

Occupational Health and Safety Council

Appeal from Orders of an OHS Officer

Aecon Transportation West Ltd.

Appellant

and

Her Majesty the Queen in Right of Alberta (OHS)

Respondent

ORDER

Panel: Peter Bowal (Chair), Rob Munro and Andrew Smith

Appeal Decision: December 8, 2017

I. Nature of this Appeal

[1] On August 21, 2017, an OHS officer representing the Respondent (“OHS”), pursuant to his regulatory authority, issued three Orders against the Appellant, Aecon Transportation West Ltd. (“Aecon”).

[2] On September 20, 2017, Aecon appealed all three Orders to the Occupational Health and Safety Council (“Council”) on the grounds that it was compliant with the *Occupational Health and Safety Code* (“Code”). Aecon has asked Council to revoke the Orders. The appeal was conducted by way of written submissions without an oral hearing at the request of the Appellant.

II. Summary of Decision

[3] For the reasons which follow, Council confirms all three Orders under section 16 (3) (a) of the *Occupational Health and Safety Act* (“the Act”).¹

III. Documents Reviewed

[4] Council reviewed and considered the following written submissions received from the Appellant and Respondent:

- (a) The Notice of Appeal submitted by Aecon on September 20, 2017; and
- (b) OHS reply submission dated October 19, 2017.

IV. OHS Officer’s Investigation and Facts

[5] On the morning of August 21, 2017, an OHS officer responded to a Contact Centre call and conducted an investigation in connection with a workplace incident approximately 60 kilometres northeast of Brooks, Alberta. An employee of the Appellant had been asked to remove a rock lodged in the equipment. The designated guard had been removed and the employee accessed the equipment which was not properly guarded. The equipment was not locked out / tagged out (de-energized) at the time and it did not have locks or tags in place. The employee sustained a serious injury and was transported to hospital.

[6] The officer wrote three Orders, which are detailed in the 7-page Contact Report dated August 21, 2017:

¹ RSA 2000, c O-2

- Order #1: Section 10(1)(a) and (c) of the *Act* to Stop Work on the Powerscreen equipment;
- Order #2: Section 9(2) of the *Act* and section 310 of the *Code* regarding provision of safeguards where material is fed or removed from machinery or equipment; and
- Order #3: Section 9(2) and section 310 of the *Code* requiring a plan of remedial action to be given to OHS.

[7] The officer indicates he found it necessary to stop the work and issue these remedial Orders because he found ongoing danger to workers and deficiencies in health and safety compliance.

V. Case on Appeal to this Council

[8] Aecon's list of grounds of appeal of the three Orders is contained in Schedule A to its Notice of Appeal. These are essentially general denials, without evidence:

"Schedule A"

1. List the specific reasons or grounds for this appeal.

- a. There was no contravention of the Occupational Health and Safety Code, 2009 justifying the Orders issued by the OHS Officer on August 21, 2017.
- b. The Supervisor instructed the worker to remove a lodged item and shut off the equipment prior to doing so. The worker did not shut off the equipment or lock and tag out the equipment prior to removing the lodged item, contrary to supervisor's instructions, worker training and Aecon's written Safe Work Procedure on 'Control of Energy Sources - Lock Out/Tag Out' (the "LOTO Procedure").
- c. The LOTO Procedure required workers to de-energize and isolate energy sources using lockout/tagout prior to conducting work, to ensure the health and safety of workers where the unexpected start up equipment or release of stored energy may cause injury.
- d. The equipment was equipped with a safeguard at the time of the incident.
- e. The injured worker and his supervisor were trained in the Appellant's LOTO procedures, prior to the incident.

VI. Standard of Review

[9] The standard of review is reasonableness. In *MacDougall v Occupational Health and Safety Council*, 2015 ABQB 591, the reviewing judge wrote at paragraph 14:

. . . the Council was not engaged in anything more than I am engaged in. They were assessing the reasonableness of the officer's decision and the fairness of the process by which she arrived at that decision.

[10] A decision of the Court of Queen's Bench, *Procrane Inc (Sterling Crane) v. Thompson and Occupational Health and Safety Council*, 2016 ABQB 646, thoroughly canvassed this issue and confirmed the same standard of review at that level with regard to this legislation.

VII. The Law

[11] An OHS officer is granted specific power in the *Act*. Section 8 (Inspection) of the *Act* states:

8 (1) For the purposes of this Act an officer may

- (a) at any reasonable hour enter into or on any work site and inspect that work site;
- (b) subject to subsection (2) require the production of any records, books, plans or other documents that relate to the health or safety of workers and may examine them, make copies of them or remove them temporarily for the purposes of making copies;
- (c) inspect, seize or take samples of any material, product, tool, appliance or equipment being produced, used or found in or on the work site that is being inspected;
- (d) make tests and take photographic or recordings in respect of any work site;
- (e) interview and obtain statements from persons at the work site.

[12] An OHS officer can write an order as outlined in section 9 (Order to remedy unhealthy or unsafe conditions) of the *Act*:

9 (1) When an officer 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 or present where the work is being carried out, the officer may in writing order the person responsible for the work being carried out.

- (a) to stop the work that is specified in the order, and
- (b) to take measures as specified in the order that are, in the opinion of the officer, necessary to ensure the work will be carried out in a healthy and safe manner,

or either of them, within the time limits specified in the order,

(2) When an officer is of the opinion that a person is not complying with the *Act*, the regulations or the adopted code, the officer may in writing order that person to take such measures, within the time limits specified in the order, as the officer considers necessary to ensure such compliance and specifies in the order.

[13] The power of Council is outlined in Section 7 (Duties of Council) of the *Act*.

7 The Council shall . . .

- (b) hear appeals in accordance with this *Act* and the regulations

[14] Appeal processes are set out in section 16 (Appeal) of the *Act*:

16 (1) A person

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

may appeal the order, administrative penalty, cancellation or suspension to the Council . . .

(3) After considering the matter being appealed, the Council may by order

- (a) in the case of an appeal from an order referred to in subsection (1) (a) confirm, revoke or vary the order

VIII. Analysis and Reasons for Decision

Failure of Appellant to Meet its Burden on Evidentiary Grounds that OHS Officer's Decision was Unreasonable

[15] Aecon did not raise any concerns about the OHS officer's investigation or legal authority to issue these Orders. Since Aecon does not rely upon mere procedural matters, but one where its brief notes still might require some weighing and consideration, this three-person panel of Council was struck.

[16] Aecon elected an appeal by written submissions only. However, it made only a few facile written denials and assertions in its own case. Aecon has the burden of proof to show, on a balance of probabilities, how the OHS officer had erred or acted unreasonably in issuing these three Orders. Aecon provided no evidence or specific arguments to interfere with the OHS officer's decision to issue these Orders. No rebuttal brief was filed in response to a very detailed written submission by the Respondent.

[17] Specifically, Aecon merely asserted that there was "no contravention justifying these Orders", "supervisor had instructed the worker to shut off the equipment and remove the lodged item", "the LOTO procedure required workers to act properly", "the equipment had a safeguard" and "the injured worker and supervisor were trained in LOTO procedures". There is no evidence to support any of these assertions or rebut what the OHS officer recorded.

[18] Aecon has not seriously raised an appealable issue nor challenged the specific merits of the OHS officer's discretion to issue these three Orders. Aecon has no reasonable prospect of success based on the evidence and arguments filed. It has not lodged an appeal that contains an air of reality to it. It can, and should, be dismissed summarily.

Merits of the Orders

[19] Alternatively, Council reaches the same conclusion when it examines the merits of this case.

[20] As to Order #1, when the OHS officer arrived on scene, the equipment was still operational. Aecon confirms that the equipment was neither locked out or

tagged out. Regardless of the style, nature and content of the “LOTO Procedure” identified by Aecon, it is reasonable and prudent for the OHS officer to stop the work process to prevent a reoccurrence of the same or similar injury to another worker in the event that this is a systemic process based event, and to allow the investigation to proceed. This is in the best interests of the workers, employer and the public interest.

[21] As to Order #2, the OHS officer specifically identifies an unguarded 39” x 16” opening with a temporary 32” x 26” plywood guard to prevent workers from coming into contact with moving machinery parts. Photographs and measurement references are provided. The temporary safeguard leaves large gaps in the space it is intended to protect into which a worker could easily insert a hand or tool to come into contact with the moving components. It is an ill-fitting piece of wood that is not a permanent fixture to the equipment and which does not meet the requirements of a guard.

[22] OHS evidence proves this would not be an effective guard in separating the worker from the moving components. As to whether the machine was equipped with a safeguard at the time of the incident, the officer’s investigation revealed that at time of the inspection there was at least one inadequate safeguard – the piece of plywood. The investigation by the Officer demonstrated that the temporary plywood safeguard was woefully inadequate and would be a violation of the *Code*, section 310. Aecon has not provided any evidence supporting the efficacy of the guard identified by the OHS officer.

[23] Regarding lockout and tagout, the Aecon supervisor acknowledges being new to the site and not aware whether the injured worker was trained in lockout / tagout procedures. Aecon confirmed the machine had not been locked out and tagged out. The equipment was in operation at the time of the injury and the key used to operate the unit was still in the control box turned to the ‘off’ position. There was no personal lock, identifying tag or warning label visible.

[24] The conditions associated with the injury demonstrate that an effective energy isolation process was not in use at the time of the incident. Accordingly, it is difficult for Aecon to argue it *ensured* the worker performing the assigned task had isolated the equipment, even if there was a procedure.

[25] With respect to Order #3, Aecon offers no evidence in the form of the procedures and training records of the injured employee and supervisor. The OHS Officer states that the supervisor did not know whether the worker was trained in lockout / tagout procedures and was new to the site. The supervisor had not reviewed the equipment manufacturing specifications and was unaware of any repair or maintenance procedures. Aecon provides no substantiating samples of procedures, directions to the worker, hazard assessment, briefing / meeting minutes. It merely offers broad statements that the lockout / tagout procedures

are developed and supervisor and worker are trained in them.

[26] Aecon's submissions are not relevant to the Orders. The employer presumably takes the position that the existence of procedures and associated training would invalidate Order #3. The OHS officer stated that he was not provided a procedure at the time of the investigation and there seemed to be a lack of understanding of the energy isolation requirements. There were no signs of an isolation process such as personal locks. Aecon does not provide evidence that the procedure or records were available during the inspection.

[27] As to whether there was any contravention of the *Code* justifying the Orders, the serious injury itself was a result of a worker completing repairs or maintenance on moving equipment. With no evidence to the contrary from Aecon, this would be a contravention of the *Code*, section 212. The OHS officer had enough information to be concerned and would be justified in issuing these Orders.

IX. Order

[28] Council confirms the three orders under section 16(3)(a) of the *Act* and dismisses this appeal.

[29] Council has no statutory jurisdiction to award costs. Nevertheless, real costs are incurred in responding to, and deciding, such appeals. If it had such authority, Council would have awarded costs against the Appellant in this case. This was not a serious appeal.
