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

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Canada Labour Code
Part II
Occupational Health and Safety

Canadian Freightways Limited
applicants

Decision No.: 04-018
April 19, 2004

[1] On November 22, 2000, health and safety officer Smith issued a direction[1] to Canadian Freightways Limited (CF) pursuant to subsection 145.(1) of the *Code*. The direction cited CF for having contravened paragraphs 125.(1)(*l*) and (*w*) of the *Code* and paragraph 12.13(*a*) of the *Canada Occupational Safety and Health (COHSRs) Regulations* entitled, "Part XII, *Safety Materials, Equipment, Devices and Clothing Regulations*." The direction alleged that CF failed to provide or to require its employees regularly exposed to contact with motorized materials handling equipment in the warehouse and freight dock with high visibility vest or other similar clothing. CF appealed the direction pursuant to section 146.(1) of the *Code* and I, Appeals officer Douglas Malanka, heard the appeal in Vancouver, British Columbia on September 18, 2001.

[2] Following my review of the appeal, I issued a written decision[2] on November 27, 2001, and confirmed the direction issued by health and safety officer Smith. CF appealed the decision to the Federal Court and the Honourable Madam Justice Dawson[3] subsequently quashed the decision on the basis that I had relied on an irrelevant provision in the *Code* to require the applicant, CF, to assume the burden of proving that the Regulations were not breached. CF subsequently agreed to have me rehear the case and submitted a memorandum of argument on February 15, 2004, wherein the Company re-argued that the direction issued by health and safety officer Smith should be rescinded. CF was unopposed by the Teamster as CF agreed that the decision rendered here in respect of the CF workplace at 22nd Avenue, Prince George, B.C. would not apply to other work places operated by the Company. A further agreement was that the evidence as disclosed in the transcript of the original appeal hearing would be the evidence.

[3] As indicated in my initial decision issued on November 27, 2001, the issue to be decided in this case is whether or not paragraph 12.13(*a*) of the *Canada Occupational Health and Safety Regulations* (COHSRs) applies in respect of CF employees employed in the warehouse at Prince George such that the warehouse and dock employees must wear high visibility vests or other similar clothing while carrying out their work.

[1] Copy of direction is attached.
[2] Canadian Freightways Limited and Teamsters, Local 31 (Health and safety officer Diane Smith), Decision No. 01-025, dated November 27, 2001
[3] The Honourable Madam Justice Dawson in the case of Canadian Freightways Limited and Attorney General Of Canada and Western Canada Council of Teamsters, Federal Court Of Canada Trial Division, Date 20030402, Docket T-2279-01.

[4] For deciding this it is necessary to look at paragraph 12.13(*a*) in conjunction with paragraphs 12.1(*a*) and (*b*), 12.2(*a*) and (*b*) and of the COHSRs, Part XII, entitled, "Safety Materials, Equipment, Devices and Clothing. The three provisions essentially establish criteria for determining the applicability of 12.13(*a*) in respect of the matter at hand.

[5] According to paragraph 12.13(*a*) of the COHSRs, an employee is required to wear a high-visibility vest or other similar clothing that is readily visible under all conditions of use where an employee is regularly exposed to contact with moving vehicles during his or her work. As pointed out by CF, a key expression in the paragraph is "*regularly exposed*." Paragraph 12.13(*a*) reads:

> *12.13(a) Where an employee is regularly exposed to contact with moving vehicles during his work, he shall*
>
> *(a) wear a high-visibility vest or other similar clothing, or …*
>
> *that is readily visible under all conditions of use.* [My underline.]

[6] However, in connection with deciding on the applicability of paragraph 12.13(*a*), it is necessary to consider paragraphs 12.1(*a*) and (*b*) and 12.2(*a*) and (*b*) of the COHSRs which set out further criteria. In accordance with paragraph 12.1(*a*) and (*b*), paragraph 12.13(*a*) applies only if it is not reasonably practicable to eliminate or control a health and safety hazard in a work place within safe limits, and only where the use of protection equipment may prevent or reduce injury from the hazard. While the terms, "*reasonably practicable*", "*within safe limits*" and "*prevent or reduce injury*" in paragraphs 12.1(*a*) and (*b*) are arguably open for interpretation, paragraph 12(*a*) and (*b*) establish the overall principle that the employer must first make every effort to eliminate or to control a hazard before turning to personal protection equipment such as a high-visibility vest, and the personal protection equipment must be effective for preventing or reducing injury. Paragraph 12.1(*a*) and (*b*) of the COHSRs read:

> *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, 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 equipment prescribed by this Part.* [My underline.]

[7] Paragraph 12.2(*a*) and (*b*) further specify that, for paragraph 12.13(*a*) to apply, the protection equipment such as a high-visibility vest must be capable of protecting the person against the hazard and must not itself create a hazard. Paragraph 12.2(*a*) and (*b*) of the COHSRs read:

> *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.* [My underline.]

[8] Summarizing the above, paragraph 12.13(*a*) would apply in respect of CF employees employed in the warehouse at Prince George only:

- if an employee was regularly exposed to contact with fork lift trucks operated at that location;
- it was not reasonably practicable to eliminate or control against contact with moving vehicle;
- the high-visible vests or similar protection equipment were capable of preventing or reducing potential injury; and
- if the high-visibility vest, or similar equipment, would not, itself, create a hazard.

[9] The Memorandum of Argument submitted by Mr. Bruce Grist, Counsel, on behalf of CF on February 16, 2004, essentially addressed the above criteria and held that paragraph 12.13(*a*) of the COHSRs did not apply in respect of employees employed in the warehouse at Prince George and that the direction should be rescinded. I retain the following facts reiterated in the Memorandum of Argument.

[10] At the *"Cross-Dock"* operation at CF's Prince George location, truck and trailer units loaded with freight were backed into the loading bays on the sides of the *"Cross-Dock"*. The freight was then unloaded and either temporarily stored in the area or immediately transferred across the dock measuring approximately 175 feet by 70 feet wide (having 15 loading doors down each side and 2 across each end) and loaded onto other trucks. Peak operating times occurred during the morning from 6:00 a.m. until 10:00 a.m. and again during the afternoon from 5:00 p.m. until 9:00 p.m. During peak operating times, there were between 8 and 12 employees working on the *"Cross-Dock"*. Of these employees, 4 operated the fork lift trucks and therefore were not at risk of coming into body contact with a moving vehicle. The remaining 6 to 8 employees were occupied in other trucks and so they were not regularly exposed to contact with the moving vehicles. Moreover, at no time during CF operations at the Prince George work place did the 10 to 12 employees congregate in one location or remain in the vicinity of a fork lift truck. Fork lift trucks were not normally used for more than five minutes further reducing the risk of contact between an employee and a fork lift truck.

[11] During the remainder of the day, there were ordinarily no more than 3 or 4 people working on the *"Cross-Dock"* and pedestrians were generally not permitted on the *"Cross-Dock"* other than dock workers. Therefore, CF employees were not regularly exposed to contact with moving vehicles at the Prince George work place during off-peak hours operations.

[12] With respect to paragraph 12.1(*a*) of the COHSRs, Mr. Grist reiterated the following facts to demonstrate the CF had controlled the risk of contact between its employees at the Prince George work place with its moving fork lift trucks such that paragraph 12.13(*a*) did not apply.

[13] First, CF's warehouse and *"Cross-Dock"* were designed in such a manner that aisles and designated areas for storage of freight were clearly marked. These aisles and storage areas restricted the locations in which the fork lift trucks could operate, and therefore ensured that pedestrian were clearly aware of the locations in which the fork lift trucks might be present.

[14] Second, the fork lift trucks were equipped with warning devices to alert people that the fork lift trucks were in operation. The warning devices included a horn, a strobe light that was automatically activated when the fork lift trucks were in operation, and head lights that were automatically activated when the ignition was turned on.

[15] Finally, visibility in the warehouse was abundant as the *"Cross-Dock"* was well-lit.

[16] With regard to paragraph 12.2(*a*) of the COHSRs, whereby the high-visibility vests or similar protection equipment must be capable of preventing or reducing potential injury, Mr. Grist reiterated the following facts in the case.

[17] Dennis Pettit, CF safety and loss prevention advisor who had worked for CF since 1962 and in managerial safety position since 1988 opined that high-visibility vests would not improve the visibility of employees working in the warehouse. His opinion was endorsed by the CF's health and safety committee in Vancouver who held that there would be no added value of wearing of high-visibility vests or other similar clothing. Mr. Grist also noted that CF had won the CTA Sun Royal Alliance Insurance National Fleet Safety Award for Canada in the 3 million to 10 million mile category for the past 2 years. In addition, CF also received industry rate reductions from Workers Compensations Boards because of its excellent safety record.

[18] Also, it was noted that health and safety officer Smith had not lead any evidence to show that the use of high-visibility vests or other similar clothing would prevent or reduce the risk of injury.

[19] With regard to paragraph 12.2(*b*) of the COHSRs, Mr. Grist referred me to the statutory declaration from Mr. Curtis Cooke, member of the Teamsters Local Union No. 31 and co-chairperson of Joint Workplace Health and Safety Committee at Prince George. Mr. Cooke attested that high visibility vests were not liked by employees and were regarded as unnecessary and potentially created a risk to employees. For example, the vests could snag on freight, the inside of the truck or trailer units, sheets of plywood and other dunnage used every day to move freight.

[20] In his summary, Mr. Grist held that the format of the review proceeding is that of a "de novo hearing" and therefore the appeals officer is to make a decision on the basis of the evidence that is lead at the hearing and cannot be based on speculation. He maintained that:

> *" The direction issued by health and safety officer Smith was based solely on her speculation opinion that the wearing of high-visibility vests would eliminate or control a safety and health hazard. There was no evidence that the safety and health hazard existed and there was no evidence that the wearing of high visibility vests in well-lit situations would prevent or reduce injury from any hazard. There was no evidence of an employee being "regularly exposed to contact with moving vehicles during his work". There was substantial evidence of the lack of any hazard and that high visibility vests would not prevent or reduce injury in the circumstances that existed.*

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[21] Whereas:

- the Honourable Madam Justice Dawson ruled in her decision that

> *[26] …the hearing into an appeal is in the nature of a de novo hearing where the appeals officer is to view all of the circumstances and then make a decision.*
>
> *[27] In the present case, the appeals officer relied upon an irrelevant provision to require the applicant to assume the burden of proving that the Regulations were not breached. In so doing, the officer erred…*;

- I agree with Mr. Grist's comment that the format of the review proceeding is that of a "*de novo hearing*" and that the appeals officer is to make a decision on the basis of the evidence that is lead at the hearing and cannot be based on speculation; [My underline.],

- the evidence led by health and safety officer Smith did not refute the evidence led by CF relative to the criteria specified in paragraphs 12.1(*a*) and (*b*), 12.2(*a*) and (*b*) and 12.13(*a*) of the COHSRs, and

- I agree with Mr. Grist's assessment that health and safety officer Smith's direction was essentially based on speculation,

I find that there was no basis for the direction that the health and safety officer issued to Canadian Freightways Limited at 3851 – 22ND Avenue, Prince George, B.C. on November 22, 2000 and hereby rescind the said direction without prejudice in respect of other CF workplaces.

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Douglas Malanka
Appeals Officer

Appendix

In the Matter of the *Canada Labour Code*
Part II – Occupational Health and Safety

Direction to the Employer Under Subsection 145(1)

On May 29th, 2000, the undersigned health and safety officer conducted an inspection in the work place operated by CANADIAN FREIGHTWAYS LIMITED, being an employer subject to the *Canada Labour Code*, Part II, at 3851 - 22ND AVENUE, PRINCE GEORGE, B.C.

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

1. 125(1)(*l*) and (*w*) and *Canada Occupational Safety & Health Regulation* 12.13(*a*)

Employees who are regularly exposed to contact with motorised materials handling equipment in the warehouse and freight dock are not provided with or required to wear a high visibility vest or other similar clothing.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(*a*) 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 Surrey, this 22nd day of November 2000.

Diana Smith
Health and Safety Officer

To: CANADIAN FREIGHTWAYS
Safety Department
4041A - 6th Street S.E.
Calgary, Alberta T2H 2J1

Summary of Appeals Officer's Decision

Decision No.: 04-018

Appellant: Canadian Freightways Limited

Respondent: None

Key Words: fork lift truck; accidental contact; high visibility vests; high visibility clothing; illumination levels; strobe light, horn; vehicle; materials handling equipment; mobile equipment; health and safety committee; accident statistics

Provisions:

***Code*:** 122.1, 122.2, 125.(1)(*l*) and (*w*), 125.(1)(*k*),145(1), 146.1, 146.1(1).

Regulations: 12.1, 12.2, 12.13(*a*),

Summary:

On November 22, 2000, a health and safety officer issued a direction to Canadian Freightways Limited, (CF) pursuant to subsection 145.(1) of the *Code*. The direction cited CF for having failed to provide or to require its employees regularly exposed to contact with motorised materials handling equipment in the warehouse and freight dock with high visibility vest or other similar clothing. CF appealed the direction pursuant to section 146.(1) of the *Code* and Appeals officer Douglas Malanka heard the appeal in Vancouver, British Columbia on September 18, 2001.

Appeals officer Malanka issued a written decision on November 27, 2001, and confirmed the direction issued by health and safety officer Smith. CF appealed the decision to the Federal Court of Canada and the Honourable Madam Justice Dawson subsequently quashed the decision on the basis that Appeals Officer Malanka had relied on an irrelevant provision in the *Code* to require the applicant, CF, to assume the burden of proving that the Regulations were not breached.

Following his review on appeal, the appeals officer rescinded the direction because the health and safety officer had failed to lead sufficient evidence to support the direction.