

Occupational Health
and Safety Tribunal Canada



Tribunal de santé et
sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Damian Azeez and Canada Border Services Agency, 2013 OHSTC 8

Date: 2013-02-06
Case No.: 2011-27
Rendered at: Ottawa

Between:

Damian G. Azeez, Appellant

and

Canada Border Services Agency, Respondent

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 confirmed.

Decision rendered by: Mr Michael Wiwchar, Appeals Officer

Language of decision: English

For the appellant: Mr Damian G. Azeez

For the respondent: Mr Sean Gaudet, Counsel, Department of Justice Canada

Canada

REASONS

[1] This concerns an appeal brought under subsection 129(7) of the *Canada Labour Code* (the Code) of a decision rendered by Mr Domenico Iacobellis, Health and Safety Officer (HSO), Human Resources and Skills Development Canada (HRSDC), Labour Program, on March 29, 2011.

Background

[2] An earthquake and tsunami off the coast of Japan in mid-March 2011 caused extensive damages to the nuclear Fukushima Daiichi facility in Japan that resulted in a series of equipment failures and nuclear meltdowns. In the following days and weeks, radioactive materials emanating from the nuclear plant into the surrounding environment caused the Japanese authorities to order an evacuation of the affected area.

[3] On March 24, 2011, Border Services Officers (BSOs) of the Canada Border Services Agency (CBSA) working at the Vista Cargo Terminal (Vista Mail Center) in Mississauga, Ontario, noticed that mail arriving from Japan had been put on the belt system for screening. Fearing that the events in Japan could have caused the mail to be contaminated with radiation, the appellant and another colleague initiated a work refusal pursuant to section 128 of the Code. The appellant believed that sorting mail arriving from Japan posed a danger to his health because it had not been screened and because he had not been provided with the necessary equipment to detect radiation. The appellant also claimed that the employer had equipment to detect radiation levels but it was not utilized.

[4] On March 25, 2011, HSO Iacobellis visited the work place to conduct an investigation.

[5] On March 27, 2011, HSO Iacobellis rendered his decision that a danger did not exist for the refusing employees at the Vista Mail Center. The reasons for his decisions were explained in his report as follows:

“I have researched all information available at the time of the refusal from the Federal and International Agencies involved in and reporting on matters related to radiation contamination in Canada and abroad. In my research, I have not found any evidence which supports the employees’ views that incoming mail from Japan may be contaminated with radionuclide particles and therefore posing a danger to their health and safety. I consider the subject matter experts to be the above listed government and international entities and at this time there have been no warnings or up-to-date data involving mail contamination both nationally and internationally that would warrant special attention.

Given the above stated information and on-going nature of the current information provided by various Federal and International (sic) Agencies **I do not believe a danger exists** pursuant to the Canada Labour Code Part II.” (HSO’s emphasis)

[6] On April 6, 2011, the appellant filed an appeal before this Tribunal of the HSO's decision. An appeal hearing was held in Toronto from March 13 to 15, 2012.

Issues

[7] I must determine the following issues:

- i) Whether the appellant was exposed to a danger as defined under the Code when he exercised his right to refuse to work.
- ii) If a danger existed, whether the danger was a normal condition of employment so as to preclude the appellant from exercising his right of refusal under the Code.

Submissions of the parties

[8] The parties' final submissions were received on May 14, 2012.

Appellant's submissions

[9] The appellant's case consisted of the evidence from Mr Azeez and no other witnesses were called to testify.

[10] In his submissions, the appellant began by arguing that the testimonies and evidence presented by the respondent did not serve to prove that the danger that prompted the work refusal, in this case the risk of being exposed to radiation being emitted from mail coming from Japan, was reduced, eliminated or mitigated by the employer. The appellant stated that the circumstances surrounding his work refusal satisfy the definition of danger that appears in Part II of the Code because any level of exposure to radiation experienced by BSOs while handling mail without protective devices or tools can create a potential hazard, such as the development of a chronic illness.

[11] The appellant referred to the introduction section of the employer's - Emergency Preparedness All Hazards Approach Plan - which, he stated, makes direct reference to the danger posed by radioactive materials:

This section is intended to assist CBSA employees in becoming aware of CBRNE threats and how to respond should an incident occur. These threats could be the result of terrorism or a non-intentional accident. Terrorist activities are of concern; however, each day shipments of dangerous goods are moved by road, rail, water and air into and out of Canada. Some of these goods are products Canadians count on every day, like gasoline and automotive oil. They include potentially hazardous materials like explosives, pesticides, radioactive materials and gases. Officers at Canada's ports of entry must be watchful for potential incidents that could cause harm to themselves and the general public.

[12] According to the appellant, the above section demonstrates that the employer acknowledges that radiation poses a threat to BSOs, even from a non-intentional accident

such as the one in Japan, and that each day, dangerous goods (including radioactive materials) are moved into and out of Canada via postal centers.

[13] According to the appellant, it was established during the hearing before this Tribunal that radiation can pose a risk to the health and wellness of a human being. He submitted that radiation exposure is cumulative, which means that repeated exposure can pose a danger if the acceptable dose limits are exceeded. Radiation, he adds, can lead to different forms of hazards, including cancer.

[14] The appellant stated that on the date of the work refusal, there was no way of knowing whether the mail coming from Japan had been exposed to radiation and he was not issued the necessary equipment (GR135 radiation detector and personal dosimeter), which are owned and operated by the employer, in order to mitigate such a risk. The appellant argued that, unlike other common dangers experienced in the postal stream of customs, such as explosives and chemical or biological substances, radiation cannot be detected through visual indicators, but require special equipment such as the GR135 and personal dosimeters. He stated that this is confirmed by the CBSA's own - Emergency Preparedness All Hazards Approach – Plan- which states under its Radiological Threat section:

Radiological

Without scientific equipment and expert assistance, recognizing radioactive materials is virtually impossible. The onset of symptoms related to a radiological release requires days to weeks, and typically there will be no characteristic signature. Radiological materials are not recognizable by the human senses, and are colorless and odorless. Specialized detection equipment is required to determine the size of the affected area and whether the level of radioactivity presents an immediate or long-term health hazard.

[15] According to the appellant, the employer made no effort to act with due diligence once it became apparent that the situation unfolding in Japan had gotten significantly worse. In his opinion, the extent to which the employer acted with due diligence amounted to nothing more than sending emails and participating in numerous conference calls with Health Canada and other government agencies.

[16] For the appellant, the information gathered and used by CBSA, Health Canada and HRSDC was very general and referred to risks and dangers posed to Canadian citizens but not specifically to BSOs. He argued that BSOs examining Japanese mail would have a much higher degree of exposure to radiation in or on the mail than would a member of the general Canadian population.

[17] The appellant stated that the CBSA never assessed the situation on the frontline of the operation at the Vista Mail Center by examining, screening or using detection tools, such as the GR135 and the dosimeters, in order to properly assess any danger posed by elevated levels of radiation on the mail coming from Japan.

[18] The appellant cited in his submissions a report dated March 29, 2006, from Defence Research and Development Canada in regards to a radiological incident exercise in which CBSA was a participant, where it states that:

The CBSA is investing in technology to detect illicit shipments of radiological and nuclear materials entering Canada. The use of this technology will further reduce the risk that dangerous materials be smuggled into Canada. In order to ensure the safety of its officers, the CBSA issued electronic dosimeters that produce an audible alarm if radiation surpasses a pre-set limit and that keeps track of total amount of radiation exposure. Officers were also issued hand-held radiation detection equipment (GR135s) that are capable of pinpointing exact locations of radiation sources, as well as identifying the specific type of radiation causing the alarm. [Appellant's underlining]

[19] In the appellant's view, this document clearly establishes that the dosimeters issued by the CBSA are meant to ensure the safety of its officers from the dangers posed by radiological and nuclear materials entering Canada. He added that the document does not state that there is "no risk", but rather that there is a risk that can be reduced; the equipment is there to detect the potential danger and then allows for the BSOs and the employer to assess and make an informed decision as to whether or not the shipment poses a danger.

[20] In his submissions, the appellant questioned the claim made by the employer that the levels of radiation were not high enough to pose a danger since no actual readings were taken from the Japanese mail at the Vista Mail Centre. He argued that all of the readings that were taken and assessed as safe by Health Canada were not of the mail, but rather of general areas as a whole. He elaborated that Health Canada radiation detection equipment situated on the West Coast of Canada would have no way of detecting the radiation levels present on Japanese mail located inside the cargo hold of a plane, nor would readings taken around the Narita airport.

[21] The appellant referenced an email sent on March 31, 2011, by the employer's witness, Dr Moir, to Mr Maheux. The appellant points out that in the email, Dr Moir stated that the risk to BSOs is "not likely". According to the appellant, this email indicated that Health Canada was making assumptions based upon the statistical chance of something occurring rather than assessing the situation by monitoring at the site of concern. He also pointed out that in that same email, Dr Moir suggested to the CBSA to have the BSOs wear dosimeters to alert them of any radiation risk in the work place.

[22] In the appellant's view, concern should be warranted when considering the motivations of Health Canada for providing CBSA with generalized radiation data in their assessment of the situation at the Vista Mail Centre. He explained that evidence of this statement can be found in an email sent by Dr Moir on March 31, 2011, to Ms Schopf and Mr Stewart, both of Health Canada. The appellant pointed out that, in that email, Dr Moir referred to setting a dose limit (for radiation) for federal employees so that Health Canada could go back to the CBSA showing that a certain dose limit would not be reached in order to pose a risk. The appellant also quoted a statement from Dr Moir's email, where she stated:

Once I get some clarity I think we are then in a position to go back with a dose limit and info to show that no one would ever receive a dose above that limit – under those circumstances it should be sufficient to “force” people back to work.

[23] According to the appellant, it is apparent from Dr Moir’s email that the goal was to come up with an acceptable dose limit to provide to the CBSA so that Health Canada could assist the CBSA in “forcing” the refusing BSOs back to work. This, he clarified, calls into question the integrity and motivations of the Health Canada and the CBSA since they are more concerned with forcing people back to work rather than coming up with hard data which would serve in protecting the BSOs who are exercising their right to refuse to work in dangerous conditions pursuant to the Code.

[24] The appellant pointed to a previous decision of this Tribunal involving a decision of the absence of danger by a HSO in a work place operated by the CBSA, where the Appeals Officer stated:

29 For that reason, I rescind the decision of health and safety officer Karen Malcolm of absence of danger and issue a direction to the employer because a “danger” exists. Consequently, I am directing the employer to immediately take all necessary measures to make sure that the employees follow the employer’s safety procedures and use any safety material, equipment, devices and clothing intended for the employee’s protection at all time while doing inspection of packages at the Gateway Postal Plant.

30 For the reasons stated above, I rescind health and safety officer Karen Malcolm’s decision of absence of danger. Consequently, pursuant to paragraph 145(2)(a) of the Code, I am directing the employer to immediately take all necessary measures protect any person from the danger by implementing and monitoring the employer’s safety and emergency procedures and the use by the employees of any safety material, equipment, devices and clothing intended for the employee’s protection at all time while doing inspection of packages at the Gateway Postal Plant.

[...]

32 Since the occurrence of this work refusal, the new Part XIX of the Canada Occupational Health and Safety Regulations, Hazard Prevention Program, has come into effect in November 2005. I trust that the CBSA is in compliance with this new regulation and all its sections, such as: Hazard Identification and Assessment; Preventive Measures; Employee Education and last but not least; Program Evaluation. I leave this to a health and safety officer to verify compliance with this regulation.¹

[25] The appellant upheld that, since this decision by Appeals Officer Lafrance, the employer has not taken all necessary measures in order to protect BSOs from the dangers posed by radiation exposure and has not made the necessary equipment readily available

¹ Emerson Waugh and Canada Border Services Agency, OHSTC-08-008.

to BSOs in order to protect their health and safety from radiological dangers while inspecting parcels within the postal stream.

[26] In conclusion, the appellant requested that this Tribunal finds that a danger did exist in the work place, and to direct CBSA to make the necessary changes to procedures, issue and adopt the usage of radiological protective/detection equipment and finally, adopt protocols regarding the protection of BSOs from radiological dangers posed to them when examining mail from Japan or items present in the Canadian customs mail stream.

Respondent's submissions

[27] The respondent's case consisted of the evidence from the following three witnesses: Ms T. Edwards, former manager CBSA Occupational Health and Safety Division, Ms B. Pacheco, at the time of the work refusal, Superintendent, Vista Mail Center and Dr D. Moir, Chief of the Radiation Health Assessment Unit, Health Canada.

[28] Ms Edwards testified about her involvement in the work refusal at issue and the circumstances surrounding it as well as the employer's decision making process in determining the risk level to CBOs at the Vista Mail Center. Ms Edwards also gave evidence about her consultations with Health Canada experts throughout this period.

[29] Ms Pacheco provided evidence about the facility and the operations at the Vista Mail Center in general and she expounded upon the circumstances at time the work refusal and her involvement.

[30] The respondent requested that Dr Moir be introduced as an expert witness following questions posed concerning her *curriculum vitae*, after which, the appellant did not contest the request. Dr Moir was accepted to provide expert evidence about the potential health effects of radiation in the work place occupied by Mr Azeez at the time of his refusal to work. Dr Moir also provided her professional opinion to CBSA and their employees as an official representing the Radiation Protection Bureau (RPB) of Health Canada throughout the work refusal timeframe and she provided evidence about that as well.

[31] In its submissions, the respondent began by alleging that some of the documents on which the appellant relied in his submissions were not introduced as evidence at the hearing before the Tribunal, and that the appellant has not provided a copy of those documents. The respondent requested that the following passages in the appellant's submissions be disregarded by the Tribunal in its deliberations: the Emergency Preparedness All Hazards Approach Plan; and a report alleged to have been prepared by Defence Research and Development Canada dated March 29, 2006.

[32] Concerning the definition of "danger" found in the Code, the respondent submitted that the Federal Court and the Federal Court of Appeal in *Verville v Canada*²

² 2004 FC 767.

and *Martin v Canada (Attorney General)*³, have 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] The respondent also submitted that, 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, 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] The respondent argued that the appellant called no other witness but himself to testify before the Tribunal. Further, it stated that the appellant presented no evidence at the hearing to support his fear that he was exposed to dangerous levels of radiation from handling Japanese mail. In the respondent’s opinion, the appellant’s work refusal was based on his fear that he might be exposed to dangerous levels of radiation, which is reflected in his submissions:

On the date of the work refusal, I had no way of knowing what had or had not been exposed to radiation when it came to examining the mail coming from Japan, let alone what the maximum acceptable limit should have been for exposure for my own health and well-being.

³ 2003 FC 1158 and 2005 FCA 156.

[35] The respondent argued that the appellant presented no medical or scientific evidence regarding the levels of exposure to radiation necessary to result in injury or illness, nor did he introduce any medical evidence with respect to any illness or injury he has suffered as a result of exposure to radiation from mail coming from Japan.

[36] The respondent expanded by referencing the testimony of Dr Moir by pointing out that she indicated that the radiation dose limits that are set by the Canadian Nuclear Safety Commission for nuclear energy workers are 50 mSv (millisievert) per year and the annual limit for members of the general public is 1 mSv. Dr Moir also emphasized that everyone is constantly exposed to radiation in everyday life, from either air-travel, x-rays, the soil, etc., all of which is dependent upon the individuals lifestyle, and that it is impossible to regulate how much radiation exposure any particular person receives.

[37] Furthermore, Dr Moir testified that the RPB was responsible for monitoring the situation following the incident at the Fukushima nuclear plant in order to assess the health implications for Canadians as a result of possible exposure to radiation, including potential impacts on Canadians living or travelling in Japan, as well as potential impacts in Canada. Dr Moir was actively involved in this risk-assessment exercise, working with the Center for Emergency Preparedness and Response of the Public Health Agency of Canada (PHAC), who was assessing the risks to Canadians in Japan and in Canada using data from monitoring stations across the country as well as modelling software. The PHAC provided regular Health Portfolio Situation Reports on the situation in Japan.

[38] Dr Moir testified that she provided daily assessments to the Department of Foreign Affairs and International Trade on the health risks for Canadians in Japan. She testified that the levels of radiation that Canadians were exposed to in Japan were less than 0.2 mSv per year (200 microsieverts). On March 30, 2011, the PHAC's situation report advised that, according to the Canadian Nuclear Safety Commission on March 29, 2011, monitoring stations in Japan, reported low ambient doses rates in Tokyo and other cities in Japan remained at a level that was not considered dangerous to human health, and that there remained no risk to Canadians in Canada.

[39] The respondent submitted that around March 25, 2011, Dr Chernin of Health Canada asked Dr Moir to provide an assessment as to whether there was any health risk posed by employees handling mail originating from Japan following the work refusal of the appellant. Dr. Moir confirmed that there was no health risk to employees handling mail arriving from Japan. On March 29, 2011, CBSA employees in Vancouver were seeking information regarding health risks due to possible exposure to radiation from examining cargo from Japan. Dr Moir's explanation for the lack of any health risk due to possible radiation exposure from mail from Japan is set out in the email below that affirms her testimony at the hearing:

Based on the typical cumulative radioactivity deposition values for Tokyo and other parts of Japan, I can tell you that the estimated annual dose for someone in Tokyo as of today is estimated to be about 140 microSv - one tenth of the public dose limit of 1 mSv/a. **And I can tell you that any contamination of mail or other goods coming from Japan would be much, much lower than this, since that estimated annual dose of 140**

microSv is based on natural background radiation (to which we are all exposed normally) as well as any radiation from the Fukushima plant deposited over the last 19 days - unless the mail has been sitting outside for that time period there is absolutely no way it would have accumulated sufficient radioactivity 24 hours a day over the course of an entire year (365 days) - this is not the likely scenario for CBSA workers. Thus I would say that no federal employee or member of the public should have a concern about handling mail from Japan. [Emphasis by respondent]

[40] At the hearing, Dr Moir testified that a CBSA employee would have to have been in constant physical contact with Japanese mail 24 hours a day in order to be exposed to the estimated dose of 140 microSv per year, which is only roughly 14% of the radiation dose limit set by the Canadian Nuclear Safety Commission for members of the general public of 1 mSv per year. This level of potential exposure cannot “reasonably be expected to cause injury or illness to a person exposed to it” and does not rise to the level of a “danger”. The respondent submitted that Dr Moir’s testimony on this subject was not contradicted by any evidence introduced by the appellant at the hearing.

[41] On another note, the respondent argued that the appellant’s reference to the Tribunal’s decision in the case of *Emerson Waugh* does not assist the Tribunal in determining the question before it on this appeal. The incident that gave rise to the work refusal in that case was the discovery of a grenade in a package on the sorting belt, leading to the evacuation of the facility. In that circumstance, the Tribunal found that there was a danger, and directed the CBSA to ensure that employees follow existing safety procedures and use safety materials, etc. The respondent contended that there was no finding of a danger posed by potential exposure to radiation from examining mail from Japan.

[42] The respondent concluded that the appellant has not established the existence of a “danger” within the meaning of the Code. Mr Azeez’s assertion of possible exposure to radiation on mail originating in Japan following the Fukushima nuclear power plant accident is based solely on hypothesis and conjecture. He presented no evidence at the hearing of his appeal to substantiate the existence of a reasonable expectation of injury or illness from examining Japanese mail. On the contrary, the expert evidence of Dr Moir was all to the effect that there was no health risk associated with handling mail from Japan, even if an employee such as the appellant was in contact with Japanese mail for 24 hours a day, 365 days per year.

Appellant’s response

[43] In his response, the appellant pointed out that the respondent’s references to the definition of “danger” as found in the Code and to cases held before the Federal Court suggest that in order for a danger to be present, there must be a reasonable chance of an injury occurring, not just a possibility.

[44] On that point, the appellant objected to the respondent’s conclusion that he was not able to satisfy this minimum standard of proof in this case. On the contrary, the appellant believes that any reasonable person having to decide whether the mail coming

from Japan after the nuclear disaster presented a danger to the workers would put into use the dosimeters, the GR135, and scan all incoming mail from Japan throughout the duration of the crisis. In the appellant's opinion, the employer failed to make a reasonable effort to prove that the mail presented no danger. He reiterated that the employer and the HSO instead made a choice to rely on the statistical data in order to come to the conclusion that the mail presented no danger to CBSA officers.

[45] Countering the respondent's reference to the definition of danger as per the Code, the appellant submitted that the HRSDC's website offers a different definition what a danger constitutes, which reads as follows:

Danger is a situation, actual or potential, which requires that the employee be immediately protected from the hazard, condition or activity in order to prevent a probable injury or illness from occurring.⁴

[46] The appellant argued that there is a potential for a danger in this case since he was not immediately protected by the employer from the hazard (the radiation) during the activity (examining and handling the Japanese mail) which has a probability of causing injury or illness.

[47] Furthermore, the appellant stated that the employer provided no effective risk mitigations, other than statements and data that were not directly related to the mail in question, but instead turned to government employees that were not present at the scene and did not directly evaluate the items in question with the proper radiation detection devices. In addition, the depth and degree of the hazard was well known worldwide. The situation presented a significant danger of illness or injury to those exposed to radiation without the proper detection tools to make a reasonable assessment of a danger.

[48] As a result, the appellant argued that it is reasonable to expect that a person would conclude that, since radiation is invisible to human senses and that it is a known cause of severe illness or death, one would use all reasonable detection devices to properly assess and make an informed conclusion to the presence of danger.

[49] The appellant believed that the respondent's remarks regarding the fact that the appellant served as his only witness are prejudicial and should not be taken into consideration in this decision. He added that by being self-represented, he was not afforded the same benefits as the respondent, such as a legal counsel paid for by the government, along with applicable expenses; full access to witnesses and expert witnesses and the ability to pay for their travel expenses, and the ability to pay to have employer observers/consultants attend the hearings.

[50] The appellant also opposed the respondent's comments that no medical evidence was submitted to prove illness. He stated that even if he had sought a medical opinion from a physician, they would have had no way of assessing the level of exposure to radiation and make medical conclusions as to his medical state. This is due to the fact, he

⁴ <http://www.hrsdc.gc.ca/eng/labour/ipg/062.shtml>

claimed, that the employer failed to provide radiation detection devices to the BSOs, which would have provided a physician with the necessary data to make a proper medical assessment of an officer's condition.

[51] In his response, the appellant asserted that the RPB's mandate is to protect the Canadian population in general. However, it does not protect or manage the risks of radiation to BSOs specifically. The appellant argued that such a responsibility relies on the employer under Part II of the Code, which specifically states in part that:

General duty of employer

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

Specific duties of employer

125(1) Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,

(l) provide every person granted access to the work place by the employer with prescribed safety materials, equipment, devices and clothing;

(q) provide, in the prescribed manner, each employee with the information, instruction, training and supervision necessary to ensure their health and safety at work;

[52] In the appellant's opinion, since it is the responsibility of the employer to provide BSOs with the information, training and equipment, the relevance of the RPB in this appeal should be dismissed. He stated that the RPB did not come to assess the scene of the work refusal, and that their data and contribution to the employer was strictly statistical and based on chances and probability for the general population, not on facts present at the Vista mail facility. The appellant maintained that the same applies to Dr Moir's testimony, claiming that her data was based on estimates and assumptions and the information she provided had no direct correlation to the Japanese mail present at the Vista facility.

[53] The appellant responded to Dr Moir's statement that it is impossible to regulate how much radiation an individual is exposed to, arguing that CBSA has used radiation detection devices in order to minimize and mitigate the dangers posed by radiation to its employees in the past. He added that since the danger has been identified to occur during customs examinations (where radiation detection devices are used), the employer cannot deny BSOs access to the same detection equipment when they are performing the exact same work function.

[54] In response to the respondent's submission that the *Emerson Waugh* decision is not relevant to this case, the appellant argued that the decision is quite clear when it stated that a danger exists and it directed the employer to protect BSOs from all hazards in the

work place. Since the employer possesses and uses radiation detection equipment in the region, then it is bound to follow the direction issued in *Emerson Waugh*. The appellant stated that, to this date, the employer has done nothing to reduce, mitigate or eliminate the dangers posed by radiation in the work place.

Analysis

[55] In my analysis, I will first have to determine whether the appellant was exposed to a danger when he exercised his right to refuse to work on March 24, 2011. Second, if I find that a danger did exist, I will have to determine whether the danger was a normal condition of employment so as to preclude the appellant from exercising his right of refusal under the Code. Last, if I determine that the danger is not a normal condition of employment, I will have to determine whether it is warranted to issue a direction of danger under subsection 145(2) of the Code.

[56] Before I begin my analysis, I need to address the appellant's concerns regarding the fact that he was not represented by legal counsel in this case and that he should not be disadvantaged because of his lack of experience with these types of matters. I wish to emphasize that the greatest procedural flexibility is always granted to unrepresented parties to an appeal and that I have treated the appellant's submission as such where it was warranted.

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

[57] Subsection 122(1) of the Code defines a "danger" 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.

[58] In his reply submissions, the appellant referred to a different definition of danger from HRSDC's website. Nonetheless, I must insist that the appellant's right to appeal a decision of the absence danger issued by an HSO is strictly derived from subsection 129(7) of the *Canada Labour Code*. Consequently, I must adhere to the definition of "danger" as defined by the Code, as well as its interpretation by the courts, in order to determine if a danger was present on the day of the appellant's work refusal.

[59] To better appreciate the scope of the definition of danger as per the Code, I will rely on the interpretation provided in *Verville v Canada*⁵ and *Martin v Canada (Attorney General)*⁶, where the Federal Court and the Federal Court of Appeal determined that to find that a "danger" exists:

⁵ 2004 FC 767.

⁶ 2003 FC 1158 and 2005 FCA 156.

- 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.

[60] 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, 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.

[61] To determine if a danger existed for the appellant on the day of the refusal, I have to ask myself whether the potential hazard of being exposed to mail coming from Japan following the Fukushima nuclear incident could reasonably have been expected to cause an injury or illness to employees at the Vista Mail Center.

[62] There is common knowledge of the potential hazardous effects on the human body as a result of radiation exposure. However, what is crucial to distinguish in the issue at hand is not whether or not on that day of the refusal there was a risk that the appellant could be exposed to radiation from the mail coming from Japan, but whether or not the levels of radiation coming from that mail were sufficiently elevated to be considered hazardous to the appellant.

[63] I am convinced from the evidence presented to me that a certain level of exposure to radiation in an individual’s daily life is unavoidable and can vary depending on an individual’s occupation or activities. Accordingly, it follows that exposure to radiation does not automatically pose a health risk and that certain levels of exposure are not

considered to be harmful to humans. I also recognize that it is impossible to evaluate and predict exactly how much radiation one will be exposed to at a given moment.

[64] I would like to address the respondent's argument about the fact no medical documentation was presented by the appellant to support his claim that he might have been in contact with hazardous levels of radiation from Japanese mail. I agree with the argument, in part, that this fact was not relevant to this case, not because the employees were not provided with the detection equipment, as put forth by the appellant, but because the effects of exposure to harmful levels of radiation can take a very long time to manifest themselves and it is unlikely that a physician could have provided a proper diagnosis for the appellant.

[65] The appellant argued that CBSA relied on information provided by Health Canada to assess whether the employees at the Vista Mail Center were at risk of being exposed to hazardous levels of radiation by handling the mail coming from Japan. As well, because the information provided by Health Canada referred to risks and dangers posed to Canadian citizens but not specifically to BSOs at the Vista Mail Center, the appellant claims that the employer did not act with due diligence.

[66] On that subject, I am convinced by evidence presented to me that Health Canada has established strict guidelines to limit the amount of exposure to radiation allowed in a given year to individuals whose occupation involves a potential exposure to higher than average levels of radiation. Health Canada is the recognized authority on these matters in this country and no evidence was presented to me to doubt the efficiency of the standards it has set for preventing injuries or illnesses from exposure to radiation.

[67] On and around the day of the appellant's work refusal, the RPB was responsible for monitoring the situation at the Fukushima nuclear plant and to assess the health implications for Canadians in Japan and in Canada as a result of possible exposure to radiation. The Center for Emergency Preparedness and Response of the PHAC was assessing those risks using data from monitoring stations across the country as well as modelling software and provided regular Health Portfolio Situation Reports on the situation in Japan. I have heard no evidence to support the idea that the data and the methods used by those organizations were improper or insufficient to correctly assess the threat of radiation exposure for Canadians in Japan or in Canada.

[68] Furthermore, Dr Moir testified that the level of radiation that Canadians were exposed to in Japan following the incident was less than 0.2 mSv per year, a level not considered dangerous to human health. Dr Moir's explanation for the lack of any health risk due to possible radiation exposure on mail from Japan to CBSA employees in Vancouver was that the "annual dose for someone in Tokyo as of today is estimated to be about 140 microSv", which represents one tenth of the public dose limit of 1 mSv a year. She added that "any contamination of mail or other goods coming from Japan would be much, much lower than this" and that "unless the mail has been sitting outside for that time period (19 days) there is absolutely no way it would have accumulated sufficient radioactivity 24 hours a day over the course of an entire year." Again, I was not presented

with any evidence to contradict those statements and I see no reason to doubt their validity.

[69] The appellant has made numerous claims that the CBSA and Health Canada were relying solely on statistical data and hypothesis to assess the situation on the ground in Japan and the potential of radiation exposure to individuals in Canada. On that point, I believe one should not confuse the methods used by scientist to collect data and make assessments in these types of situations with mere conjectures or assumptions. From the evidence that was presented during the hearing, it was made clear to me that the assessments provided by both Health Canada and the RPB were made according to well established scientific standards and the CBSA and HSO Iacobellis were justified to rely on those assessments to evaluate the risk at the Vista Mail Center.

[70] Consequently, knowing that the levels of radiation present on the ground in Japan were not sufficiently elevated to contaminate an object being sent to Canada with hazardous levels of radiation, I believe that it was perfectly reasonable to conclude that the mail coming from Japan did not represent a hazard to the appellant and the other employees at the Vista Mail Center. While it is true that radiation poses a different risk than biological or chemical hazards due to the fact that it does not have the usual signs associated with a hazardous substance, such as odor or a visual indicator, the reality is that at the time of the work refusal, there was no data suggesting that hazardous levels of radioactivity could be present in the mail coming from Japan. On the contrary, all the data provided by Health Canada and the RPB showed that the radiation levels in and coming from Japan were well under the acceptable levels for an individual over the course of a year.

[71] In regards to the concerns raised by the appellant alleging that Health Canada and CBSA's goal was to force the refusing BSOs back to work rather than protecting them, I received no convincing evidence to support that claim other than the appellant's interpretation of Dr Moir's comment in an to Health Canada. In any case, this allegation does not negate the fact that the data provided by Health Canada to CBSA clearly indicated that the levels of radiation that could possibly reach Canada, by mail from Japan or otherwise, were not considered hazardous to humans.

[72] In light of these facts, I believe it is fair to conclude that the level of potential exposure to radiation coming from the mail from Japan at the Vista Mail Center could not have reasonably been expected to cause injury or illness to the appellant on the day of the refusal, and consequently does not meet the definition of "danger" as per the Code.

Decision

[73] For these reasons, I confirm the decision of the absence of danger rendered by HSO Iacobellis on March 27, 2011.

Michael Wiwchar
Appeals Officer