Decision No. 95-005

CANADA LABOUR CODE
PART II
OCCUPATIONAL SAFETY AND HEALTH

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

Applicant:	Keystone Bulk Transport Ltd. Brandon, Manitoba Represented by: William G. Ryall, Counsel
Mis en Cause:	Dwayne Laushway Safety Officer Human Resources Development Canada
Before:	Serge Cadieux Regional Safety Officer Human Resources Development Canada

An oral hearing was held in Winnipeg, Manitoba on April 19, 1995.

Background

The safety officer's Accident Investigation Report describes accurately and in detail the accident that occurred in this case. The report summarizes the incident as follows:

> On September 22, 1994 asphalt was being loaded from a C.P. Rail car into a Keystone Bulk Transport Ltd. tanker type trailer #1307 at C.P. Rail Yards, Brandon.
>
> This process was interrupted by an explosion that damaged the effluent spout of the loading hose and Trailer #1307 as well as spraying hot asphalt from the top loading hatch of the tanker.
>
> Keystone Bulk Transport Ltd. employee, Norman Milne, who was standing at the trailer's loading hatch "dipping" at the time of occurrence jumped to the ground 3,570m below to avoid the effects of the explosion.
>
> He was subsequently taken to the hospital...

The safety officer further describes the accident in the following terms:

> In the presence of truck driver, Norman Milne, Pounder Emulsions Employees[1] (PEE's) commenced the transfer of asphalt from the rail car to the truck trailer.
>
> The pumping/heating unit was appropriately connected and the pumps were started by PEE's. PEE's then started up the asphalt heating unit to raise the asphalt to the desired temperature.
>
> Keystone Bulk's driver reports climbing Trailer #1307, fifteen minutes into the loading operation to check the level of asphalt being loaded. He was unable to detect asphalt in the trailer but noted an undue amount of vapour being expelled from the trailer to loading hatch.
>
> In response to observations PEE's noted that the suction valve had not been opened on the pumping apparatus to allow the flow of asphalt. This valve was immediately opened to permit asphalt to commence its flow.
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> The heating unit, which was reported on approximately four minutes prior, had excessively heated vapours pushed from it by incoming asphalt.
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> The asphalt vapour was forced through the loading spout and into trailer 1307. There was a plume of increase "smoke" followed by a five second flash as the asphalt vapour was believed to have spontaneously combusted.
>
> On seeing the "smoke plume", Mr. Milne, the truckdriver jumped from the rear driver side area of the work platform on trailer 1307 to escape the expected spray of hot asphalt.
>
> Mr. Milne received injuries to his right heel as a result of impact with the ground surface and/or his ensuing roll out of the danger zone.

The safety officer explained that the employee was injured by the fall and therefore he accepted the fall as being the hazard. In his assessment of the danger, the safety officer concluded that the danger was the height and the contact with the ground. He addressed the situation by giving the direction (APPENDIX) under appeal.

Preliminary Objection

At the beginning of the hearing, Mr. Ryall submitted, as a preliminary objection, that the Regional Safety Officer "has no jurisdiction to hear this review to the Direction issued in respect to Keystone tractor trailer units in that a tractor trailer unit is not a "structure" within the meaning of the Canada Labour Code and as such the direction issued must be rescinded by the Hearing Officer."

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[1] All hooking up of asphalt transfer/heating equipment as well as the transfer of product was the responsibility of Pounder Emulsions' Employees (PEE), a provincial jurisdiction employer.

The basis for this objection is a recent decision rendered by the Provincial Court of Ontario in the matter of *Regina v. Transport Provost Inc* in which the company was charged with a violation of paragraph 125(j) of the Canada Labour Code, Part II (the Code) and subsection 12.10(1) of the Canada Occupational Safety and Health Regulations (the Regulations) for not providing a fall-protection system to employees working from an unguarded structure above 2.4 meters. The Court ruled in favour of Provost Transport by concluding that a tanker trailer was not an unguarded structure as contemplated by the Regulations. The charges were dismissed on the basis "that the word "structure" is not broad enough to include a wheeled, readily mobile, truck tank trailer, I must conclude that the acts complained of in the six counts in the information charging the accused, are not offenses known to law."

Mr. Ryall requested that I issue a decision on this matter before proceeding with any other aspect of the case.

Decision re: Preliminary Objection

Prior to the hearing, Mr. Ryall was provided with decisions that dealt with the issue of what constituted a structure and was asked to make submissions on those decisions at the hearing. Mr. Ryall summarized his objection by saying "that we see that the principles outlined by the Supreme Court of Canada (in *Springman and the Queen)* are dealing with the mobility of the trailer and the intention of permanent affixation to land and in our particular case, I don't think there is any doubt that the tank trailers of Keystone Bulk Transport are not trailers affixed to land."

While we could have proceeded on the basis that the objection would be taken under reserve, given the decision of the Supreme Court of Canada in *Bedard v. the Queen*, in which the Court took the opposite view in respect of affixation in the soil, the following decision was given.

For the purposes of this case, there are essentially two types of directions that can be given by a safety officer. The safety officer can give a direction either under subsections 145(1) or 145(2) of the Code.

In cases where a direction is given under the authority of subsection 145(1) of the Code, a specific provision of the Code or the Regulations must have been violated for a contravention to exist. In the instant case, the objection would be valid if the safety officer had given that type of direction and cited the employer for contravening a specific provision which he would be required to identify. That is not the case presently since the safety officer did not find the employer to be in contravention of a specific provision of the Code and the pursuant Regulations.

The direction of the safety officer is given under the authority of paragraph 145(2)(a) of the Code. Under that provision, a direction is given for a situation of danger. The safety officer does not have to identify a provision of a Regulations to make a finding that danger exists. He merely has to conclude on the basis of the facts before him that a situation exists that constitutes a danger and give a direction as he has done in this case. The direction of the safety officer makes no reference to the term structure and does not cite the employer for contravening a particular provision of the Code or the Regulations. The direction deals with a situation of danger.

It is my decision that the safety officer was authorized to make a finding of danger in this case. It is also my decision that as a consequence of the direction given for a situation of danger, I am authorized to review the direction as formulated. The objection is DISMISSED.

Submission for the Employer

Mr. Ryall submits that in the ordinary course of business of Keystone, there is no danger associated with the operation of the trailers. There is a risk or danger in the product, asphalt, in that an employee would be burnt if exposed to it during the transfer of the product from a rail car to a tanker trailer. While there may be a risk of being on top of the trailer, there surely is no danger of being on top of it. That assertion is supported by the decision of a Quebec Joint Review Board in *Carlew Inc. v. Syndicat des travailleurs de l'energie et de la chimie*, in which the Board rescinded a direction of an inspector, which dealt with the same issue as the one identified in the direction.

Mr. Ryall further suggests that the danger arising from the handling of the product, in this case asphalt, while in movement, is covered by the Transportation of Dangerous Goods Act, and Keystone Bulk Transport has complied with the requirements under that legislation. Furthermore, the company indicated they would not load or unload that particular product in the future.

Decision

The issue to be decided in the instant case is whether the danger referred to in the third paragraph of the direction is, as it is described:

> "Where employees are required to work on the top of Tanker Trailers at a height greater than 2.4 meters above the nearest permanent safe level without protection from falls."

In regards to the formulation of danger above, I must ask myself if it is dangerous to be on top of a truck trailer without fall-protection equipment and not, as counsel for the employer would have me consider, whether a provision of the Code and the Regulations was contravened. It could certainly be argued that by not providing fall-protection equipment as required by the Code and the pursuant Regulations, the employer would be in contravention of a specific provision of the Code. In defense, the employer would argue that a tractor trailer is not a structure and we would be entangled in a debate over that issue as it would relate to a specific provision of the Regulations. That is not the issue before me presently . The issue is danger and danger can exist without a violation of the Code. In *Alberta Wheat Pool v. Grain Workers' Union*, Court File No. A-998-91, the Federal Court of Appeal said, in respect of the existence of a danger without the presence of a specific violation of the Code, that:

> "To find that a danger exists does not require proof of a violation of the Code; a danger can exist without the Code violations mentioned by the S.O. in her directions."

Also, I agree with the decision in *Carlew* above which concludes that there is a risk of being on top of a trailer but that does not by itself constitute a danger. Under normal circumstances, the tanker trailer is loaded at a permanent loading site with means of escape extending to the top of the

trailer. If anything, a fall-protection device in the instant case could have created a greater hazard to Mr. Milne by being exposed to and probably be sprayed and burnt by hot asphalt. Such a situation is contrary to the purpose of the Code, which is the prevention of accidents and injuries, and is also contrary to paragraph 12.1(b) of the Regulations which provides:

> 12.1 Where
>
> (a) it is not reasonably practicable to eliminate or control a safety or health hazard in a work place within safe limits
>
> (b) the use of protection equipment may prevent or reduce injury from that hazard,
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> every person granted access to the work place who is exposed to that hazard shall use the protection equipment prescribed by this Part.

I believe that the danger to Mr. Milne on the day of transfer of hot asphalt was not the fact that he was on top of the trailer without fall-protection equipment. The true hazard in this situation is the transfer of hot asphalt. The absence of established safe work procedures in transferring hot asphalt from a rail car to a tanker trailer is, in my opinion, directly responsible for the accident. In fact, the safety officer identified that situation in his analysis of the causes of the accident. The safety officer noted that

> Mr. Milne's failure to anticipate the potential for danger in respect of the product/process in part was the result of:
>
> 1) The lack of provision of/use of (MSDS's) on site detailing the nature and hazards of the product. (i.e. flash point)
>
> 2) The lack of established procedures detailing the driver's responsibilities in respect of loading and integration of activities with others involved in the process.
>
> 3) The lack of hazards analysis investigation in respect of the task performed, designed to identify hazards and appropriate precautions.
>
> 4) Appropriate supervision was not provided that could have averted this accident through monitoring of processes procedures and precautions.

The first item above must be disregarded since the product being transported is in transit and consequently, it is subject to the provisions of the Transportation of Dangerous Goods Act. I have dealt with this issue in Canadian Pacific Express and Transport Ltd. v. Transportation and Communications Union, unreported decision No. 94-011. Furthermore, I have no information as to the type of identification and information that was available for that product at the work site as well as the type of training that was given to Mr. Milne under that Act, if any.

However, the sum of the other three items constitute, in my opinion, the safe work procedures that should have been in place to protect the safety and health at work of Mr. Milne during the transfer of hot asphalt. Their absence constituted a condition likely to cause injury to Mr. Milne before the condition could be corrected. Keystone Bulk Transport failed to comply with the Code in this respect. The direction should be varied to reflect this situation.

For all the above reasons, I HEREBY VARY the direction given, on September 28, 1994 under paragraph 145(2)(a) of the Code by safety officer Dwayne Laushway to Keystone Bulk Transport Ltd., by removing the second and third paragraphs of the direction and replacing them with the following paragraphs:

> The said safety officer considers that the transfer of hot asphalt from a rail car to a tanker trailer constitutes a danger to employees at work:
>
> Where employees are required to work in the absence of established safe work procedures governing the transfer of hot asphalt from a rail car to a tanker trailer.

Decision rendered on May 9, 1995.

Serge Cadieux
Regional Safety Officer

APPENDIX

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

DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145(2)(A)

On September 23, 1994, the undersigned safety officer conducted an investigation in the work place operated by Keystone Bulk Transport Ltd., being an employer subject to the Canada Labour Code, Part II, located at 334 Park Avenue East, Brandon, Manitoba, the said work place being sometimes known as Keystone Bulk Transport Ltd.

The said safety officer considers that the operation of tanker trailers constitute a danger to employees while at work:

Where employees are required to work on the top of Tanker Trailers at a height greater than 2.4 meters above the nearest permanent safe level without protection from falls.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(a) of the Canada Labour Code, Part II, to take measures for guarding the source of danger no later than October 14, 1994.

Issued at Winnipeg, this 28th day of September, 1994.

Decision No.: 95-005

SUMMARY OF REGIONAL SAFETY OFFICER DECISION

Applicant: Keystone Bulk Transport Ltd.

KEYWORDS

Structure; asphalt; procedures; danger; vary; fall- protection equipment.

PROVISIONS

Code: 145(2)(a)
COSH Regulations: 12.1, 12.10

SUMMARY

A truck driver of Keystone Bulk Transport Ltd. was on top of a tanker truck to monitor the transfer of hot asphalt from a rail car to the tanker truck. The process was interrupted by an explosion due to overheating of the product and resulted in the spraying of hot asphalt from the top loading hatch of the tanker. The employee jumped to the ground to protect himself from the hot asphalt and injured himself in the process. The safety officer concluded that the danger was working from the top of the trailer at a distance greater than 2.4 meters without fall-protection equipment. He gave a direction for danger under paragraph 145(2)(a) of the Code.

The regional safety officer disagreed with the safety officer to the extent that the danger was not the fact that the employee was working at that height without fall-protection equipment but that the danger was the transfer of hot asphalt without established safe work procedures. The direction was varied accordingly.