

APPEAL DECISION

BORDER PAVING LTD.

VS

**WORKPLACE, HEALTH AND
SAFETY**

The Appeal Panel (the Panel) convened first on October 5, 2005 to hear an appeal pursuant to *Section 16(1)(a)* of the *Occupational Health and Safety (OH&S) Act (Act)*

Section 16 of the *Act* reads:

Appeal

16(1) *A person*

(a) to whom an order is issued under section 9, 10, 11, 12, 14, 25 or 33, or

*(b) whose license has been cancelled or suspended,
may appeal the order, cancellation or suspension to the Council.*

(2) *An appeal under subsection (1) shall be commenced by serving a notice of the appeal on a Director of Inspection within 30 days from the date that the order being appealed from was served on the person making the appeal*

(3) *After considering the matter being appealed, the Council may by order*
(a) confirm, revoke or vary the order being appealed,
(b) confirm the cancellation or suspension,
(c) reinstate the cancelled license, certificate or permit,
(d) substitute a suspension for a cancellation, or
(e) remove or vary a suspension.

(4) *When an appeal is made to the Council under subsection (1), the Council shall hear the appeal and render a decision as soon as practicable.*

(5) *An appeal lies to the Court of Queen's Bench from an order of the Council on a question of law or a question of jurisdiction and on hearing the matter the Court may make any order, including the awarding of costs, that the Court considers proper.*

(6) *An appeal under subsection (5) shall be made by way of originating notice within 30 days from the date that the order of the Council is served on the person appealing the order of the Council.*

(7) *When an appeal is commenced under subsection (1), the commencement of that appeal does not operate as a stay of the order, cancellation or suspension being appealed from except insofar as the chair or a vice-chair of the Council so directs.*

(8) *When an appeal is commenced under subsection (5), the commencement of that appeal does not operate as a stay of the order of the Council being appealed from except insofar as a judge of the Court of Queen's Bench so directs.*

RSA 1980 cO-2 s11;RSA 1980 c15(Supp) s11;1983 c39 ss9,19

The appellant requested an appeal of the orders issued by Workplace, Health and Safety (WH&S) under CCR Reference Number: DBOE-6D5L6T, in particular Orders #: 1, 2, 3, 4, 5, and 9.

The specific reasons for appeal and remedies sought are:

1. Order #1 – Stop Work Order

- Specifications and Certifications – Following Specifications OHS Code 2003-12
*12 An employer must ensure that
(d) equipment and supplies are erected, installed, assembled, started, operated, handled, stored, serviced, tested, adjusted, calibrated, maintained, repaired and dismantled in accordance with the manufacturer's specifications or the specifications certified by a professional engineer.*

Ray Go Rustler 304-A, unit #052043 roller was involved in a rollover incident June 3, 2005 at approximately 5 p.m. sustaining mechanical and structural damage. Stop Use Tag #2517 placed on the steering wheel. The roller was transported by Border Paving Ltd. Flatbed transport truck to the Finning shop yard at 10430-178 St., Edmonton on June 4, 2005 for secured storage.

Border Paving Ltd to ensure the 304A Ray Go is secured until such time as it is agreed to by WH&S as to the mechanical inspection schedule and by whom.

The Ray Go 304A, #052043 roller cannot be used until the proper repairs and mechanical inspection certificate is completed by a journeyman heavy duty mechanic registered in Alberta or by the manufacturers' authorized service mechanic. Mechanical inspection certificate to be forwarded to WH&S for review and removal of the Stop Use Tag.

Border Paving advised WH&S officers on June 4, 2005 that all the Ray Go rollers are voluntarily removed from service until such time as the cause of the incident and the necessary preventative measures are implemented.

- **Appeal/Remedy:** Border requests through this appeal that the matter of voluntary removal from service be revoked from the order that applies to all the Ray Go rollers.

2. Order #2 – Stop Work Order

- General Safety Training AR62/2003 – 15
15(1) An employer must ensure that a worker is trained in the safe operation of the equipment the worker is required to operate.

(2) An employer must ensure that the training referred to in subsection (1) includes the following:

- (a) the selection of the appropriate equipment;*
- (b) the limitations of the equipment;*
- (c) an operator's pre-use inspection;*
- (d) the use of the equipment;*
- (e) the operator skills required by the manufacturer's specifications for the equipment;*
- (f) the basic mechanical and maintenance requirements of the equipment;*
- (g) the hazards specific to the operation of the equipment at the work site.*

WH&S officer requested the written training manual and training records for the injured worker for the operation of the Ray Go 304A roller. WH&S advised there was no written training manual or training records for operating the equipment. The worker was trained by the crew supervisor, show and tell training.

Border Paving Ltd to develop a written training manual for the Ray Go 304A roller and forward to WH&S to review.

Ray Go 304A roller operators to be trained following the manual and written records of training maintained on the operator's files.

Training records to be forwarded to WH&S for review.

- **Appeal/Remedy:** Border requests through appeal that the requirement to develop a written training manual be revoked.

3. Order #3 – Stop Work Order

- Hazard Assessment, Elimination and Control – Hazard Assessment OHS Code 2003 – 7

7(1) An employer must assess a work site and identify existing or potential hazards before work begins at the work site.

(2) An employer must prepare a report of the results of a hazard assessment and the methods used to control or eliminate the hazards identified.

(3) An employer must ensure that the date on which the hazard assessment is prepared or revised is recorded on it.

(4) An employer must ensure the hazard assessment is repeated

- (a) at reasonably practicable intervals to prevent the development of unsafe and unhealthy working conditions,*
- (b) when a new work process is introduced,*
- (c) when a work process or operation changes, or*
- (d) before the construction of a new work site.*

WH&S officer requested the written hazard assessment for the operation of the Ray Go 304A roller on Mountain Road. WH&S officers were advised there was no formal hazard assessment but were given a copy of the tailgate meeting held before the start of paving the approaches. The meeting minutes info was brief and incomplete.

Border Paving Ltd to develop a written hazard assessment for the operation of the Ray Go 304A rollers, and forward copy for review by WH&S.

- **Appeal/Remedy:** Border requests through appeal that the requirement to develop the written hazard assessment beyond what they have presently in place be revoked.

4. Order #4 – Order

- Powered Mobile Equipment – Inspection and Maintenance OHS Code 2003 – 260

260(5) An employer must ensure that a record of the inspections and maintenance is carried out as required by subsections (1) and (2) is kept at the work site and readily available to a worker who operates the powered mobile equipment.

WH&S officer requested to see the inspection log book and the maintenance records and the mechanical inspection certificate for the Ray Go 304A roller. There were no records kept in the roller.

Border Paving Ltd to develop a policy, procedure or system to ensure proper log books and maintenance records including mechanical inspection certificates are maintained with each individual Ray Go 304A roller. Forward to WH&S for review.

- **Appeal/Remedy:** Border requests through appeal that the order requiring said records/logs/inspections to be maintained with each roller be revoked.

5. Order #5 – Order

- General - Availability of Specifications AR 62/2003 – 7
7(1) If the Act, a regulation or an adopted code requires work to be done in accordance with a manufacturer's specifications or specifications certified by a professional engineer, an employer must ensure that
 - (a) the workers responsible for the work are familiar with the specifications, and*
 - (b) the specifications are readily available to the workers responsible for the work.**(2) If the Act, a regulation or an adopted code refers to a manufacturer's or employer's specifications or specifications certified by a professional engineer, an employer must ensure that, during that period of time that the matters referred to in the specifications is readily available to workers affected by them.*

WH&S officers requested the manufacturer's manual for the Ray GO 304A roller and were advised that the manual should be at the Stony Plain maintenance shop.

WH&S officers requested the manufacturer's operators manual for the Ray Go 304A roller and were advised it was not available with the equipment. An inspection of the roller did not find the manual.

Border Paving Ltd to ensure the operator's manual is readily available with the roller at all times. Forward confirmation to WH&S of policy or procedures to be followed and manuals available for each roller.

- **Appeal/Remedy:** Border requests through appeal that order requiring the manual to be readily available with each roller, as well as the policy/procedures be revoked.

6. Order #9 – Stop Work Order

- Powered Mobile Equipment – Rollover Protective Structures OHS Code 2003 – 270
270(3) If powered mobile equipment is not referred to in subsection (1) and a hazard assessment identifies rollover as a potential hazard, the employer must

(a) equip the powered mobile equipment with a rollover protective structure that is either supplied by the manufacturer or certified by a professional engineer as being suited to that equipment, or

WH&S officers observed the replacement Ray Go 304 shipped from Stony Plain had no rollover protective structure but was equipped to have ROP's installed.

Border Paving Ltd to install rollover protective structures in all Ray Go 304 rollers and forward documentation to WH&S for review and lifting of the Stop Work Order on the Ray Go 304 rollers.

- **Appeal/Remedy:** Border requests through appeal that the order requiring rollover protective structures for Ray Go 304 rollers be revoked.

The appellant contends and supports that:

- Order #1;
 - Cause was never determined
 - All rollers are impacted with said order
 - Order appears to be company focused instead of Industry focused
 - Exhibit A (3 pages in total)

- Order #2;
 - Written training materials and records are ineffective and only demonstrate ability to complete paperwork.
 - That “show and tell” training is being performed.
 - All operators are competent.
 - Exhibit B

- Order #3;
 - Hazard assessments are in place.
 - Are completed at every new work site.
 - Are documented.
 - Details covered under contractual obligations that address “industry” hazards are not considered to be “hazards” and are not required to be documented again.

- Order #4;
 - Inspections and maintenance is being performed.
 - Records are available at the Stony Plain shop.
 - Information is available to any worker via phone/fax or email through their supervisors.
 - Copies can be faxed to the local hotel for pick up.
 - It is not feasible to store with equipment, nor is it to maintain it as current.

- Order #5;
 - Manual is available at the Stony Plain shop.
 - Information can be requested from the shop via the local supervisor.
 - It is not feasible to store the manual with said equipment.
 - Hands on training covers the material contained within.

- Exhibit C

- Order #9;
 - It is not identified as being required in the OHS Code.
 - Was previously identified as being required in previous legislation, but not so in present legislation.
 - Not required as the potential for incident is negated with normal intended operation.
 - Not utilized Industry wide.
 - Exhibit D

Procedural Matters:

During the appeal hearing, the Appellant and Respondent indicated and agreed that the remaining orders listed within the CCR Reference # DOBE-6D5L6T are satisfied or not a present issue before the Appeal Panel. Additionally CCR Reference #DOBE-6DL9V9 has been mutually agreed upon by the parties not to be an issue before the Appeal Panel.

Specifically:

1. Order #1

- The time required and authority to seize the said equipment by the officer in question.

2. Order #6

- Powered Mobile Equipment – Operator Responsibilities
OHS Code 2003 – 256
256(d) use the seat belts and other safety equipment in the powered mobile equipment,

WH&S officers advised roller operators did not use seat belts while operating the rollers.

Border Paving Ltd to advise WH&S in writing of policy, procedure or system to be followed to ensure all roller operators wear seat belts.

3. Order #7

- Investigation of Accident – Investigation of Accident

RSA 2000 cO-2 – 19

19(2) Every person present at an accident when it occurred or who has information relating to the accident shall, on the request of an officer, provide to the officer any information respecting the accident that the officer requests.

Border Paving Ltd to provide WH&S a copy of the written contract for the paving work on Mountain Road, the injured workers personnel file and training records, Ray Go 304A, #052043 roller (maintenance records, mechanical inspection certificate, operators manual, manufacturers specifications) and safe work practices for operating the Ray Go 304 rollers.

4. Order #8

- Serious Injuries and Accidents – Serious Injuries and Accidents

RSA 2000 cO-2 – 18

18(3) If an injury or accident referred to in subsection (2) occurs at a work site or if any other serious injury or any other accident that has the potential of causing serious injury to a person occurs at a work site, the prime contractor or, if there is no prime contractor, the contractor or employer responsible for that work shall

- (a) carry out an investigation into the circumstances surrounding the serious injury or accident,*
- (b) prepare a report outlining the circumstances of the serious injury or accident and the corrective action, if any, undertaken to prevent a recurrence of the serious injury or accident, and*
- (c) ensure a copy of the report is readily available for inspection by an officer.*

(4) The prime contractor, contractor or employer who prepared the report referred to in subsection (3) shall retain the report for 2 years after the serious injury or accident.

Border Paving Ltd to forward a copy of the written incident investigation report to WH&S for review.

In addition to the above, the parties further agreed to remove the contents of Tab #6, which was titled Border Paving Ltd Accident Investigation Report. This material was removed from the Appeal Panel's binders.

Submissions Considered by the Appeal Panel

From the Appellant

OHSC Appeal Questionnaire – completed by Appellant

- Appellant’s own testimony
- Exhibit’s A-D
- OHSC Appeal Questionnaire – completed by the Appellant
- Cross examination of the Respondent by the Appellant

From the Respondent, WH&S

- Package of information relating to the appeal obtained from both the Appellant and the Respondent including:
 - OHSC Appeal Questionnaire – completed by Appellant
 - Client Contact Report issued to the Employer
 - Submission binder produced by WH&S
 - Cross-examination by WH&S of the Appellant.

Evidence:

The following is a list of evidence and information presented by the parties at the appeal, considered by the Panel, some of the testimony was felt to be hearsay and was given the weight of hearsay evidence.

- Tab 15.
- Tab 7.
- Tab 22.
- Tab 11.
- Tab 21.
- Tab 23.
- Tab 24.
- Tab 40 and Exhibit B

Rationale and Decision:

The Appeal Panel reviewed all material presented, considered cross-examinations and written submissions provided.

Decision of the Appeal Panel;

CCR Reference #DBOE-6D5L6T

1. Order #1 – Varied:

Variance as directed;

The Ray Go 304A, #052043 roller cannot be used until the proper repairs and mechanical inspection certificate is completed by a journeyman heavy-duty mechanic registered in Alberta or by the manufacturer’s authorized service mechanic. Mechanical inspection certificate to be forwarded to WH&S for review and removal of the Stop Use Tag.

Rationale:

- Stop use was only implied for the roller involved in the incident.
- No other rollers received Stop Use Tags.
- Causation had not been determined.
- Section 11(2) OH&S Act

2. Order #2 – Varied:**Variance as directed;**

Develop a written training manual for the Ray Go 304A roller, a copy of which is to be forwarded to WH&S. All Ray Go 304A Roller operators for Border Paving Ltd to be trained using a combination of the review of the written training manual and the existing hands on training. Records of training to be kept on file.

Rationale:

- No documentation of training.
- No formal guide to follow for hands on training.
- No competency check documented.
- No clear evidence that training is being performed.
- *Section 9 (1)(b) OH&S Act*
- The panel agrees with the appellant's position on hands on training, and the appellant's stance that written material alone only provides that material was completed. It is the Panel's opinion that the combination of the two will provide a guide and consistency to the trainer and trainee.
- The original order went beyond the intent by requesting the manual be reviewed as well by WH&S, further it has the training limited to following only the manual in question.
- The review of training records goes beyond the intent of the original order; WH&S can at a later time follow up with the employer to determine if training is being performed.

3. Order #3 – Revoked:

Rational on direction;

The appellant was directed specifically to develop a hazard assessment for the Ray Go 304A rollers and to forward a copy for review. The order did not specify an assessment for the rollers on any particular work site or location, nor did it identify the roller involved in this particular incident.

Rationale:

- WH&S was provided a written report as required under Sec 7(2) of the OHS Code 2003.
- Tab 15 meets the expressed intent and content of *Sec 7* of the OHS Code 2003.
- Although generic in its design and no supporting documentation that workers were provided a copy, the order as wrote did not address these points.

The appellant has complied with the order as written and as such this order is revoked by the Panel.

4. Order #4 – Varied:

Variance as directed;

Border Paving Ltd to develop a form of record for each individual roller to ensure inspections and or maintenance is carried out as required by the manufacturer's specifications. These records are to be kept at the worksite and made readily available to a worker who operates the powered mobile equipment.

Rationale:

- The order as varied supports the requirements of *Sec 260(5)* of the OHS Code 2003.
- Tab #22 – Operator's manual does not require inspections to be written.
- The OHS Code 2003 does not stipulate the requirement for log books, or that records of maintenance or inspection be maintained with each individual roller.

5. Order #5 – Revoked:

Rational on direction;

The order directed that the operator’s manual be readily available with the roller at all times, further confirmation of policy or procedure to ensure this was to be followed for each roller.

Rationale:

- Operator’s manual is available at the shop.
- Manual was made available for inspection in Alberta by an Officer.
- Appellant testified that workers can access any of this information through their Supervisor anytime via; phone or faxed copy to the local hotel.
- Sec 7 OHS Regulations 2003 states that this material must be readily available to the workers responsible for the work.

The order was revoked based upon the lack of definition of “readily available”, the appellant has provided testimony of their system to address the access to the appropriate information. The appellant further provided that equipment is not equipped with storage appropriate for the storage of this material. The regulation indirectly supports the appellant’s system.

6. Order #9 – Confirmed:

Rational on direction;

The order directed the installation of rollover protection structures on all Ray Go 304 rollers and to forward documentation for review.

Rationale:

- Sec 270(3) If powered mobile equipment is not referred to in subsection (1) and a hazard assessment identifies rollover as a potential hazard, the employer must
 - (a) equip the powered mobile equipment with a rollover protective structure that is either supplied by the manufacturer or certified by a professional engineer as being built suited to that equipment, or
- The hazard assessment submitted by the appellant under Tab 15 indicates rollover potential when working near shoulders.
- Tab 7 which was the worksite hazard assessment indicated shoulders as a hazard as well.

The order is confirmed by the Panel as the Appellant has indicated the hazard of rollovers in both its generic and worksite specific hazard assessments, further rollers are not referred to in subsection (1) of Sec 270 OHS Code 2003.

OCCUPATIONAL HEALTH AND SAFETY COUNCIL

Tim Bennett
Chairperson
Employer Representative

Wendy Clark
Public Representative

Ernest Tessier
Employee Representative

Appellant:

Border Paving Ltd.

Respondent:

Workplace, Health and Safety
Alberta Human Resources and Employment