work.

I have already dealt with the issue of the guardrail. It certainly is not, in my view, the only solution to the problem in the instant cases. This is not to say that a guardrail cannot be adapted to the structure in question here. However, given the general wording of section 12.10 of the Regulations, a myriad of solutions can be envisaged.

For example, consideration is not given to using other types of protective devices, of changing the distance of "2.4 meters above the nearest permanent safe level", of adapting the proposed guardrail to the situation at hand, of looking at other types of fall-protection systems and the list goes on. I believe that too much time is spent discussing the legalistic interpretation of a provision to demonstrate the non-applicability of its requirements and too little time is actually spent looking at the safety aspects of the problem and proposing solutions.

Therefore, to answer the question of whether subsection 12.10(1) of the Regulations is appropriate to protect an employee working above 2.4 meters on the truck and trailer units described earlier, my reply is that it is. The safety officer also affirmed in the directions that the applicants were in contravention of section 124 of the Code thereby implying that resolution of this problem can be achieved in different ways. I fully agree with the safety officer who, I understand, is more than willing to assist the parties to achieve this goal.

If the applicants maintain that no other solution is possible in view of a restricted reading of section 12.10 of the Regulations, then a fall-protection system is required as provided by that provision. Since only the fall-protection systems described in subsection 12.10(2) of the Regulations have been looked at superficially by the applicants, it cannot be argued, in accordance with [7]section 12.2 of the Regulations, that any such system would create a hazard to the employee. In the event that the above could be successfully argued, the only alternative would be to ensure that no employee works on these structures until compliance with section 124 of the Code can be achieved.

In summary, I believe that the directions of the safety officer were justified in the instant cases. Subparagraph 12.10(1)(a)(i) of the Regulations, as well as section 124 of the Code are being contravened. Nonetheless, the directions given by the safety officer need to be corrected to, firstly, reference the provisions of the Code which authorize section 12.10 of the Regulations and, secondly, to make the corrections I have mentioned earlier respecting the typographical errors.

For all the above reasons, I HEREBY VARY the direction given under subsection 145(1) of the Canada Labour Code, Part II by safety officer Wm. H. Grealis, on June 24, 1993 to MCL Motor Carriers Limited, by replacing the four paragraphs of the direction referred to in the Background of this decision (see page 2), with the following four paragraphs:

> "The said safety officer is of the opinion that the following provisions of the Canada Labour Code, Part II are being contravened.
>
> Section 124 and paragraphs 125(j), (t) and (u) of the Canada Labour Code, Part II and subparagraph 12.10(1)(a)(i) of Part XII (Safety Materials, Equipment, Devices and Clothing) of the Canada Occupational Safety and Health Regulations.
>
> e.g. persons working more than 2.4 meters above the nearest permanent safe level are not being guarded from falling and are not provided with a fall-protection system.
>
> Therefore, you are hereby directed, pursuant to subsection 145(1) of the Canada Labour Code, Part II to terminate the contraventions no later than September 30, 1993."

-and-

For all the above reasons, I HEREBY VARY the direction given under subsection 145(1) of the Canada Labour Code, Part II by safety officer Wm. H. Grealis, on July 22, 1993 to Auto Haulaway Inc., by replacing the four paragraphs of the direction referred to in the Background of this decision (see page 3), with the following four paragraphs:

> "The said safety officer is of the opinion that the following provisions of the Canada Labour Code, Part II are being contravened.

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[7] 12.2 All protection equipment referred to in section 12.1
(a) shall be designed to protect the person from the hazard for which it is provided; and
(b) shall not in itself create a hazard

Section 124 and paragraphs 125(j), (t) and (u) of the Canada Labour Code, Part II and subparagraph 12.10(1)(a)(i) of Part XII (Safety Materials, Equipment, Devices and Clothing) of the Canada Occupational Safety and Health Regulations.

e.g. persons working more than 2.4 meters above the nearest permanent safe level are not being guarded from falling and are not provided with a fall-protection system.

Therefore, you are hereby directed, pursuant to subsection 145(1) of the Canada Labour Code, Part II to terminate the contraventions no later than October 30, 1993."

Decision rendered on January 14, 1994

Serge Cadieux
Regional Safety Officer

Summary of RSO Decision

RSO Decision No: 93-106

Applicants:	Auto Haulaway Inc. and MCL Motor Carriers Limited Toronto, Ontario
Interested Parties:	Teamster Union, Local 938

Identical directions were given, under subsection 145(1) of the Canada Labour Code Part II, by a safety officer to two different companies engaged in the carriage of new and used vehicles. The safety officer found the companies to be in contravention of section 124 of the Code and subparagraph 12.10(1)(a)(i) of the Regulations. No safety measures were taken to protect the employees from falling from the unguarded structure of the trailer units and no fall-protection equipment was provided as required by the Regulations.

The applicants argued that the law does not require the structure to be guarded and that if it does, the guard required would create an unsafe situation. However, the Regional Safety Officer agreed with the safety officer in both cases. Upon request from the applicants, the RSO gave only one decision for the two cases. The RSO ruled that the companies were effectively in contravention of the above noted provisions. The RSO noted that the companies had numerous possibilities to resolve the problem, but failed to take measures to protect its employees for several years. The RSO also noted that if the applicants maintain that no safety measures can be taken and that the fall-protection system prescribed is inadequate in the instant cases, then no employee should be allowed to work on the unguarded structure until compliance can be achieved.

The directions of the safety officer were varied only to correct some minor typographical errors.