

**Case No.:** 2008-34  
**Decision No.:** OHSTC-09-024

**CANADA LABOUR CODE  
PART II  
OCCUPATIONAL HEALTH AND SAFETY**

Seair Seaplanes Ltd.  
*Appellant*

and

Parv Bhangal  
*Respondent*

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June 22, 2009

This case was decided by Michael Wiwchar, Appeals Officer.

**For the appellant**

Sean Taylor, Counsel

**For the respondent**

Parv Bhangal, Work Place Health and Safety Representative

## **APPEAL**

- [1] This is an appeal made under subsection 146(1) of the Canada Labour Code, Part II, (the *Code*), regarding one item stated in a direction issued by Health and Safety Officer (HSO) Lance Labby, on November 5, 2008, under subsection 145(1) of the *Code* and pursuant to the Canada Occupational Safety and Health Regulations (the *Regulations*). A hearing was held in Richmond, British Columbia, on April 30, 2009.

## **BACKGROUND**

- [2] The circumstances regarding this matter involve a floating dock operated by Seair Seaplanes Ltd., the employer, which is located on the bank of the Fraser River on the south side of the Vancouver airport. The dock is owned by the Vancouver International Airport Authority and the employer has operated flights from this location since 1980.
- [3] More specifically, the dock is located at the base of a railed ramp that bridges the dock to the shore. The dock is constructed of wood, in good repair, approximately 21 feet in width, approximately 275 feet in length and sits low on the water. Tires are installed on the sides of the outer perimeter and act as bumpers that aircraft rest against when docked. A slip resistant mat measuring 3 feet in width, installed in February 2009, runs down the length of one side of the dock's outer perimeter surface. The outer perimeter of the surface is also equipped with a bull rail that is approximately 1 foot high and is designed to moor the aircraft to the dock.
- [4] HSO Labby testified that the direction and the hazard of drowning issue emanated from an inspection conducted on June 19, 2008 where he observed pilots and dock personnel/dockhands working on the dock without personal flotation devices, that is, without life jackets or buoyancy devices. He wrote down contraventions on an "Assurance of Voluntary Compliance" form and it was signed by an employer representative thereby declaring that the employer would take remedial action to comply.
- [5] A letter dated July 11, 2008, was received by the HSO from Mr. Terry Hiebert, Operations Manager and employer representative, stating that dockhands would use life jackets provided by the employer when on the dock.
- [6] The HSO returned to the work place on October 14, 2008, to conduct a follow up to his previous inspection. He noticed that only dockhands were wearing life jackets yet, he did not observe pilots performing work on the dock at that time, only pilots in transit to aircraft. His report stated that he was advised that pilots perform work at infrequent times on the

floating dock. All the same, no evidence regarding who or precisely when this work by pilots was performed or if life jackets are worn was adduced during the hearing. HSO Labby returned to the work place on November 5, 2008 to deliver the direction now under appeal that addressed six items.

- [7] The employer is only appealing item no. 3 of the said direction that reads as follows:

No.: 3

Paragraph 125.(1)(l) of the Canada Labour Code Part II, Subsection 12.11(1) – Canada Occupational Health & Safety Regulation (sic).

Where, in a work place, there is a hazard of drowning, the employer shall provide every person (every employee including pilots) granted access to the work place with:

- a life jacket or buoyancy device that meets the standards set out in the Canadian General Standards Board Standard CAN2-65.7-M80, Life Jackets, Inherently Buoyant Type, dated April 1980, or 65-GP-11, Standard for: Personal Flotation Devices, dated October, 1972.

- [8] In a letter dated November 17, 2008, Mr. Hiebert responded to the HSO regarding item no. 3 of the direction and stated that all employees that are required to work on the dock are provided with an approved personal flotation device. He also stated that pilots are merely transiting the dock to get to an aircraft.

- [9] The HSO did not describe the precise hazardous condition or activity in his direction. However, in his testimony, he identified the hazard of drowning as being to persons such as employees namely dockhands and pilots. In his opinion, walking on the dock amounts to being exposed to a hazard of drowning and is consistent with, in his words, "the language of the *Code*". Since dockhands do in fact wear life jackets at all times while on the dock, his direction was aimed at pilots and it applied more specifically while pilots are in transit to the aircraft. He also testified that the direction excluded passengers.

- [10] At the time of his inspections, the HSO requested information from the employer regarding how the hazard and risk of drowning was identified and assessed, still no such information was provided to him. His investigation into determining the potential and probability of this hazard being harmful to employees ended without further enquiry into the issue. In fact, item no. 2 of the said direction stated that the employer did not have a hazard prevention program in place to address all of the hazards associated with employee dock operations. A component of this hazard prevention program is to identify hazards and assess the risk as stated in the quoted *Regulations* for this item.

- [11] When questioned by the appellant's counsel about the hazard of drowning to pilots and dockhands, the HSO stated that the risk increases as employees come closer to the water which is near to the edge of the dock. When probed further about the probability of being exposed to the hazard when an employee is positioned in the middle of the dock, he stated that the overall probability of falling into the water is, in his words, "very, very low" and decreases.
- [12] Nonetheless, the HSO maintained that in his experience, an unplanned event can occur, such as tripping. He elaborated that, even in the middle of the dock, it is possible that a person can trip, fall and in some manner approach the edge of the dock and clear the bull rail and fall into the water. He did admit that the chance of this happening is, in his words, "very, very slim".
- [13] The HSO stated during his testimony that if a hazard assessment and risk analysis is conducted by the employer with the participation of employees and the conclusion is that life jackets are not required for pilots while in transit to the aircraft, then he would, under these circumstances, accept this determination.

### **ISSUE**

- [14] The issue raised in this appeal is whether HSO Labby erred in finding a contravention of paragraph 125(1)(l) of the *Code* and paragraph 12.11(1)(a) of the *Regulations*.

### **SUBMISSIONS FROM THE PARTIES**

#### **Appellant**

- [15] Mr. Taylor, counsel for the appellant, divided his submission into 3 parts as follows:

- 1) The dock is not a work place,
- 2) Any alleged hazard of drowning is within safe limits,
- 3) Hazard posed by the use of life jackets by pilots.

- [16] At the hearing, the appellant submitted 7 exhibits and called 5 witnesses.

#### **1) The dock is not a work place**

- [17] The appellant submits that the *Code* definition of work place means any place where an employee is engaged in work for the employer and that for scheduled flights, the pilots are merely using the dock as a means of

transiting to their work place which is the aircraft. All the pilots' tasks such as loading cargo, assisting passengers, flying the aircraft in this work place, occur on the aircraft and not on the dock.

- [18] Should pilots perform work on the dock such as re-fuelling or washing aircraft they wear life jackets. However, the appellant submits that when they are not performing any such work on the dock, the dock ceases to be a work place for the pilots under the *Code*.
- [19] Mr. Terry Hiebert testified that, apart from his managerial functions, he is also a pilot and from this perspective he considers himself working when he is in the aircraft but not while in transit to it which takes less than a one minute walk. He stated that pilots at infrequent times wash aircraft and perform some dock duties. However, when they do these tasks, they wear life jackets and he acknowledges that those tasks are considered as work. Also, he stated that pilots assist dock personnel in the loading of baggage but that is done from the aircraft and they do not perform loading tasks from the dock.
- [20] Mr. Douglas Dzuss has been a pilot since 1988 and has flown for the employer since 1993. He testified that his work is in the aircraft and that he uses the floating dock only to access the plane. He rarely performs any type of work on the dock itself but on occasion he has washed the aircraft and when he does he agrees that a life jacket is to be worn. The practice for pilots is to escort passengers down the ramp onto the dock, then walk down the middle, and then assist them onto the plane. There is no need to deviate from this practice in his view and therefore there is no risk of drowning.
- [21] Mr. Shawn Evans is the chief pilot with Tofino Airlines and he testified that his airline utilizes the same dock as Sear Seaplanes Ltd. He stated that the practice to approach the aircraft from land is to walk down the ramp onto the floating dock and to walk down the center. He stated that there is never a reason to approach the edges of the dock and therefore there is no risk of drowning.
- [22] Mr. Parv Bhangal is an employee at Sear Seaplanes Ltd. and occupies the position of dock supervisor as well as being the work place health and safety representative for employees. His representative role began in October 2008, following HSO Labby's visit and since that time he has been active in the development and implementation of many aspects of the work place health and safety program. Mr. Bhangal provided evidence regarding the job description and duties of dock personnel on the dock, emergency procedures, safety equipment, training and, general docking procedures performed by employees. He stated all dock personnel including himself wear life jackets at all times while on the dock in the performance of their duties.

- [23] Mr. Bhangal stated that pilots rarely perform dockhand duties such as fuelling or washing the aircraft and that when doing these tasks they do wear life jackets and it is his position that this should always be the case when doing this type of work.

## **2) Any alleged hazard of drowning is within safe limits**

- [24] Mr. Taylor submits that the use of protection equipment, such as in this case life jackets, for pilots, is required solely where it is not reasonably practicable to eliminate or control a health or safety hazard in a work place within safe limits as stipulated in the *Regulations*. Therefore, where the hazard can be controlled within safe limits, there is no requirement to use protective equipment, and hence is recourse of last resort.
- [25] Mr. Bhangal testified that pilots are always accompanied by a dockhand on all departures and arrivals of aircraft which is known as the company's "buddy system". He does not believe that any type of flotation device is required for pilots because all they do is walk to the plane and that there is no hazard of drowning while doing this. He has never been approached by pilots about the hazard of drowning or about them being provided with life jackets. He has never received a complaint regarding the hazard of drowning from a passenger nor have they ever asked to be provided with protection against this hazard. He stated that pilots walk to the aircraft the same as passengers and the risk to each is equal.
- [26] Mr. Bhangal testified that he has been tasked with the responsibility to install a new slip resistant mat on the dock surface the same as the existing mat installed that runs the length along the perimeter of the dock. The new mat, to be used as a walkway, will measure 5 feet in width and will soon be securely installed in the center of the dock running east to west, a measure that will reduce the risk of drowning further. Also, it is foreseen that another 3 feet in width of mat will be installed along the opposite perimeter of the dock in the same manner as the existing mat. Passengers and pilots will be instructed to use this designated walkway when walking on the dock to the aircraft.
- [27] Mr. James Molloy, Vice President Aviation Corporate Safety, for Harbour Air Ltd., testified that his company operates a similar floating dock approximately 100 meters away from the dock in this matter. Mr. Molloy stated that his company has formally conducted a risk analysis in accordance with the *Regulations* in relation to dock personnel and pilot uniforms and safety apparel relating to the hazards regarding their duties on the dock. He considers that their pilots, 33 in total, are not exposed to a hazard of drowning when they are transiting from the ramp to the aircraft via the dock. He states that the risk is minimal and that the benefit of a pilot wearing a life jacket in this circumstance would be

outweighed by the potential harm taking into account other hazards that may arise from wearing the device.

- [28] Evidence adduced through Mr. Hiebert indicated the employer has operated between 10 and 15 daily flights at the dock facility since 1980 and in those 29 years, nobody has ever fallen off the dock. Every witness stated the same fact in regards to their personal recollection. He also stated that pilots are escorted to the aircraft by dock personnel and that dock personnel always wear a life jacket and they are trained in emergency procedures.
- [29] The witnesses have testified that this is a safe dock, structurally sound and well maintained and that materials are never stored on the dock for aviation safety reasons in relation to foreign objects and debris as well as the tripping hazard that may be created to persons on the dock.
- [30] Through the evidence provided by Mr. Banghal, the employer maintains that emergency procedures are in place in the event that anybody falls into the water and furthermore, the risk is also mitigated by the presence of emergency rescue equipment on the dock such as safety rings, rope and ladders.

### **3) Hazard posed by the use of life jackets by pilots**

- [31] The appellant submits that the use of life jackets by pilots while on the dock will result in more hazards than the action purports to eliminate. This would be against the requirements in the *Regulations* in that all protection equipment shall not in itself create a hazard.
- [32] Evidence was adduced from the pilots that the use of life jackets will create many new hazards such as: Snagging on internal and external controls, restricting the pilot's movements in the plane, storage difficulties, potential foreign object damage if the life jacket is left on the dock, issues regarding over-compliance and its attendant risks and issues regarding distractions of both the pilots and the dockhands during take off procedures.

### **Respondent**

- [33] Mr. Bhangal is the respondent in this matter and he did not call any witnesses nor did he submit any exhibits.
- [34] Mr. Bhangal cross examined some witnesses and participated in the course of the hearing. However, since he testified as a witness for the appellant, I will consider his evidence in relation to the issue and I will not repeat his position separately.

## **ANALYSIS**

[35] As previously stated in paragraph 14, I must decide whether HSO Labby erred in finding a contravention of paragraph 125. (1) (I) of the *Code* and paragraph 12.11 (1) (a) of the *Regulation*.

[36] Paragraph 125. (1) (I) of the *Code* reads as follows:

**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,

(I) provide every person granted access to the work place by the employer with prescribed safety material, equipment, devices and clothing;

[37] The prescribed safety devices stated in paragraph 125(1)(I) are stipulated in paragraph 12.11(1)(a) as follows:

**12.11 (1)** Where, in a work place, there is a hazard of drowning, the employer shall provide every person granted access to the work place with

(a) a life jacket or buoyancy device that meets the standards set out in the Canadian General Standards Board Standard

i) CAN2-65.7-M80, Life Jackets, Inherently Buoyant Type, dated April 1980, or

ii) 65-GP-11, Standard for: Personal Flotation Devices, dated October, 1972.

[38] Therefore, in order to decide on this matter, I will need to address the following:

a) Is the dock a work place?

b) Is there a hazard of drowning to pilots while in transit to the aircraft?

### **a) Is the dock a work place?**

[39] A work place is defined under section 122. (1) of the *Code* as follows:

**"work place"** means any place where an employee is engaged in work for the employee's employer

[40] The dock is used by the employer to conduct his business and is integral to its operation because: the aircraft must be moored to it for arrivals and departures, employees perform essential tasks vital to the operation on it and finally, it is the only access to and egress from the aircraft, the link, to the employer's office being the base of this operation which is located on land.



[41] It may be argued that this work place is not owned by the employer but I nevertheless find that the activities performed on the dock are under the employer's control. The appellant has been operating the dock on behalf of the owners as well as utilizing the dock for its own activities since 1980.

[42] Pilots in transit to the aircraft from the shore, pilots working on the dock and dockhands working on the dock are all engaged in activities under the employer's control at the work place.

[43] I disagree with the appellant's submission that the dock ceases to be a work place for pilots if they are not performing physical work. Therefore, I find the dock to be a work place.

**b) Is there a hazard of drowning to pilots while in transit to the aircraft?**

[44] The HSO was clear in his testimony that every person granted access to the work place by the employer, in relation to his direction, referred to "every employee including pilots". He is neither concerned about dockhands since they have been wearing life jackets on the dock at all times since July 2008 nor passengers. Consequently, he stated that the alleged contravention only applies to pilots while in transit to and from the aircraft on the dock because during this time they are exposed to a hazard of drowning and therefore must be provided with a life jacket.

[45] Neither the *Code* nor the *Regulations* specifically define the terms "hazards" or "risk". I will therefore quote the definitions of these terms from a recognized industry health and safety publication<sup>1</sup>.

**Hazards:** The potential for harm. Hazards include all aspects of technology and activity that produce risk. Hazards include the characteristics of things (equipment, dusts) and the actions or inactions of people.

**Risk:** An estimate of the probability of a hazard-related incident or exposure occurring and the severity of harm or damage that could result.

[46] First, I find based on the evidence of this case and within the context of the above definitions, that the potential for harm of the hazard of drowning is insignificant. Secondly, the probability or likelihood of this risk being realized is negligible and the severity of harm that could result is equally negligible.

[47] Although the employer has not submitted any documented evidence to me of the hazard identification and assessment process and method used or the written results of their analysis, I am convinced through the

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<sup>1</sup> National Safety Council, Accident Prevention Manual for Business and Industry, Engineering & Technology, 13<sup>th</sup> Edition, pages 7 & 8.

testimony of the witnesses that the potential of this hazard causing harm is very low and the probability and severity of the risk is equally low. In addition, I give weight to Mr. Maloy's evidence in that he has conducted a formal risk analysis of the condition of his dock in accordance with the *Regulations* which is similar and located adjacent to the dock operated by Seair Seaplanes Ltd.. Mr. Maloy has concluded that the risk is minimal.

[48] I am not persuaded by HSO Labby's testimony that the unplanned event that he described can occur and thereby expose a pilot who is walking down the center of the dock to a hazard of drowning.

[49] On the other hand, I agree with the appellant that based on the evidence presented, a pilot's risk of drowning due to being exposed to this hazard by merely walking on the dock in the center of the dock to the aircraft is negligible at best.

[50] In any event, I am convinced that the hazard of drowning for pilots, in addition to being negligible, is controlled within safe limits thus not requiring protection equipment which is in accordance with section 12.1 of the *Regulations* that states the following:

**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 equipment prescribed by this Part.

[51] There is agreement between the HSO, witnesses and the work place health and safety representative that the hazard of drowning exists when employees are working near the edge of the dock. I concur with this assessment. Life jackets are provided to employees in this circumstance because they are in close proximity to the water and it is not reasonably practicable to eliminate or control the hazard of drowning.

[52] Then again, when pilots are in transit to their aircraft, I am not swayed that the hazard is beyond safe limits. I find that the employer has controlled the hazard in this circumstance by implementing a number of measures.

[53] The following is a list of the measures the employer has taken to control the hazard of drowning in order to bring it within safe limits:

- The dock is structurally sound and is in good repair,
- No materials are stored on the dock and it is kept clean, particularly

in the center walkway,

- Pilots and passengers are instructed to walk down the centre of the dock and they are accompanied by dockhands,
- Emergency rescue equipment is available on the dock and dockhands are trained in its use,
- Emergency procedures are in place in the event of a fall into the water,
- A slip resistant mat is installed along one perimeter and is to be installed along the opposite perimeter, and more notably, a mat will be installed down the center of the dock, thus providing additional safety and this will further indicate the path of travel,
- Pilots not in transit to the aircraft who perform activities near the edge of the dock wear life jackets.

[54] Finally, the HSO concluded, I am certain with good intention and in the interest of health and safety, to determine that a contravention existed in the circumstance based on, in his words, “the language of the *Code*” before receiving information regarding the hazard from the employer or in the alternative by seeking the facts on his own initiative. Item no. 2 of his direction stated that the employer did not have a hazard prevention program in place and therefore an assessment of work place hazards was never formally conducted. As a result, he was premature in requesting protection equipment for a hazard that neither the employer nor the HSO actually identified or assessed to be a hazard of drowning in the circumstance. It would have been preferable to wait for the outcome of the results of a hazard and risk assessment rather than determine that a hazard of drowning existed based solely on the language of the *Code and Regulations*.

### **DECISION**

[55] For these reasons I rescind item no. 3 of the direction issued on November 5, 2008 by HSO Labby to Sear Seaplanes Ltd.

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Michael Wiwchar  
Appeals Officer