

Occupational Health  
and Safety Tribunal Canada



Tribunal de santé et  
sécurité au travail Canada

Ottawa, Canada K1A 0J2

**Citation:** Doug Doherty, 2012 OHSTC 36

**Date:** 2012-10-18  
**Case No.:** 2012-01  
**Rendered at:** Ottawa

**Between:**

Doug Doherty, Appellant

**Matter:** Appeal under subsection 129(7) of the *Canada Labour Code* of a decision rendered by a health and safety officer

**Decision:** The decision that a danger does not exist is rescinded

**Decision rendered by:** Mr Michael Wiwchar, Appeals Officer

**Language of decision:** English

**For the appellant:** Mr Dale McEachern, Safety Officer, International Longshoremen's & Warehousemen's Union, Local 508

Canada

## REASONS

[1] This matter concerns an appeal brought under subsection 129(7) of the *Canada Labour Code* (the Code) of a decision rendered by Mr Sultan Virani, Health and Safety Officer (HSO) with Transport Canada Marine.

### Background

[2] On December 26, 2011, the appellant, Mr Doug Doherty, crane operator employed by Tidal Transport and Trading Ltd., was loading logs from the water into the hold of the vessel MV Black Forrest at Crofton, British Columbia.

[3] Sometime before 1:00 PM, the appellant complained that the motor of the crane he was operating - crane #4 on the MV Black Forrest - was cutting out when the hoist lever was pulled all the way back which left the load suspended with no power for the few seconds it took to restart the crane. At approximately 1:00 PM, the appellant exercised his right under section 128 of the Code to refuse to work.

[4] HSO Virani arrived on the scene to conduct his investigation at around 2:30 PM on the day of the refusal. HSO Virani was accompanied by the appellant, Mr Dale McEachern, Safety Officer for the International Longshoremen's & Warehousemen's Union, and the vessel's Chief Engineer.

[5] HSO Virani, Mr McEachern and the Chief Engineer observed while the appellant operated the crane and noted that the crane did in fact cut out when the hoist lever was pulled all the way back with a jerk. The Chief Engineer informed HSO Virani that the hoisting motion on the crane needs to be gradual because a jerking motion created too much pressure on the hydraulics, which can cause the hydraulic pipes to burst, and because it is a safety mechanism, the cranes' power will cut out. The appellant then continued to operate the crane, which remained operational until the hoist lever was pulled back in a jerking motion. The appellant stated that the jerking motion is a normal method of operation.

[6] They then proceeded to crane #3, which was operating without any reported issues. HSO Virani asked the appellant to operate it; it also cut out when the hoist lever was pulled back with a jerking motion. They continued to crane #2, where HSO Virani asked the operator if he had experienced similar problems. The operator stated that the cranes on the MV Black Forrest did in fact cut out when a jerking motion is applied to the hoist lever but that they presented no problems when a gradual motion is applied.

[7] Based on the information provided by the Chief Engineer, the operators of cranes #2 and #3, and the observation of the operation of crane #4, HSO Virani concluded that the crane can be safely operated with the gradual motion and without applying the jerking motion on the hoist lever. He then rendered a decision that a danger did not exist on December 26, 2011.

[8] On January 5, 2012, the employee filed an appeal of the decision of no danger by HSO Virani.

[9] On March 13, 2012, HSO Virani contacted this Tribunal to provide additional information concerning the cranes onboard the MV Black Forrest. He stated that the vessel went to load at Port Alberni, British Columbia, in the last week of February and the crane experienced the same problem as reported by the appellant on the day of his work refusal. The vessel's management subsequently decided to change the crane's hydraulic filter, which stopped the crane from cutting out. The hydraulic filters of the other cranes on the vessel were also changed.

[10] On March 21, 2012, I received the appellant's arguments by way of written submissions. There is no respondent in this case.

[11] On July 12, 2012, I held a conference call with the appellant and Mr McEachern, representative for the appellant, in order to obtain some clarifications on the source of the hazard alleged by the appellant on the day of his work refusal.

### **Issue**

[12] The issue in this case is whether the appellant was exposed to a danger as defined under the Code when he exercised his right to refuse work.

### **Appellant's submissions**

[13] In the appellant's written submissions, it was explained that when a crane suddenly cuts out, there is always a safety concern which can vary in degrees depending on the procedure in process and the location of the lift. It is contended that, some operators, such as the appellant, produce more cargo stowage than others as their experience enables them to run the crane faster. The submission also lists some of the normal procedures/techniques requiring cranes to be "run hard" when loading logs, which include:

- Hammering loads down on existing logs to fill voids below for a safer surface and more quantity per hatch (quickly hoisting up then down with swinging or without swinging).
- Crowning a deck load by knocking logs by swinging loads and dropping them or raising them quickly by jerking the controls.
- Swinging and dropping abruptly to extend the "boom reach direction" up and down for bundle placement.
- Swinging and dropping abruptly to put bundles into the wings of a hatch.
- Short jerking motions are used to pull the slings so the load does not move from its existing position.
- When pulling the slings, quick forward jerk motion to "touch down" the cables so they do not whip around out of control.
- Placing load down, booming down, quickly raising hoist slightly, then quickly lowering hoist to slide the load further.

- After the slings (2) pull loose from under the bundle, quickly lowering the hoist line in order to “touch-down” the slings for immobilization of the swing. The swinging slings are one of our major safety concerns on deck loads.

[14] The appellant argued that these motions are done to control the load safely and in accordance with the requirements needed for loading logs into the vessel. This is why only “pedestal” cranes are used in this application and perform these functions with ease.

[15] It is also submitted that on December 26, 2011, Mr McEachern was in attendance on the MV Black Forest when the operation of crane #4 was running abnormally by cutting out. According to his personal observations, the crane operated by the appellant would cut out and would have to be restarted by the operator. Such a loss of power requires the operator to neutralize his controls then reach around behind him to restart the controls. This process can take 8 to 12 seconds when done in an expeditious fashion.

[16] In Mr McEachern’s opinion, the loss of control over a load due to a loss of power in the crane represents an extreme hazard; especially as the slings are whipping through the air after being pulled (slings are 40 feet long, 1 inch in diameter with knobs on the ends). He added that the risk of injury increases substantially when stowing on deck in closer vicinity of workers. The risk is also substantial to the operator since the crane’s cab is an enclosed space which is not equipped with any type of protection in the front where the window is located.

[17] The appellant also argued that the vessel’s Master Maintenance Manual does not mention the cutting out of the crane as part of a normal operation when the limits are not reached. The manual simply states that at any time when not functioning properly or when an irregular noise is heard, the crane must be stopped and investigated to find the cause. It is added that the ship did not provide any engineering documents describing the need for soft handling of the crane’s hoist lever, nor is there any indication that the cranes must be handled in such a manner.

[18] On December 26, 2011, while HSO Virani wrote the decision, the appellant submitted that they could see through the cabin window that crane #4 was repeatedly cutting out while “slewing” onboard the vessel without any hoist cable movement or “sudden jerking” of levers (the load was slewing in one steady motion). Earlier crane operation only did it periodically as described by the operator when he was interviewed.

[19] According to the appellant, HSO Virani recommended to the captain to go over all the cranes and get them running the best they could. A-1 Marine, a ship servicing company, was called over that evening in order to correct any problems by checking over all the cranes. After a systemic check, the A-1 Marine technician determined that the cranes were not functioning properly because the hydraulic filters were clogged. According to the appellant, the filter on crane #4 was totally black, thus clogged the worst (as explained by Mr McEachern, the darker the hydraulic filter element, the more contaminated it is). The hydraulic filters on all four cranes were subsequently changed.

[20] The appellant argued that the cranes are equipped with a safety system that shuts down the crane if the oil flow is restricted and causing heat build-up with pressure drops; this is what was indicated as verified by the technician.

[21] In Mr McEachern's view, HSO Virani's decision that the appellant was handling the crane in an abnormally rough manner does not hold ground. He stated that the appellant has many years of experience and is specialized in log loading. He is quite familiar with the type and characteristics of these cranes. According to the appellant, the statement from the Chief Engineer that the hydraulic lines would burst with this type of use is misleading; if this were the case, all vessels loading logs would have bursting lines and this in itself would be a new hazard.

[22] Furthermore, Mr McEachern stated that on February 22, 2012, the acting superintendent on the MV Black Forest, Mr J. Cross, called to notify him that the cranes on the vessel were cutting out again. The operator, Mr S. Whitefield, confirmed that at that time, crane #1 was the worst one of the four. After explaining to Mr Cross how the problem was rectified in December 2011, Mr Cross assured that they would have a marine technician come over and repair the cranes and he agreed that it was a legitimate safety concern.

[23] Mr McEachern added that later that day, A-1 Marine replaced all the cranes hydraulics filters. The following day, Mr Cross and the crane operators told him that once the repairs were done, the cranes functioned acceptably without the radical "cutting out" as the previous day.

[24] During our July 12, 2012, teleconference, I asked Mr Doherty to elaborate on the kind of hazard that can result from a crane cutting out. He explained that when the crane would cut out, the suspended load came close to the crane's cab while swinging back and forth. He added that in the 8 to 10 seconds required to restart the crane, the load can swing up to 30 feet each way and can even start spinning over the water, putting in danger the signal men on the water as well as increasing the risk of a collision with other cables or objects around the vessel.

### **Analysis**

[25] The issue put before me in this appeal is whether at the time of the work refusal, the appellant was exposed to a danger as the term is defined in subsection 122(1) of the Code, which reads as follows:

"danger" means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely

to result in a chronic illness, in disease or in damage to the reproductive system.

[26] In his initial work refusal and again in his submissions, the appellant claimed that the cutting out of the crane represented a danger to himself and other workers because once a crane loses its power, the operator loses control over the load that is suspended to the crane's slings, which can result in uncontrollable swinging and loss of the load.

[27] While conducting his investigation, HSO Virani questioned the MV Black Forrest's Chief Engineer, who assured him that the cranes could be operated safely by applying a gradual motion to the hoist lever. This information was also corroborated by other crane operators and by directly observing the cranes being operated.

[28] At the time when HSO Virani wrote his decision, the problem of the clogged hydraulic filter was unknown by both himself and the Chief Engineer. From this point of view and with the information available on the day of the appellant's work refusal, I can appreciate how he came to the conclusion that the issue of the crane cutting out was the result of the jerking motion used by the appellant to operate the crane, and that consequently, the alleged danger could be eliminated by using a more gradual motion on the hoist lever.

[29] However, in light of the information concerning the clogged filters that has been provided to this Tribunal following HSO Virani's decision, it is apparent that the technique used by the appellant for operating the crane was not the sole cause of the hazard alleged by himself on December 26, 2011.

[30] While there seems to be a debate on the question of whether the technique employed by the appellant while operating the crane was a factor in the cutting out of the power, I am of the opinion that the evidence provided to this Tribunal clearly establishes that the clogged hydraulic filters played a more significant part in the power cut out. Taking into account the fact that the same issue was reported by different operators following the December 26, 2011, work refusal by the appellant, and that in each case, the problem appeared to be resolved once hydraulic filters were changed, I conclude that this issue was the main cause of the cutting out of the crane.

[31] On this note, I must now determine whether the cutting out of the crane did in fact represent a danger to the appellant or to other workers. In order to find if there was a danger, I need to analyze the circumstances and events as they unfolded on December 26, 2011, the day of the appellant's work refusal.

**Was the appellant exposed to a danger as defined under the Code when he exercised his right to refuse to work?**

[32] The Federal Court and the Federal Court of Appeal in *Verville and Canada*<sup>1</sup> and *Martin and Canada (Attorney General)*<sup>2</sup>, determined that to find that a “danger” exists:

- There has to be a hazard, condition or activity that can reasonably be expected to cause an injury or illness to an employee, which may not happen immediately upon exposure, but needs to happen before the condition or activity is altered.
- The definition does not require that the “danger” cause an injury every time the hazard, condition or activity occurs. The French version, “susceptible de causer” indicates that it must be capable of causing injury at any time but not necessarily every time.
- It is not necessary to establish precisely the time when the hazard, condition or activity will occur, but only to ascertain in what circumstances it could be expected to cause injury and establish that such circumstances will occur in the future, not as a mere possibility, but as a reasonable one.

[33] Moreover, Madame Justice Gauthier, in the Federal Court *Verville* decision, noted that:

- Reasonable expectation of injury cannot be based on hypothesis or conjecture, but if a hazard, condition or activity is capable of coming into being or action, then it should be covered by the definition.
- There is more than one way to establish that one can reasonably expect a situation to cause injury. It is not necessary to have proof that someone else has been injured in exactly the same circumstances; a reasonable expectation could be based on expert opinions or even the opinion of ordinary witnesses having the necessary experience.
- A reasonable expectation of injury could even be established through an inference arising logically or reasonably from known facts.

[34] To determine if a danger existed on December 26, 2011, for the appellant or for other workers, I will have to ask myself whether the potential hazard of the power of the crane cutting out while stowing logs in the vessel’s hatch can reasonably be expected to cause an injury.

---

<sup>1</sup> 2004 FC 767.

<sup>2</sup> 2003 FC 1158 and 2005 FCA 156.

[35] In its submissions and during the July 12, 2012, conference call, the appellant argued that when the crane would cut out, the suspended load came close to the crane's cab while swinging back and forth. In the time required to restart the crane, the slings can swing out of control, creating the risk of a collision with other objects or even of the load shifting in a manner that can provoke it to fall.

[36] Even though no official report of a previous incident involving an injury caused by a crane cutting out was presented to this Tribunal, the Federal Court established in *Verville* that it is not necessary to show that an injury has occurred in the past under the same circumstances to prove that the situation can reasonably be expected to cause injury. The Court also states that a reasonable expectation that an injury can occur can be based on the opinion of an ordinary witness with sufficient experience.

[37] In the present case, I am positive that the opinions offered by Mr Doherty and Mr McEachern represent an informed and credible assertion of the hazard created by the loss of control over a load while operating a crane on a vessel similar to the MV Black Forrest. Their combined experience in this field of work gives them ample credentials to ascertain what type of hazard in these circumstances can reasonably constitute a health and safety issue for both the crane operator and any other individual on the worksite.

[38] It should also be mentioned that the prevention of accidents and the injuries that can result from them is embedded in the preventative purpose of the Code, and this foremost principle must guide me in my analysis. The purpose provision in Part II of the Code can be found at section 122.1, which reads as follows:

122.1 The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.

[39] As stated above in *Verville* and *Martin*, for something to be considered a danger it does not need to cause injury every time the hazard, condition or activity occurs, nor does it need to be frequent. It just has to be capable of causing injury at any time.

[40] I have no doubt that when a loss of control on the crane occurs, it can be reasonably expected that a danger for the worker and other individuals can occur. In the circumstances where a crane operator has lost control over a load of logs suspended in the air which can swing up to 30 feet in each direction, even a minor incident can have very serious consequences, such as the load shifting and falling on the deck or on the water, or the slings colliding with other objects on or near the vessel, all of which can cause very serious injuries or even death.

[41] Therefore, I conclude that at the time of Mr Doherty's work refusal a danger did exist.



[42] Having found that a danger did exist at the time of the work refusal, I will now turn to whether this danger constituted a normal condition of employment and thus barred the appellant from exercising his right under the Code to refuse dangerous work.

**Is the danger a normal condition of employment?**

[43] I must determine whether at the time of the appellant's refusal, the danger he was exposed to was a normal condition of employment pursuant to paragraph 128(2)(b) of the Code and accordingly if he was precluded from exercising his right to refuse the dangerous work.

[44] While the Code does not define what constitutes a "normal condition of employment", it does lay out principles that must guide the employer in its intervention, the priority to be given to measures to be taken to protect employees, and the employer's general obligation in sections 122.1, 122.2 and 124 of the Code. Those provisions are as follows:

122.1 The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.

122.2 Preventative measures should consist first of the elimination of hazards, then the reduction of hazards and finally, the provision of personal protective equipment, clothing, devices or materials, all with the goal on ensuring the health and safety of employees.

124. Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.

[45] Furthermore, the Federal Court in *P&O Ports Inc. and Western Stevedoring Co. Ltd. v. International Longshoremen's and Warehousemen's Union, Local 500*<sup>3</sup>, upheld the Appeals Officer's interpretation in that case with regard to a danger that constituted a normal condition of employment. Like the Court, I am in complete agreement with the interpretation of this notion by the Appeals Officer, which is reproduced at paragraph 46 as follows:

[152] I believe that before an employer can say that a danger is a normal condition of work, he has to identify each and every hazard, existing or potential, and he must, in accordance with the Code, implement safety measures to eliminate the hazard, condition, or activity; if it cannot be eliminated, he must develop measures to reduce and control the hazard, condition or activity within safe limits; and finally, if the existing or potential hazard still remains, he must make sure that employees are provided with the necessary personal protective equipment, clothing, devices and materials against the hazard, condition or activity. This of course, applies, in the present case, to the risk of falling as well as to the risk of tripping and slipping on the hatch covers.

---

<sup>3</sup> 2008 FC 846.

[153] Once all these steps have been followed and the safety measures are in place, the “residual” hazard that remains constitutes what is referred to as the normal condition of employment. However, should any change be brought to this normal employment condition, a new analysis of that change must take place in conjunction with the normal working condition.

[154] For the purposes of this case, I find that the employers failed, to the extent reasonably practicable, to eliminate or control the hazard within safe limits or to ensure that the employees were personally protected from the hazard of falling off the hatch covers.

[46] Similarly and more recently in *Canada and Vandal et al.*, the Federal Court affirmed the reasoning of this Tribunal on what constitutes a normal condition of employment in the context of correctional officers having to escort inmates. In *E. Vandal et. al. v. Correctional Service of Canada*<sup>4</sup> this Tribunal stated that:

[302] There is also an important distinction to be made between such a danger and a danger that constitutes a normal condition of employment that would preclude a refusal to work. The latter presupposes that the employer has first determined that a danger exists during escorts and has then taken all of the measures necessary to protect its employees, i.e. it has identified and controlled all of the factors that could have a major negative impact on the duty of conducting escorts. At that point there is nothing more the employer can do to protect its employees any further.

[47] Therefore, in order to determine whether the danger of a crane repeatedly cutting out while loading logs into the hold of the vessel is a normal condition of employment, I must take into consideration the steps taken by the employer to mitigate this danger.

[48] On this point, no evidence was provided to me to demonstrate that the employer took sufficient steps to mitigate this danger before HSO Virani rendered his decision. At the time of the work refusal, the Chief Engineer of the vessel was of the opinion that the issue was solely the result of the use of an improper technique by the appellant while operating the crane.

[49] However, the evidence that was provided by both the appellant and HSO Virani regarding issues concerning the hydraulic system of the cranes and the clogged filters, which only came into light after the December 26, 2011, decision of no danger, clearly establishes that the technique employed by the appellant was not the cause of the crane cutting out. In my opinion, this serves to prove that on the day of the work refusal, there were some steps that the employer could have taken to mitigate the danger had a proper inspection of the cranes been conducted.

[50] Therefore, I cannot conclude that the cutting out of the crane was a “residual” hazard which constitutes a normal condition of employment.

---

<sup>4</sup> OHSTC-07-009.

[51] With all of this evidence in mind, I am persuaded that a danger did in fact exist on December 26, 2011, and that this danger was not the result of the appellant's operation of the crane and the techniques he employed, but by a clogged hydraulic filter on the crane operated by the appellant. Furthermore, I am of the opinion that the danger was not a normal condition of employment.

[52] That being said, from all the evidence that has been gathered in this case, it is apparent that the underlying cause of the danger has since been identified and rectified. Also, I deem that the evidence presented shows that the cranes' hydraulic filters are now being properly maintained and that, consequently, the danger should not reoccur.

### **Decision**

[53] For these reasons, I rescind the decision of no danger rendered by HSO Virani on December 26, 2011. Furthermore, I will not issue a direction to the employer to take measures to correct the hazard that constituted the danger in circumstances of this case because I am assured by Messrs Doherty and McEachern, following the teleconference held on July 12, 2012, that appropriate repairs were made to the cranes' hydraulic filters which as a result eliminated the hazard.

Michael Wiwchar  
Appeals Officer