

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: Department of National Defense
Canadian Forces Base Halifax
Represented by: Ed Miller, Base safety officer

Respondent: Union of National Defense Employees (UNDE)
Local 80406
Represented by: Patrick Burgess, First Vice-President

Mis en cause: M.G. Fougere
Safety Officer
Human Resources Development Canada

Before: Serge Cadieux
Regional Safety Officer
Human Resources Development Canada

An oral hearing was held on October 18, 1995 in Dartmouth, Nova Scotia.

Background

On April 25, 1995, Mr. Wayne Ernst, a roofing inspector at the employ of the Department of National Defense (DND), fell off the roof of a building, known as Canadian Forces Ammunition Depot, at the CFB¹ Halifax. Mr. Ernst subsequently died of his injuries.

Safety officer Mark Fougere investigated the fatality the same day. The safety officer noted in his investigation report that :

"At that time I was informed that it appeared that Mr. Ernst had inadvertently fallen approximately sixteen feet (16') while conducting a roof inspection. He was discovered by CFAD (Canadian Forces Ammunition Depot) Bedford workers who assisted the injured unconscious man and immediately summoned the site fire department.

First-aid measures were commenced until the fire department arrived and took control of the scene. Victim was stabilized until ambulance arrived then moved and transported by ambulance to hospital unconscious. I was informed that CFAD Fire Department had washed down bodily fluids

¹ CFB means Canadian Forces Base

where the victim landed and that another individual had removed a clipboard, measuring tape and ladder. Mr. Ernst had not been wearing fall protection and a device for securing such was not available."

After discussing the matter with colleagues, on May 9th 1995, the safety officer formed the opinion that violations of the Code occurred at or about the time of the accident and that, in accordance with operational program directives, directions must be issued.

A first direction (APPENDIX-A) was given to DND under subsection 145(1) of the Code for having disturbed the scene of the accident. A second direction (APPENDIX-B) was also given to DND under paragraph 145(2)(a) of the Code for allowing the employee to work from an unguarded structure above 2.4 meters. Both direction are appealed by DND.

Submission for the Employer

The detailed submission of the employer is on record. In respect of the first direction, the employer argued that it acted appropriately in this case and never intended to deceive the safety officer by disturbing the scene of the accident. In fact, the employer submitted that the moving of the spray can and the pencil, the washing down of the accident scene and the removal of the ladder, of the clipboard and the measuring tape "do not in any reasonable manner constitute the disturbance of an accident scene."

In respect of the second direction, the employer explained that the basis for the direction is the fact that the safety officer equated an "unguarded structure" to the "roof" where Mr. Ernst was working. The rationale given by the safety officer is found in the definitions of these terms in the National Building Code (NBC). However, it is the employer's position that the NBC does not support the safety officer's reasoning in this case because a roof is part of a structure but not a structure in itself.

Submission for the Employee

Mr. Burgess finds no justification and no excuse for the employer who disturbed the scene of the accident. Mr. Burgess notes that :

"It would be reasonable to assume that a CLC Safety (sic) Officer would soon be on the scene, if only because of the seriousness of the accident. In this case Mr. Ernst left CFDA at 11:20am and Mr. Fougere arrived at 12:20pm. I would think that a temporary barricade could have been erected and the site secured against any and all tampering by anyone until a CLC safety (sic) officer was on the scene to lead a proper investigation into such a serious accident."

In terms of the definition of an "unguarded structure", Mr. Burgess takes the following position:

"...I would reasonably think of a roof as being the top of a structure, without a guardrail around it, would it not then be reasonable to consider this an "unguarded structure". I am

sure that at the top of the CN Tower there is a roof but I don't think it would be a safe place to be without some form of protective equipment on."

Decision

There are two issues to be decided in this case. The first issue pertains to the first direction whereas the second issue pertains to the second direction. I will deal with each issue separately.

Direction under subsection 145(1) of the Code

In this case, the issue to be decided is whether DND contravened subsection 127(1) of the Code which provides as follows:

127.(1) Subject to subsection (2), where an employee is killed or seriously injured in a work place, no person shall, unless authorized to do so by a safety officer, remove or in any way interfere with or disturb any wreckage, article or thing related to the accident except to the extent necessary to

- (a) save a life, prevent injury or relieve human suffering in the vicinity;
- (b) maintain an essential public service; or
- (c) prevent unnecessary damage to or loss of property.

The use of the expression "no person shall" above indicates that Parliament imposed a statutory mandatory requirement on any person, and particularly the employer who controls the work place, to keep the scene of an accident intact unless

- (i) that person has obtained prior authorization by a safety officer to do otherwise; or
- (ii) one of the three conditions mentioned above in (a), (b) or (c) prevailed.

Evidently, in this case, no safety officer ever authorized DND to disturb the scene of the accident. Furthermore, none of the three conditions listed above existed at the time of the accident. Mr. Miller cannot use as a defense the Standing Operating Procedure of the DND Fire Department which provides that it is necessary to wash down blood stains and other body fluids "to prevent possible adverse health effects to other individuals." That action is contrary to the intent of paragraph 127(1)(a) since erecting a temporary barricade around the scene of the accident is sufficient to protect any person in the vicinity. There is also no justification for removing the ladder from its original position and that action by itself is in direct conflict with the intent of section 127 of the Code.

I need not dwell any longer on this issue. DND has taken actions respecting the scene of the accident which caused the death of Mr. Ernst that are clearly in contravention of subsection 127(1) of the Code. For all the above reasons, I HEREBY CONFIRM the direction given under

subsection 145(1) of the Canada Labour Code, Part II on May 12, 1995 by safety officer M.G. Fougere to the Department of National Defense.

Direction under paragraph 145(2)(a) of the Code

In this case, the issue to be decided is, as specified by the direction, whether:

"Work activities on unguarded structures more than 2.4 m above the nearest permanent safe level are considered a danger to any employee who may risk a fall and injure themselves."

Therefore, to resolve this issue, each of the following questions must be answered in the affirmative, i.e.

- (i) is a roof an unguarded structure? If so,
- (ii) is the work taking place more than 2.4 m above the nearest permanent safe level? If so,
- (iii) does working under those conditions constitute a danger to any employee?

To the question "is a roof an unguarded structure?", my analysis leads me to conclude that, in this case, the roof in question is an unguarded structure. Mr. Miller's analysis of this question resulted in a conclusion opposite to mine. Nonetheless, the substance of his analysis, which is the acknowledgement by the NBC that a building is a structure, is the same. Mr. Miller stated:

"In the absence of a definition it is our contention that a roof is not an unguarded structure and indeed would be the quote "nearest permanent safe working level" unquote referred to in the direction. In support of this contention are the definitions of the term "Building" contained in the NBC (Exhibit D) which refers to a building as a "structure" and the term "Building height" which indicates that a roof is part of a "Building" and is therefore part of a "structure" not a structure in itself."

On the basis of this analysis and other considerations, Mr. Miller concluded that a roof is not an unguarded structure although the building is a structure. If I were to accept this conclusion, I would also have to accept that every constituting part of the building i.e. the walls, the floors, the foundation and every other parts of the building constitute separate and independent entities. In carrying this analysis to the limit, the structure would amount to an abstract concept, not a physical reality. I would have to ignore that the sum of its individual parts form a whole i.e. the building.

I do not accept that proposition. Working from the structure, in my opinion, means working from any of the constituting parts of the building. Therefore, in my view, working on the roof which is an integral part of the building, means working from the structure.

To the question "is the work taking place more than 2.4 m above the nearest permanent safe level?", I would also answer in the affirmative. One may argue that while an employee is working on the roof of a building, the roof is the permanent safe level. Whether this argument is valid or not is irrelevant. What is important is that the closer an employee gets to the edge of the roof, the more unsafe it becomes. At the edge, one has to admit that the only permanent safe level is the ground below. More than likely, when Mr. Ernst fell to the ground, he was sufficiently close to the edge to go over it. The edge was not protected to prevent Mr. Ernst from going over it.

Finally, to the question "does working under those conditions constitute a danger to a roof inspector?", in this case, I would also answer in the affirmative. As noted by Mr. Miller during the hearing, another basis for the safety officer's direction is subparagraph 12.10(1)(a)(i) of the Canada Occupational Safety and Health Regulations (the Regulations) which provides as follows:

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, the employer shall provide a fall-protection system

It is abundantly clear from that provision that any employee, including a roof inspector, must be protected from falling off a roof. The Regulations recognize the dangers associated with working above 2.4 meters. At this point in time, we are unaware of the reason for Mr. Ernst's tragic fall. There is a myriad of possibilities. More than likely, that is why the legislator entrenched in the legislation a provision that would ensure the protection of all employees working at that height from an unprotected or unguarded structure. There are many methods that can be used to comply with this provision, either by protecting the structure by any appropriate method or by providing the employee with an appropriate fall-protection system.

My responsibility in this case is to rule as to whether the safety officer was correct in finding that Mr. Ernst was in a situation of danger by working on the roof at a distance greater than 2.4 m from the nearest permanent safe level. I am of the opinion that Mr. Ernst was in danger at that moment. For all the above reasons, I HEREBY CONFIRM the direction issued on May 12, 1995, under paragraph 145(2)(a) of the Canada Labour Code, Part II by safety officer M.G. Fougere to the Department of National Defense.

Decision rendered on November 22, 1995

Serge Cadieux
Regional Safety Officer

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

DIRECTION TO EMPLOYER UNDER SUBSECTION 145(1)

On April 25th, 1995, the undersigned safety officer conducted an accident investigation in the work place operated by Department of National Defence, being an employer subject to the Canada Labour Code, Part II, at CFB Halifax, the said work place being sometimes known as CFAD Bedford.

The said safety officer is of the opinion that the following provision of the Canada Labour Code, Part II, is being contravened:

1. Paragraph 127.(1) of the Canada Labour Code, Part II.

The scene of an accident at Building 172 was disturbed.

Therefore, you are HEREBY DIRECTED, pursuant to subsection 145(1) of the Canada Labour Code, Part II, to terminate the contravention immediately.

Issued at Halifax this twelfth day of May 1995.

M. G. Fougere
SAFETY OFFICER # 1663

TO: Department of National Defence
CFB Halifax
FMO Halifax
Halifax, Nova Scotia
B3K 2X0

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

DIRECTION TO EMPLOYER UNDER PARAGRAPH 145(2)(a)

On April 25th, 1995, the undersigned safety officer conducted an accident investigation in the work place operated by Department of National Defence, being an employer subject to the Canada Labour Code, Part II, at CFB Halifax, the said work place being sometimes known as CFAD Bedford.

The said safety officer considers that a condition in the workplace constitutes a danger to an employee while at work:

Work activities on unguarded structures more than 2.4 m above the nearest permanent safe level are considered a danger to any employee who may risk a fall and injure themselves.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(a) of the Canada Labour Code, Part II, to protect any person from the danger immediately.

Issued at Halifax, this twelfth day of May 1995.

M. G. Fougere
SAFETY OFFICER # 1663

TO: Department of National Defence
CFB Halifax
FMO Halifax
Halifax, Nova Scotia
B3K 2X0

SUMMARY OF REGIONAL SAFETY OFFICER DECISION

Applicant: Department of National Defence (DND)

Respondent: UNDE, Local 80406

KEYWORDS

Disturb, scene of accident, fall-protection system, roof inspector, fall

PROVISIONS

Code: 127(1), 145(1), 145(2)(a)

COSH Regs: 12.10(1)(a)

SUMMARY:

Following the tragic fall of a roof inspector at the Canadian Forces Base in Halifax, a safety officer gave two directions to DND. The first direction was given for disturbing the scene of the accident and the second direction was given because the employee was working on the roof, an unguarded structure, more than 2.4 m above the nearest permanent safe level.

The RSO agreed with the safety officer in both instances and CONFIRMED both directions.