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Occupational Health and Safety Council
Appeal

Hearing: January 31, 2013

Decision: March 13, 2013

Bridge City Window Cleaning

Appellant

and

Occupational Health and Safety

Respondent

DECISION

Occupational Health and Safety Council Appeal Panel Members

Peter Bowal (Chair), Nina Novak and Rob Munro

Appearances

For the appellant: Darcy Berent and Gerry Berent

Jurisdiction

The Appellant, Bridge City Window Cleaning, operates a window cleaning business in Lethbridge. On July 24, 2012, the Respondent issued four Orders to the Appellant. Compliance was achieved on all these orders within one week. The Appellant, properly within the 30-day time set out in the *Occupational Health and Safety Act (OHS Act)*, section 16(2), has filed an appeal to the Occupational Health and Safety Council, citing errors against all four of these Orders.

The Appeal Panel (the Panel) convened on January 31, 2013 in Lethbridge, Alberta to hear the appeal pursuant to section 16(1) of the *OHS Act*.

Facts and Analysis

In making our findings of fact, we have referred to the OHS officer's notes, summary, photographs, Client Contact Reports, and the employee statements and work order / hazard assessment forms produced by the Appellant at the hearing.

In the Notice of Appeal and at the oral hearing, the Appellant frequently referred to "harassing and bullying" behaviour of the OHS officer when dealing with the workers. We have no reason to doubt that the workers and the Appellant may have felt that the OHS officer treated them that way. While intimidation by an officer may, in egregious cases, go to motives and credibility of that officer, we are not in a position to judge that issue and note that the OHS officer's conduct – or perceptions of that conduct – does not influence us in this appeal. We limit our considerations to what the Appellant said at the hearing and the written record.

The Orders arose from the OHS officer personally observing exterior window cleaning from a 32 foot extension ladder. This came to the officer's attention as he observed the cleaner through the window on the third floor from inside the building on the afternoon of July 24, 2012. The officer's notes, and summary that was later prepared, indicate that the worker was standing on the second from the top rung of the ladder, without fall protection, working a squeegee with his right hand and resting his left hand against the window. The photograph taken at the time is not conclusive but shows the cleaner's left hand on the top of the left side rail. In the next photograph, taken a few minutes later,

the cleaner has rags in his left hand and it is not clear whether that hand is in contact with the ladder.

There were two other window cleaners on the site, one on a shorter ladder and one on the ground. All three on-site workers were called to a ground level meeting by the OHS officer who then wrote the four Orders on the basis of his ensuing investigation. We will consider each of the Orders in turn.

Order #1: Stop Work

The OHS officer has discretion under section 9(1) of the *OHS Act* to stop work when he is “of the opinion that work is being carried out in a manner that is unhealthy or unsafe to the workers engaged in the work.” This Order was written under the *OHS Code*, section 137, which reads:

Fall protection

137(1) An employer must ensure that a worker working from a portable ladder from which the worker may fall 3 metres or more uses a personal fall arrest system.

137(2) Subsection (1) does not apply while the worker is moving up or down the portable ladder.

137(3) Despite subsection (1), if it is not reasonably practical to use a personal fall arrest system, a worker may work from a portable ladder without fall protection if

- (a) the work is a light duty task of short duration at each location,
- (b) the worker’s centre of balance is at the centre of the ladder at all times even with an arm extended beyond the side rails of the ladder, and
- (c) the worker maintains three-point contact whenever the worker extends an arm beyond a side rail.

The Appellant does not challenge the officer’s conclusions that: it was the employer of these window cleaners, that one was working from a portable ladder on the second rung from the top, the worker could have fallen 3 metres or more, was not using a personal fall arrest system, and was not moving up or down the ladder when the alleged violation was observed.

The Appellant pointed out that it is not possible to have a fall arrest system on a portable ladder. The particular issue in the appeal of this Order is the exception to the need for fall protection in section 137(3)(c), whether the worker maintained three-point contact whenever the worker extends an arm beyond a side rail.

The term in section 137(3)(c), “three-point contact”, is not defined in the legislation. The officer’s position is that the three points must be on the ladder. The Appellant’s position is that the building is the third point of contact. In fact, the Appellant added,

the worker technically had *five* points of contact, as he was bracing each of his knees against the inside of the ladder.

The cleaner's "interview" two days later, recorded in writing does not refer to points of contact at all. His handwritten, undated statement – presumably drafted later in contemplation of this appeal – is much more detailed. At the hearing, the Appellant said this handwritten statement was done "the next day." In any event, the cleaner wrote in his own pen: "I braced my feet on the sides of the ladder, likewise my knees, while standing on the 2nd top run, stabilizing lateral with window edge and top of window ledge."

With respect, we disagree. The photograph taken from inside the building, while far from unobstructed, show the cleaner on the second rung with no window edge or ledge within reach of his left hand. When he stepped down to the third rung, the window ledge was within reach but was photographed without having any grasp on it.

The purpose of the "three-point contact" rule when an arm is outside of the side rail, as the cleaning hand was in this case, is to maximize stability by optimizing the centre of gravity of the worker on the ladder. Merely touching the window with a few fingers until it is cleaned – and we are not clear from the photographs that was the case here – adds virtually nothing to stability. There is nothing on to which the cleaner can grab. The Appellant conceded that the window itself offered insufficient stability. None of the photographs produced show the cleaner holding onto the ledge as he said he did from this height.

The Appellant also says the third point of contact is the top of the ladder. In the three most helpful photographs of the moment, we cannot really confirm that the cleaner is even grasping the top of the ladder. He has rags in his hand and appears to be holding them loosely in his left hand. The Appellant also cannot have it both ways. The cleaner said he was holding on to the window ledge with his left hand. If he was not, the Appellant cannot then assert he was holding on to the top of the left side rail of the ladder at the material time, when the cleaner never even stated that and the photographs are dubious on that point. It may be that with his left hand, the cleaner did make contact, most likely from the third rung, with the window ledge and the side rail of the ladder, but the officer observed periods where this was not the case and the photographs appear to support mostly that observation.

Under our power to "confirm, revoke or vary the Order being appealed" [section 16(3)(a) of the *OHS Act*], we confirm this Order.

Order #2: Non-Compliant Hazard Assessment Report

Part 2 of the *Code* is sub-headed “Hazard Assessment, Elimination and Control”. This second Order was in relation to a contravention of section 7 which reads as follows:

Hazard assessment

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

7(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.

7(3) An employer must ensure that the date on which the hazard assessment is prepared or revised is recorded on it.

7(4) An employer must ensure that 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 significant additions or alterations to a work site.

The Order records the officer’s concerns about the Hazard Assessment Form prepared for the window cleaning on this building on this day:

The hazard assessment report on site shows a date with two numbers and does not indicate the year, does not identify hazards associated with the use of ladders (fall protection and ladder slope angle), does not identify any control measures consistent with the requirements of the OHS Code Section 9 for identified hazards, and identifies the hazards of wind gusts as a control measure for the hazard of working at heights identified in the report.

The Employer confirms that workers fill out the hazard assessment form.

The Appellant submits that the form contains both the Work Order (top part) and the Hazard Assessment (bottom part). The date on the bottom part is clear (“July 24/12”). We agree with this and find no problem with the date requirement on the Hazard Assessment portion.

As for the rest of the Hazard Assessment form, at the appeal hearing, the Appellant agreed that this form was not completed correctly, but “the whole organization should not be held accountable for that.” Even if an employer carefully trains employees in proper completion of Hazard Assessments, as the Appellant said it did here, the law places the legal responsibility on the employer. We agree with the OHS officer in his

observations above regarding this Hazard Assessment form. Essentially no hazards or controls for working at height were indicated.

The issue arose as to whether a worker can complete these Hazard Assessments, because section 7 of the Code mandates the “employer” to do them. The workers signed this Hazard Assessment. The OHS officer saw that as non-compliance with section 7. At the hearing, the Appellant referred to the definition of “employer” in the *OHS Act*, which includes “a person designated by an employer as the employer’s representative” [section 1(k)]. However, we note that this section is prefaced, “In this Act . . .” We agree that employers may designate representatives for the purposes of the *Act*, but not for obligations under the *Code*. Employer is not defined in the same way in the *Code*.

Obviously, in corporations and other employers, “the employer” is often a delegated human being, but section 7 of the *Code* contemplates that the person who completes the Hazard Assessment should be a senior decision maker – at least be a high level supervisor of the work function – and not the workers carrying it out. This is a logical interpretation of section 7 of the *Code* because section 8 goes on to require employers to “involve affected workers in the hazard assessment and in the control or elimination of the hazards identified” and to “ensure that workers affected by the hazards identified in a hazard assessment report are informed of the hazards and of the methods used to control or eliminate the hazards.”

We confirm Order #2.

Order #3: Employer Mandate to Train Workers on Fall Protection

The third Order was under section 141 of the *Code*, dealing with the requirement upon employers to ensure their workers are trained in enumerated aspects of fall protection:

Part 9 Fall Protection

Instruction of workers

141(1) An employer must ensure that a worker is trained in the safe use of the fall protection system before allowing the worker to work in an area where a fall protection system must be used.

141(2) The training referred to in subsection (1) must include the following:

- (a) a review of current Alberta legislation pertaining to fall protection;
- (b) an understanding of what a fall protection plan is;
- (c) fall protection methods a worker is required to use at a work site;

- (d) identification of fall hazards;
- (e) assessment and selection of specific anchors that the worker may use;
- (f) instructions for the correct use of connecting hardware;
- (g) information about the effect of a fall on the human body, including
 - (i) maximum arresting force,
 - (ii) the purpose of shock and energy absorbers,
 - (iii) swing fall,
 - (iv) free fall;
- (h) pre-use inspection;
- (i) emergency response procedures to be used at the work site, if necessary; and
- (j) practice in
 - (i) inspecting, fitting, adjusting and connecting fall protection systems and components, and
 - (ii) emergency response procedures.

141(3) In addition to the training described in subsection (2), an employer must ensure that a worker is made aware of the fall hazards particular to that work site and the steps being taken to eliminate or control those hazards.

The officer's findings on this Order were that one worker was discovered in violation of the fall protection standard and "all workers on site advised that they had not received instruction fully compliant with the requirements of this section." His summary, however, on the Client Contact Report was slightly different: "Both all workers (sic) on site confirmed not having completed all the training required in this section."

The officer went on to state the section 141 requirement in these terms:

The Employer must provide a document on company letterhead and signed by the Employer confirming that workers on this site working where fall protection is required have received training that meets all the requirements of OHS Legislation.

The officer was incorrect in stating the section 141 requirement in this way. The main point is that the focus is on what the employer did, or failed to do, not what law the employees can recite when asked.

Although the OHS officer records considerable detail in his notes on site, he made no note about his asking the three workers about their training in fall protection. The workers in their written statements suggest this was an unpleasant interaction. They

said the officer implied they did not know the safety legislation because they were in contravention of it. According to them, he asked them to tell them what they knew. Mr. Bennett wrote, “I said that I was uncertain, but that we had gone over safety in orientation . . . He shrugged off my answer, and continued to ask if I knew other legislation. Having not memorized the various numbers he was referring, I simply said I didn’t know. I didn’t want to say yes or no because I couldn’t recite legislation that he was referring by number, and if I said yes or no and have him come back and say that I said the opposite. Didn’t want to unintentionally lie to him.” [sic]

The other cleaners on site gave similar statements. They say they were threatened with fines if they lied to the officer. They said, and we have no reason to doubt, that they were intimidated by the accusatorial and “demeaning tone” (words of Mr. Spears), and their response was to “stop talking.” They said that the OHS officer did not *ask* them, but instead *told* them. There is nothing in the workers’ later statements about them having admitted to not having fall protection training – to the contrary. The Appellant says the OHS officer may have misconstrued the workers’ silence for admissions.

Section 141 should not be invoked as some form of pop quiz by an unknown regulator who suddenly appears on the worksite and stops work. Most well trained workers will not know the details, phraseology and section numbers of the applicable legislation, especially when they are suddenly interrupted and put on the defensive. That does not mean that section 141 has been violated. Rather, this section is focused on determining whether the employer has trained the workers “in the safe use of the fall protection system.”

As to the OHS officer’s observation that “all workers on the site advised that had not received instruction fully compliant with the requirements of this section,” we do not find that this is clear on the facts. Even if it was, it is an unfairly high and unreasonable standard to impose on workers. It is not consistent to allow workers to inculcate their employers by their halting response in this way, but then to prohibit them from completing Hazard Assessments. As the requirement is focused on what the employer must do, OHS officers should ascertain *from the employer* whether this has been done.

Given what was mostly likely a misguided inquiry, it is not clear what precisely occurred on the worksite that afternoon in the anxiety of this investigation. It is impossible to determine what the workers understood, what they said and what they meant – and also what the officer heard or implied. It is clear to us that the workers’ answers were more equivocal than what the officer concluded. At the appeal hearing, the Appellant said it was not asked for evidence of its training of the workers on the fall protection system. Most importantly, the Appellant stated repeatedly that it trained these workers on section 141 matters. The fall protection plan, dated December 2011, was produced within a few days to comply with this Order.

We revoke Order #3.

Order #4: Employer Mandate to Train Workers on Fall Protection

The final Order was issued under section 136 of the *Code*:

Securing and positioning

136 A worker must ensure that

- (a) a portable ladder is secured against movement and placed on a base that is stable,
- (b) the base of an inclined portable ladder is no further from the base of the wall or structure than one-quarter of the distance between the base of the ladder and the place where the ladder contacts the wall . . .

The OHS officer wrote that “the base of the ladder was on loose landscaping wood chips,” not on a stable base. The only evidence of this contravention is three photographs of the ladder propped up against the building wall. However, none of the photographs clearly show the actual surface upon which this ladder is standing. No photograph captures, without obstruction, the base of the ladder contacting the ground.

While this is a subjective observation of the OHS officer on the site, we are reluctant to overturn his discretion in the matter. The Appellant said the ladder was on a very stable base. While we cannot see the actual base contact point, the area around the feet of the ladder appears hard packed and stable to us on the photographs. The wood chips were not freshly deposited and they appear thinly dispersed. The surface appears to be firm and settled. Can one say that the nearby grass surface is more stable?

Given the lack of specific evidence to the contrary, we reverse the officer on this point. We cannot be too prescriptive about surfaces to plant ladders, whether they are on grass, concrete, packed soil or a few wood chips. This is not a case where the ladder is clearly on a non-stable base.

Further, the OHS officer wrote that a cleaner was working on “a 32 foot extension ladder that was positioned with the base of the ladder closer to the wall than one quarter the height of the rise of the ladder,” in contravention of section 136(b). No measurements were presumably taken by the officer on the site, as none were entered into evidence.

The officer notes in the Comments section at the end of the Client Contact Report that the “ladder had a steeper than 4 to 1 angle.” On the basis of this comment, we believe the officer has mis-interpreted this requirement. Section 136(b) prohibits a ladder to be

splayed more than a quarter of its contact height. A ladder positioned “steeper” than this ratio is *not* a contravention. Finally, our visual and casual geometric measurements from the photographs of the base distance do not support a finding of a contravention of this requirement.

We revoke Order #4.

Conclusion

For the reasons given above, with respect to Bridge City Window Cleaning, OHS File OHS-027388-66ADD, Orders #1 and #2 are confirmed and Orders #3 and #4 are revoked.

Occupational Health and Safety Council Appeal Panel

Peter Bowal, Chair

Nina Novak

Rob Munro