

CANADA / JUDGMENT

Workers' Compensation Board v. G & D Construction Ltd.

2020 BCSC 1770

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 1770 Workers' Compensation Board v. G & D Construction Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Workers' Compensation Board v. G & D Construction Ltd.,

2020 BCSC 1770

Date: 20201119

Docket: S178148

Registry: Vancouver

Between:

Workers' Compensation Board

Petitioner

And

G & D Construction Ltd. and Dalwinder Singh Kandola

Respondents

Before: The Honourable Madam Justice Matthews

Reasons for Judgment

Counsel for Petitioner appearing via teleconference:

A.K. Sandhu

Counsel for Respondents appearing via teleconference:

N.S. Gill

Place and Date of Hearing:

Vancouver, B.C.

October 15, 2020

Place and Date of Judgment:

Vancouver, B.C.

November 19, 2020

Overview

- [1] G & D Construction Ltd. provides framing services on construction projects. On multiple occasions prior to August 30, 2017, the Workers' Compensation Board found G & D Construction to be in violation of work place health and safety legislation and regulations including with regard to the obligation of employers to ensure that a fall protection system is used when work is being done at certain heights. The Workers' Compensation Board imposed administrative penalties against G & D Construction but further violations occurred. On October 20, 2017, Mr. Justice Silverman of this Court issued an order prohibiting G & D Construction Ltd. and its principal, Dalwinder Singh Kandola, from continuing or committing contraventions of the Workers Compensation Act, R.S.B.C. 1996, c. 492 and the Occupational Health and Safety Regulation, B.C. Reg. 296/97 and requiring G & D Construction Ltd. and Dalwinder Singh Kandola to comply with the Workers Compensation Act, R.S.B.C. 1996, c. 492 and the Occupational Health and Safety Regulation, B.C. Reg. 296/97.
- [2] As a result of inspections carried out by the Workers' Compensation Board in 2018 and 2020 at work sites where G & D Construction was providing framing services, the Workers' Compensation Board documented further breaches of the Workers Compensation Act (the Act had been amended between the 2018 and 2020 inspections) and the Occupational Health and Safety Regulation in relation to failures to have appropriate guard rails, to have fall protection systems, and to have workers wearing fall protection systems. The Workers' Compensation Board brings this application to have G & D Construction and Mr. Kandola held in contempt of court.
- [3] G & D Construction and Mr. Kandola submit that the breaches subsequent to the October 20, 2017 order are not as extensive as the Workers' Compensation Board submits and were immediately rectified. They submit that given the non-extensive nature of the breaches and the short duration of them, I should conclude that Mr. Kandola and G & D Construction made good faith efforts to comply with the order and I should exercise my discretion to not find G & D Construction and Mr. Kandola in contempt of court. They also argue that the October 20, 2017 order was not clear because some of the alleged violations took place after

the Workers Compensation Act was amended in 2019 and the order only prohibits conduct that contravenes the version of the Workers Compensation Act and regulations in force at the time the order was made.

- [4] The submissions made on this stage of this application addressed whether I should find G & D Construction and Mr. Kandola in contempt of court. If I make that finding, the parties will come back before me to address penalty.
- [5] Accordingly, the issues are:
- a) whether the breaches were so minor and transient that I should conclude that G & D Construction and Mr. Kandola made good faith efforts to comply with the order and my discretion to not find contempt; and
 - b) whether the order was sufficiently clear because it did not state that it applied to the Workers Compensation Act as amended.
- [6] I find the elements of civil contempt of court have been established beyond a reasonable doubt. I find that G & D Construction and Mr. Kandola intended to do the acts that constitute breaches of the order and they have not established a lack of defiance or good faith that causes me to decline to exercise my discretion. I conclude that the order was sufficiently clear. I find G & D Construction and Mr. Kandola in contempt of court.

The nature of the breaches, efforts to comply with the order and discretion to not find contempt

- [7] Mr. Kandola and G & D Construction concede that most, but not all, of the violations that the Workers' Compensation Board asserts occurred after the October 20, 2017 occurred as alleged. However, they take issue with some and they submit that the violations do not establish that they acted in "defiance" of the October 20, 2017 order. They submit that because the evidence shows that they acted in good faith and took reasonable steps to comply with the order I should exercise my discretion to decline to make a finding of contempt.
- [8] The leading case on civil contempt is *Carey v. Laiken*, 2015 SCC 17, in which the Court set out three elements which must be proved beyond a reasonable doubt to establish civil contempt (at para. 33): (1) the order must state clearly and unequivocally what should and should not be done, (2) the party alleged to have breached the order must have knowledge of the order, and (3) the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels. The first and second elements are in issue in this case.
- [9] In *Workers' Compensation Board of British Columbia v. Seattle Environmental Consulting Ltd.*, 2017 BCCA 19, the Court of Appeal considered an appeal of a finding of contempt based on a breach of a court order requiring an individual and a company to comply with the Workers Compensation Act and the Occupational Health and Safety Regulation. At para. 103,

the Court of Appeal explained that the concept of contempt of court "rests on the power of the court to uphold its dignity and process". The Court of Appeal stated that the purpose of a contempt order is a declaration that a party has acted in defiance of a court order. Citing Carey at paras. 36-37, the Court of Appeal went on, at para. 104, to explain that the contempt power is discretionary and should not be used merely as a means of enforcing judgments but rather should be used cautiously and with great restraint. The Court of Appeal said "[t]hus, where an alleged contemnor acted in good faith in taking reasonable steps to comply with the order, the judge entertaining a contempt motion retains some discretion to decline to make a finding of contempt".

- [10] The Court in Carey confirmed, at para. 37, that the court retains a discretion to decline to make a finding of contempt where "it would work an injustice in the circumstances of the case."
- [11] The Court in Carey also addressed at some length the required intent in the third requirement. The required intent is not to breach the court order, rather, it is the intention to do the thing prohibited by the court order or to not do the thing the court order requires. G & D Construction and Mr. Kandola focus on the statement of the Court of Appeal in Seattle Environmental Consulting that civil contempt is to declare that a party has acted in "defiance" of a court order. That is not a statement of the test for intention. It is the underlying purpose of a contempt order and an observation that follows the findings of the three required elements. Carey makes it clear that "contumacious intent" is not the test (at paras. 38 and 42). Instead "contumacy or lack thereof goes to the penalty be imposed following a finding of contempt", Carey at para. 38 citing the Ontario Court of Appeal in Sabourin and Sun Group of Companies v. Laiken, 2013 ONCA 530 at paras. 59 and 62.
- [12] In this case, therefore, the required intention that must be proved beyond a reasonable doubt is that G & D Construction and Mr. Kandola intended to have worksites that did not have appropriate guard rails, fall protection systems, workers working without fall protection systems, workers working at unsafe heights and workers working contrary to a stop work order as alleged by the Workers' Compensation Board. However, even if that intention is established, if I conclude that G & D Construction was making good faith efforts to comply, it is open to me to exercise my discretion to not find contempt.
- [13] I will set out the background to the October 20, 2017 order and the subsequent violations in order to determine whether the facts as a whole show that the violations were minor and transitory and whether G & D Construction made good faith attempts to comply with the October 20, 2017 order.

The October 20, 2017 Order

- [14] The Workers' Compensation Board sought the October 20, 2017 order because on multiple occasions Workers' Compensation Board officers observed G & D Construction Ltd. workers working at elevations of three metres or more above grade without fall protection in contravention of a s. 11.2(1)(a) of the Occupational Health and Safety Regulation.
- [15] This application for contempt relates to inspections of G & D Construction work sites on March 1, 2018, March 3, 2020, May 7, 2020 and May 13, 2020. On each of those occasions the inspections revealed failings or lapses that contravene the Workers Compensation Act and the Occupational Health and Safety Regulation including safety issues relating to working at heights involving risks of falling.

March 1, 2018 Inspection

- [16] On March 1, 2018, among other violations, a Worker's Compensation inspector noted guard rails missing from the top floor of a structure where workers were working exposing the workers to a fall hazard of 11 feet and four inches to the main floor and up to 21 feet nine inches to the grade. Mr. Kandola deposed that the workers were not working there until the next day when the guard rails were to be installed. His evidence contradicts the affidavit evidence of the Workers Compensation Board inspector, Mr. Duffy, who deposed that he observed workers on that level in areas where there were no guard rails. Mr. Duffy filed a reply affidavit where among other things, he confirms that he saw workers who were not protected by guard rails setting flooring joists on that level.
- [17] All of the evidence is by affidavit. No cross examinations have been undertaken. I do not have any means of determining whom to believe and so I conclude that the Workers' Compensation Board has not met the standard of proof beyond a reasonable doubt on this aspect of this breach.
- [18] G & D Construction and Mr. Kandola do not dispute the other violations noted that day as follows: G & D Construction and Mr. Kandola failed to ensure that a fall protection system was used for work being done where a fall of 10 feet or more may occur; G & D Construction and Mr. Kandola failed to ensure that refuse spills and waste material were not allowed to accumulate so as to constitute a hazard; G & D Construction and Mr. Kandola failed to ensure that a stairway comprised of framing treads and a hand rail be provided to each floor level before construction of the next floor or deck surface was undertaken; and G & D Construction and Mr. Kandola failed to provide information instruction and supervision necessary to ensure the health and safety of workers carrying out the work.
- [19] I find that the Workers' Compensation Board has proved beyond a reasonable doubt that on March 1, 2018, the contraventions that it alleges occurred with the exception of its allegation that workers were working in an area where guard rails were missing.

March 3, 2020 Inspection

- [20] The Workers' Compensation Board has led affidavit evidence that on March 3, 2020, G & D Construction and Mr. Kandola did not have a written fall protection plan in place at their work site, did not have a ladder of sufficient length to enable safe performance of the work activity and that balconies and window openings accessible to workers on the second and third floor of the worksite did not have guard rails installed.
- [21] Mr. Kandola states that the workers on this site all had the necessary fall protection equipment ready for use. He asserts that while it is correct that he did not have a written fall protection plan on the site at the time, it was because he was involved with a crane operator who was unloading a bundle of plywood sheets onto the roof of the work site. He deposed that he completed the written fall protection plan later on the same day and posted it.
- [22] I find that the Workers' Compensation Board has proved beyond a reasonable doubt that G & D Construction and Mr. Kandola failed to have a written fall protection plan for work was being done at a location where workers were not protected by permanent guard rails in which a fall of 7.5 metres or more could occur and that G & D Construction and Mr. Kandola failed to ensure that an appropriate ladder of sufficient length to enable the safe performance of the work activity was being used. I find that the Workers' Compensation Board has proven beyond a reasonable doubt that on March 3, 2020 the contraventions it alleges of the Occupational Health and Safety Regulation under the Workers Compensation Act occurred.

May 7, 2020 Inspection

- [23] On May 7, 2020, Workers' Compensation Board inspector Mr. Stroud observed workers on a G & D Construction worksite not using fall protection systems when working at heights exceeding 10 feet, including Mr. Kandola. Mr. Stroud observed Mr. Kandola's fall protection harness next to Mr. Kandola where he was working at an unsafe height with the harness dangling off the side of the building being constructed. Mr. Kandola deposed that his harness kept getting stuck in construction materials. He deposed that at the time the inspector took his photograph, he had removed his harness for no longer than two minutes so that he could move to another area.
- [24] In a response affidavit, Mr. Stroud deposed that the regulations provide for work platforms and guard rails to be constructed so that workers who need to unhook their safety harnesses can move safely in the work area if the harness is not practicable. He deposed that the regulations require certain types of vertical lifelines and double lanyard systems to be used so that the worker is adequately protected from falling. Mr. Stroud also deposed that at the time he took his photograph of Mr. Kandola not wearing his fall protection harness, a second worker is depicted below Mr. Kandola also not wearing any personal fall protection equipment and standing on a wooden work platform which did not have guard rails. Mr. Stroud deposed that worker was in the direct view of Mr. Kandola and was exposed to a fall

hazard of 10 feet and seven inches. Mr. Stroud observed a third worker installing sub-fascia at the rear of the worksite not using any method of fall protection.

- [25] Mr. Kandola deposed that with regard to the second worker, he was not compliant with Mr. Kandola's directions with regard to wearing his harness and was terminated. He provides no explanation about the third worker.
- [26] Mr. Kandola's evidence and explanation does not call into doubt the evidence of Mr. Stroud that G & D Construction and Mr. Kandola were contravening the do not Occupational Health and Safety Regulations.
- [27] I find that the Workers' Compensation Board has proved beyond a reasonable doubt that on May 7, 2020, three employees of G & D Construction including Mr. Kandola were not wearing fall protection harnesses when they were working at heights requiring such protection systems to be used. In addition, the Workers' Compensation Board has proved beyond a reasonable doubt the other contraventions found by Mr. Stroud on that day including that G & D Construction and Mr. Kandola did not provide workers with the information, instruction, training and supervision necessary to ensure the health and safety of those workers in carrying out their work.

May 13, 2020 violation of the May 7, 2020 Stop Work order

- [28] Mr. Stroud deposed that because of the observations he made on May 7, 2020, he concluded that workers were at elevations which presented a high risk of serious injury or death and failed to protect themselves from falls despite having personal fall protection equipment available. He issued a stop work order that applied to all work being conducted at heights of 10 feet or greater above grade. The stop work order was to remain in place pending G & D Construction and Mr. Kandola complying with conditions including completing a supervisory training course, retaining the services of a safety consultant and developing a formal safety program. Mr. Stroud posted stop work order placards at the stairway entrance located at the front and rear of the building prior to his departure from the work site on May 7, 2020. On May 9, 2020, a confirmation of the order to stop work was issued to G & D Construction. On May 9, 2020, Mr. Stroud spoke with Mr. Kandola by telephone to review the contents of the stop work order and sent him a copy of stop work confirmation by email as well as the inspection report.
- [29] On May 13, 2020, while the stop worker order was in place, Mr. Stroud returned to the worksite to conduct a follow-up inspection. He observed a worker working at a height that he estimated to be 14 to 16 feet above grade.
- [30] Mr. Kandola deposed that he a misunderstood the scope of the stop work order because he understood it to apply to work that was over 10 feet above the ground and that it was his belief that his employee was working less or equal to 10 feet above ground level.

- [31] It is apparent that the stop work order did apply, as Mr. Kandola said he thought it did, to heights of 10 feet or greater. The contravention was that the worker was working at a height of 14 feet or greater.
- [32] In this instance, the untested competing affidavit evidence does not preclude reaching a finding of fact. Mr. Kandola asserted that he thought the worker was working at a height of 10 feet or less but he does not state any reason for that belief. Mr. Stroud, by contrast, deposed that he observed the height at which the worker was working. I accept Mr. Stroud's evidence on this point.
- [33] The Workers' Compensation Board has proven beyond a reasonable doubt that G & D Construction and Mr. Kandola were in contravention of the stop work order by having a worker working at a height of over 10 feet on May 13, 2020.

Exercise of Discretion

- [34] G & D Construction and Mr. Kandola submit that on the totality of the evidence, I should not find that they were acting in defiance of the October 20, 2017 order and I should find that they were taking good faith steps to comply with it. They submit that the latter is evidenced by the fact that the contraventions were minor and they were quickly addressed.
- [35] The Workers' Compensation Board argues that G & D Construction and Mr. Kandola have demonstrated a pattern of non-compliance with both the spirit and the letter of the safety requirements that govern workplaces in British Columbia through the Workers Compensation Act and its Occupational Health and Safety Regulation. The Workers' Compensation Board submits that that the number of contraventions since the October 20, 2017 order, and Mr. Kandola's response to them, demonstrate an ongoing disrespect for occupational health and safety, for the authority of the Workers' Compensation Board, and for the court.
- [36] With regard to intent, the only inference available on the evidence is that G & D Construction and Mr. Kandola intended to undertake the actions that resulted in the violations.
- [37] As I have already stated, the primary question not one of intent, but whether G & D Construction and Mr. Kandola made good faith attempts to comply with the October 20, 2017 order and were simply caught out temporarily on a few inconsequential transgressions.
- [38] Mr. Kandola's evidence on this application does not demonstrate good faith attempts to comply with the October 20, 2017 order. Rather, it demonstrates that he and his company consistently prioritize other facets of their business over workplace safety. For example, Mr. Kandola asserts that he was caught in a photograph with his harness off temporarily. The problem with that assertion is that other workers also had their harnesses off on that same day at the time the inspector was there and one of them was working without his harness in the line of vision of Mr. Kandola. While Mr. Kandola asserts he later terminated that

employee, Mr. Kandola did not have his harness on either demonstrating that he does not lead by example and does not make safety a priority. This is also demonstrated by Mr. Kandola explaining that he did not have a fall protection plan in place was because he was busy dealing with a crane delivering supplies to the worksite. There is no doubt that worksites are busy places and the supervisors of them often have many balls in the air, but an approach where safety issues are only planned for and addressed when time permits does not demonstrate good faith compliance.

- [39] In addition to the thin explanations for the non-compliance with the safety regulations that Mr. Kandola has provided, the failure to comply with the stop work order demonstrates a lack of respect and intention to comply with authorities on occupational health and safety matters. The only inference that can be drawn from this is that Mr. Kandola and G & D Construction put their interests in continuing with work above their obligation to comply with the stop work order. The evidence also shows an indifference to compliance with the order of the court which was contravened by the stop work order and by the contraventions that preceded it.
- [40] The importance of these issues is demonstrated by evidence led by the Workers' Compensation Board that between 2015 and 2019 the Workers' Compensation Board accepted 59 work-related death claims involving falls from elevation across all industry classification units and incurred claim costs of over \$512 million across all classification units for injuries and deaths associated with falls from elevation. The 59 deaths were part of 23,000 claims.
- [41] I accept that the evidence shows that Mr. Kandola and G & D Construction came into compliance quickly with the exception of the contraventions noted on May 7, 2020 and the conditions for resumption of work which were not fully addressed until May 19, 2020. I conclude that on the other occasions the rapid steps to come into compliance demonstrates that G & D Construction and Mr. Kandola are capable of complying and do so when they are caught contravening the Workers Compensation Act and Occupational Health and Safety Regulation.
- [42] For these reasons, I am persuaded that G & D Construction and Mr. Kandola were not acting in good faith in their attempts to comply with the October 20, 2017 order. Instead, I find that they demonstrated defiance towards the order as well towards the authority of the Workers' Compensation Board. I conclude that good faith and lack of defiance are not established and so are not bases for me to exercise my discretion to not find contempt.

Whether the order was sufficiently clear because it did not state it applied to the Workers Compensation Act as amended

- [43] An additional issue raised by G & D Construction and Mr. Kandola is that the October 20, 2017 order is not sufficiently clear to support a finding of contempt because the order prohibits further contraventions of the Workers Compensation Act then in force and the Occupational Health and Safety Regulation made pursuant to it. Some of the contraventions

on which this contempt application is based are contraventions of the Workers Compensation Act as amended subsequent to the October 20, 2017 order. G & D Construction and Mr. Kandola argue that the first element of civil contempt of court has not been made out because the order are alleged to have been breached does not clearly and unequivocally state that G & D Construction and Mr. Kandola must be in compliance with the Workers Compensation Act "as amended".

[44] I am not persuaded by this argument for two reasons.

[45] First, this issue was addressed in Seattle Environmental Consulting where the Court of Appeal held that it is clear and unequivocal that employers, workers, supervisors and the directors and officers of Corporation have an obligation to comply with the Workers Compensation Act and its regulations as they exist from time to time. Mr. Justice Savage, speaking for the court, also said that the failure to expressly specify a requirement of compliance with the Worker's Compensation Act and its regulations as amended does not create impermissible ambiguity because the only reasonable understanding of an order that requires compliance with those enactments is that the order refers to them as amended. That is enough to dispose of this argument.

[46] However, it also the case that the amendments have no substantive affect on the obligations on employers to comply with the Workers Compensation Act and the Occupational Health and Safety Regulation. The provision of the Workers Compensation Act in force at the time the October 20, 2017 order was made was s. 115(1) which reads as follows:

115 (1) Every employer must

(a) ensure the health and safety of

(i) all workers working for that employer, and

(ii) any other workers present at a workplace at which that employer's work is being carried out, and

(b) comply with this Part, the regulations and any applicable orders.

[47] The revised provision is s. 21(1) of the Workers Compensation Act , R.S.B.C. 2019, c. 1 which reads as follows:

21 (1) Every employer must

(a) ensure the health and safety of

(i) all workers working for that employer, and

(ii) any other workers present at a workplace at which that employer's work is being carried out, and

(b) comply with the OHS provisions, the regulations and any applicable orders.

- [48] The "OHS provisions" and "regulations" referred to in s. 21(1) (b) of the 2019 amendments to the Workers Compensation Act are in the Occupational Health and Safety Regulation to which I have been referring to in these reasons and which sets out the specifics of the contraventions including the requirements for a fall protection system, a written fall protection plan, etc. It was not amended subsequent to the October 20, 2017 order and prior to the latest of the contraventions which form the basis of this application.
- [49] I conclude that the Workers' Compensation Board has established beyond a reasonable doubt that the order alleged to have been breached clearly and unequivocally states what should and should not be done.

Conclusion

- [50] All three elements of civil contempt have been proved beyond a reasonable doubt. I conclude that G & D Construction and Mr. Kandola did not make good faith attempts to comply with the court order and did behave in defiance of it. I am not persuaded to exercise my discretion to not find contempt. I find G & D Construction and Mr. Kandola to be in contempt of the October 20, 2017 order.
- [51] The parties may make arrangements to appear back before me to address the issue of penalty.

"Matthews J."

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