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Canada Appeals Office on Occupational Health and Safety • Bureau d'appel canadien en santé et sécurité au travail

CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY

United Parcel Service Canada Ltd.
applicant

and

Karen Malcolm
health and safety officer

Decision No. 01-022
September 10, 2001

This case was heard by Douglas Malanka, appeals officer, in Mississauga, Ontario on June 12, 2001.

Appearances

Mr. Jack Graham, Counsel

Mr. Stuart Morrish, Safety and Compliance Manager, United Parcel Service (UPS) Canada Ltd.

Mr. Craig Fairclough, Health, Safety and Compliance Supervisor, UPS

- [1] This case concerns an appeal of a direction by United Parcel Service Canada Ltd. (UPS) pursuant to subsection 146.(1) of the *Canada Labour Code*, Part II (hereto referred to as the Code or Part II).
- [2] On November 30, 2000, UPS appealed the direction that health and safety officer Karen Malcolm issued to the UPS terminal at 2900 Steeles Avenue West, Concord Ontario on November 17, 2000. The direction made pursuant to subsection 145.(1) of the Code cited UPS for contravening paragraph 125(w) of the Code and subsection 12.5(1) of *Canada Occupational Health and Safety (COHS) Regulations* entitled, Part XII, Safety Materials, Equipment, Devices and Clothing, Recording and Reporting (HOIRR) Regulations. The direction ordered UPS to cease the contravention by December 29, 2000, and ensure that UPS employees wear protective footwear where there is a risk of foot injury. See Appendix for a copy of the direction
- [3] Health and safety officer Malcolm submitted a copy of her report and testified at the hearing. I retain the following from her report and testimony.
- [4] On September 8, 2000, health and safety officer Malcolm conducted an inspection of the UPS work place located at 2900 Steeles Avenue West, Concord, Ontario. In preparation for her inspection, she reviewed past hazardous occurrence reports that UPS had previously submitted to Human Resources Development Canada (HRDC) in compliance with section 15.1 and subsections 15.8(1) and (2) of the COHS Regulations¹. Six of the reports dealt with foot injuries at the 2900 Steeles Avenue West location over a 2 year period. Based on the reports, health and safety officer

¹ Sections 15.1 and subsections 15.8(1) and (2) of the COHS Regulations read:

15.1 In this Part, "disabling injury" means an employment injury or an occupational disease that

- (a) prevents an employee from reporting for work or from effectively performing all the duties connected with the employee's regular work on any day subsequent to the day on which the injury or disease occurred, whether or not that subsequent day is a working day for that employee,
- (b) results in the loss by an employee of a body member or part thereof or in the complete loss of the usefulness of a body member or part thereof, or
- (c) results in the permanent impairment of a body function of an employee; (blessure invalidante)

15.8(1) The employer shall make a report in writing, without delay, in the form set out in Schedule I to this Part setting out the information required by that form, including the results of the investigation referred to in paragraph 15.4(1)(a), where that investigation discloses that the hazardous occurrence resulted in any one of the following circumstances:

- (a) a disabling injury to an employee [My underline];
- (b) an electric shock, toxic atmosphere or oxygen deficient atmosphere that caused an employee to lose consciousness;
- (c) the implementation of rescue, revival or other similar emergency procedures; or
- (d) a fire or an explosion.

[My underline.]

15.8(2) The employer shall submit a copy of the report referred to in subsection (1)

- (a) without delay, to the health and safety committee or the health and safety representative, if either exists; and
- (b) within 14 days after the hazardous occurrence, to a safety officer at the regional office or district office.

Malcolm accepted an Assurance of Voluntary Compliance (AVC) from UPS wherein UPS promised to comply with item 3 of the AVC. Item 3 read:

Item 3 Ensure all employees wear protective footwear where there is a hazard of injury. COHS 12.5(1) CLC 125(v).

- [5] On September 19, 2000, Mr. Morrish wrote to health and safety officer Malcolm and requested that her “direction” be reviewed by an appeals officer. Health and safety officer Malcolm responded to Mr. Fairclough on November 9, 2000, and explained the AVC was not a direction. However, she reiterated that UPS had several foot injuries and that approved protective footwear was necessary for the safety of employees. On November 17, 2000, she issued her direction to UPS.

- [6] Under questioning by Mr. Graham, health and safety officer Malcolm confirmed that she had based her finding and direction solely on the hazardous occurrence reports that UPS at 2900 Steeles Avenue West had previously submitted to HRDC. She also confirmed that she had not conducted any follow-up investigation regarding the hazardous occurrence reports to confirm that a foot injury hazard existed at the UPS work place, or whether it was reasonably practicable to eliminate or control the foot injury hazard, if one existed. Paragraph 12.1(a) of the COHS Regulations entitled, “Safety Materials, Equipment, Devices and Clothing” specifies that subsection 12.5(1) only applies where it is not reasonably practicable to eliminate or control the hazard.

- [7] Mr. Morrish, Safety and Compliance Manager, UPS, explained UPS operations at 2900 Steeles Avenue West, Concord, Ontario and characterized operations there as being highly mechanized. Mr. Morrish testified that UPS employs approximately 940 employees and that the turnover of employees is very large. He also testified that UPS provides new employees with health and safety training and that the company is vigilant regarding occupational health and safety. He reported that UPS has an active joint occupational health and safety committee and that UPS conducts site safety audits on a regular basis.

- [8] Mr. Fairclough testified that UPS investigates accidents promptly and takes necessary corrective action. With regard to the hazardous occurrence reports relied upon by health and safety officer Malcolm, he recalled that one of the injured employees had been wearing protective footwear at the time of the hazardous occurrence.

- [9] Mr. Graham argued that the direction should be rescinded because the risk of foot injury is controlled at UPS. He held that the facility is highly mechanized and that the conveyor system there is equipped with spill over protection. He reiterated that UPS employees are trained with regard to the risk of foot injury, that UPS remains vigilant regarding safe

operations, that UPS conducts work place safety audits and that the occupational health and safety committee is active and effective. Finally, he held that UPS has a low accident frequency.

[10] In support of his request that I rescind the direction, Mr. Graham also referred me to 4 previous unreported decisions of this office. They included:

- the decision of Regional Safety Officer Serge Cadieux in the case of Manitoba Pool Elevators and Judy Hickman, Safety Officer, HRDC, decision # 96-004; dated March 8, 1996;
- the decision of Regional Safety Officer Serge Cadieux in the case of Mowat Express and Communications, Energy and Paper Workers Union of Canada, decision # 94-004, dated June 1, 1994;
- the decision of Regional Safety Officer B. Southiere in the case of CANPAR Transport Ltd., and Transportation Communications, and Mariana Grinblat, Safety Officer, HRDC, decision # 95-005, dated March 15, 1996; and,
- the decision of Regional Safety Officer D. Malanka in the case of Buckham Transport Ltd. and Safety Officers Greg Garron and Karen Malcolm, HRDC, decision # 01-004, dated February 23, 2001.

[11] The role of an appeals officer following an appeal of a direction of a health and safety officer is stated in subsection 146.1(1) of the Code. Subsection 146.1(1) reads:

146.1(1) If an appeal is brought under subsection 129(7) or section 146, the appeals officer shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it and may

(a) vary, rescind or confirm the decision or direction; and...

[My underline.]

[12] The issue to be decided in this case is whether the evidence establishes that it is necessary for UPS to ensure that its employees employed at 2900 Steeles Avenue West, Concord, Ontario, wear protective footwear. In this regard, paragraph 125.(1)(w) of the Code specifies that:

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,

- (w) ensure that every person granted access to the work place by the employer is familiar with and uses in the prescribed circumstances and manner all prescribed safety materials, equipment, devices and clothing;

- [13] The prescribed safety materials, equipment, devices and clothing referred to in paragraph 125.(1)(w) of the Code are specified in Part 12, Safety Materials, Equipment, Devices and Clothing of the COHS Regulations. With regard to safety footwear, subsection 12. 1 and 12.5(1) read respectively:

12.1 Where

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

12.5(1) Where there is a hazard of a foot injury or electric shock through footwear in a work place, protective footwear that meets the standards set out in CSA Standard Z195-M1984, *Protective Footwear*, the English version of which is dated March, 1984 and the French version of which is dated December, 1984, shall be used

- [14] As noted by Appeals Officer Serge Cadieux in the case of Manitoba Pool Elevators and Judy Hickman, Safety Officer, HRDC, decision # 96-004; dated March 8, 1996 (see paragraph 5):

P. 5: It follows that, in the instant case, protective footwear is required when the following conditions are met, i.e.

- 1. there is a hazard of foot injury;
- 2. it is not reasonably practicable to eliminate or control the hazard in a work place within safe limits; and
- 3. the use of protective footwear may prevent or reduce injury from that hazard.

- [15] Health and safety officer Malcolm testified that she based her direction solely on her reading of the 6 UPS foot injury occurrence reports that UPS, 2900 Steeles Avenue West, had previously submitted to HRDC over the past two years. At the hearing, she tabled 7 other UPS hazard occurrence reports related to foot injury, but these did not pertain to the workplace at 2900 Steeles Avenue West and are not relevant here.
- [16] With regard to the 6 UPS foot injury hazardous occurrence reports from 2900 Steeles Avenue West, Officer Malcolm acknowledged that she had not investigated into the occurrences prior to issuing her direction. Consequently she had not confirmed the cause of the foot injuries related to the hazardous occurrences, or whether or not the injured employees had been wearing foot protective equipment at the time of the occurrences.

- [17] As indicated above in paragraph 14, protective footwear is required where there is a hazard of foot injury, where it was not reasonably practicable to eliminate or control the hazard of foot injury within safe limits, and where the use of protective footwear may prevent or reduce injury from the hazard. Since officer Malcolm did not address herself to these criterion, she did not establish that protective footwear is required at the UPS work place located at 2900 Steeles Avenue West, Concord, Ontario. Consequently, I must rescind the direction that she issued to UPS on November 17, 2000 pursuant to subsection 145.(1) of the Code.

Douglas Malanka
Appeals Officer

APPENDIXIN THE MATTER OF THE *CANADA LABOUR CODE*
PART II - OCCUPATIONAL HEALTH AND SAFETYDIRECTION TO EMPLOYER UNDER SUBSECTION 145(1)

On September 7th, 2000, the undersigned safety officer conducted an inspection in the work place operated by United Parcel Service Canada Ltd., being an employer subject to the *Canada Labour Code*, Part II, at 2900 Steeles Avenue West, Concord, Ontario.

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

The Canada Labour Code, Part II, Paragraph 125(w)

The Canada Occupational Health and Safety Regulations, subsection 12.5(1)

Employees are not wearing protective footwear where there is a risk of foot injury.

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 December 29, 2000.

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 to reoccur.

Issued at North York, Ontario, this 17th day of November 2000.

Karen Malcolm
Health and safety officer

To: UNITED PARCEL SERVICE CANADA LTD.
2900 STEELS AVENUE WEST
OPERATING CENTRE
CONCORD, ONTARIO
L4K 1C2

SUMMARY OF APPEALS OFFICER DECISION

Decision No.: 01-022

Applicant: United Parcel Service Canada Ltd.

KEY WORDS: Protective footwear, foot injury, occurrence reports,

PROVISIONS:

Code: 125.1(w), 145(1)(a), 146.1(1)
Regulations 12.1, 12.5(1)

SUMMARY: On September 8, 2000, a health and safety officer inspected the United Parcel Service Canada Ltd. terminal at 2900 Steeles Avenue West, Concord, Ontario. In preparation, the officer reviewed past hazardous occurrence reports that UPS had previously submitted to Human Resources Development Canada in compliance with section 15.8 of the *Canada Occupational Health and Safety Regulations* entitled "*Hazardous Occurrences Investigation, Recording and Reporting Regulations*." Six of the reports dealt with foot injuries at the 2900 Steeles Avenue West location over a 2 year period. Based on the reports, the health and safety officer directed UPS to ensure that employees are wearing protective footwear where there is a risk of foot injury.

Following his review, the Appeals Officer rescinded the direction due to lack of evidence.