

CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY

Forest Products Terminal Corporation Ltd.

and

International Longshoremen's Association (ILA),
Local 273

applicants

Decision No. : 03-13, 03-014, 03-015
June 20, 2003

This case was heard by Michèle Beauchamp, appeals officer, in Saint John, New Brunswick, on December 10, 2002.

Appearances

For the employer

Bruce Harding, General Manager, Operations, Forest Products Terminal Corporation Ltd.

Sandy Thompson, Co-Chair, Health and Safety Committee, Forest Products Terminal Corporation Ltd.

Doug Beckington, Co-Chair, Health and Safety Committee, Furncan Marine

For the employees

Michael Godin, ILA, Local 273

Brian Straight, ILA, Local 273

Pat Riley, Secretary-Treasurer and Business Agent, ILA, Local 273

Brian Duplessis, President and Business Agent, ILA, Local 273 and Co-Chair, Health and Safety Committee, Forest Products Terminal Corporation Ltd.

Health and Safety Officers

Gavin Insley, Transport Canada (TC) Marine

Ian Rennie, TC Marine

Stephen Cann, TC Marine

[1] This case concerns the three following appeals, made under Part II of the *Canada Labour Code* (the *Code*):

- Appeal made by the employer, Forest Products Terminal Corporation Ltd., under subsection 146(1), of a direction (Appendix A) issued in writing on November 21, 2000 by health and safety officer Stephen Cann;
- Appeal made by Michael Godin, an employee of Forest Products Terminal Corporation Ltd., under subsection 129(7), of a decision of absence of danger rendered in writing by health and safety officer Gavin Insley on February 15, 2002, following the employee's refusal to work;
- Appeal made by Brian Straight, an employee of Forest Products Terminal Corporation Ltd., under subsection 129(7), of a decision of absence of danger rendered in writing by health and safety officer Ian Rennie on March 18, 2002, following the employee's refusal to work.

[2] The appeal made by Forest Products Terminal Corporation Ltd. concerned the following direction issued by health and safety officer Stephen Cann under subsection 145(1) of the *Code*:

The said Safety Officer is of the opinion that the following provisions of the *Canada Labour Code*, Part II, are being contravened:

1. *Canada Labour Code* Part II 125.(1)l
2. *Canada Labour Code* Part II 125.(1)w
3. *Marine Occupational Safety and Health Regulations* Part 10.4

The employer has failed to ensure that all employees and all persons granted access to the workplace have and use Protective Headwear

Therefore, you are HEREBY DIRECTED, pursuant to subsection 145(1) of the *Canada Labour Code*, Part II, to terminate the contraventions no later than November 21 2001.

[3] The appeal made by employee Michael Godin concerned the decision of absence of danger issued by health and safety officer Gavin Insley on February 15, 2002, after his investigation of Mr. Godin's refusal to work.

[4] Mr. Godin refused to work for the following reasons, as stated in health and safety officer Insley's investigation report:

Mr. Godin stated that he did not feel safe with the safety hat on, that it blocked his vision, that there had been another person killed with a hard hat on and he did not want to be a statistic. He stated that he had Emphyzema and that, with the hat on, he could not wear the hood of the thermal coveralls that he had on, that this would affect his health as he could not keep his head warm.

[5] The appeal made by employee Brian Straight concerned the decision of absence of danger issued by health and safety officer Ian Rennie on March 18, 2002, after his investigation of Mr. Straight's refusal to work.

[6] Mr. Straight refused to work for the following reasons, as stated in health and safety officer Rennie's investigation report::

It (wearing the hard hat) restricted his mobility and flexibility of movement when hooking up wood pulp onto the spreader. The ship was rocking and it was causing problem.

[7] The work refusals made by the two employees were directly related to the direction that had been issued previously to their employer, Forest Products Terminal Corporation Ltd., on November 21, 2001. Forest Products Terminal Corporation Ltd. appealed that direction to an appeals officer, but nevertheless complied with it, as required by the *Code*, until a decision is rendered about it.

[8] Because of the direct link between the three cases, I held two pre-hearing teleconferences with the parties and the health and safety officers concerned, on October 16 and 24, 2002. The purpose of these teleconferences was mainly to discuss if the three appeals would be dealt with by holding three separate hearings or by holding a single one that would deal with the three issues.

[9] The parties were of the opinion that it would be preferable and efficient to hold one single hearing dealing with the three issues. I agreed with them and a hearing date was set. Because their position on the issue of longshoremen having to wear hard hats was mainly similar, the parties also requested that the hearing be informal, allowing the parties to discuss the issues as well as express and question their opinions and positions openly. I also agreed to their request.

[10] The following sections present a summary of the circumstances that led, first, to the issuing of the direction and, second, to the rendering of the two decisions of no danger by the health and safety officers.

Circumstances that led health and safety officer Stephen Cann to issue a direction to Forest Products Terminal Corporation Ltd.

[11] Health and safety officer Stephen Cann established the following facts concerning the circumstances that led him to issue a direction to regarding protective headwear. They are reproduced here from his investigation report and testimony at the hearing.

[12] A Forest Products Terminal Corporation Ltd. superintendent contacted the Saint John Marine Safety Office on November 20, 2001 regarding the loading of the MY BBC Japan. Health and safety officers Stephen Cann and Lionel Comeau visited the BBC Japan on that day, to ascertain its stability condition and assess the ship crew's ability to competently discharge their duties with respect to the positive stability necessary to unload the vessel safely.

[13] Workers were discharging the cargo, consisting of assorted well drilling components. The size of these components was irregular and in some cases, substantial lifts had to be done. The largest and heaviest of these lifts required the use of both ship cranes in a tandem lift and the transfer of water ballast to maintain the angle of heel of the vessel within acceptable limits.

[14] Weather conditions were overcast with moderate temperatures and light winds. The main deck rail of the vessel was approximately at the height of the wharf and the vessel rose relative to the dock as the tide was coming in and the vessel was being unloaded.

[15] The crane capacity and certification were reviewed, as well as the stability condition of the vessel required for both the actual lifts taking place and the proposed heaviest lifts. The information provided appeared to be in order, but while reviewing it, the health and safety officers received word that one of the cranes had shut down due to a heeling alarm.

[16] As he was observing the crane operation and the work being done by the stevedores in the cargo hold and on shore, health and safety officer Cann came to realize that the stevedores were exposed to overhead hazards. This was particularly true for this vessel and cargo, as some shifting of the cargo had taken place during transit and the vessel, being relatively small, listed appreciably with each cargo lift.

[17] The shifting of the cargo during the voyage had damaged some containers. As a result, there were loose bits of wood and other materials in and on the lifts. The irregular shape of the cargo had also necessitated the use of a large amount of cargo securing material during the initial stow. The movement of the vessel during the lifts increased the swing of the suspended loads and thus increased the possibility of loose materials coming off the load.

[18] The health and safety officers went from the main deck to the bridge, to observe the operation and the master's use of the wing tanks to stabilize the vessel during the lifts. They then proceeded to the main deck of the vessel to again observe the crane operation.

[19] After speaking with superintendent Daryl Bettle about the cranes and the stability condition of the vessel, the health and safety officers left the work site at 17:00 p.m. Health and safety officer Cann indicated to superintendent Bettle that he felt that the area required employees to wear a hard hat and that he would examine the situation with a view to issuing a direction if it was required.

[20] On November 21, after reviewing the safety meeting minutes from Forest Products Terminal Corporation Ltd., health and safety officer Cann returned to the employer's office and issued a direction to Bruce Harding, General Manager Operations, regarding the supply, training and use of appropriate protective headgear for employees when they were working under overhead hazards.

[21] According to health and safety officer Cann, Mr. Harding gave him documents regarding a work refusal decision issued by a health and safety officer concerning the protective headwear issue and the subsequent ruling made by the Canada Industrial Relations Board (CIRB)¹. Mr. Harding indicated that the stevedores had used this ruling as an indication that the CIRB did not require the use of hard hats at the work site.

[22] Health and safety officer Cann was not aware of this ruling. However, after carefully reviewing the documents and discussing the issue with his colleagues, he did not think that the employees or the employer had any firm grounds to come to the conclusion that the CIRB's decision did not require the use of hard hats at the work site. Furthermore, to his knowledge, the parties had not fully acted on the CIRB's recommendations.

[23] On December 5, health and safety officer Cann received information from Mr. Harding regarding the direction that he had issued. On December 10, he wrote back:

... Thank you for your confirmation that, with respect to employees, item one has been completed and item two is to be completed by December 31 2001. The code applies to all persons granted access to the workplace by the employer and thus includes any persons involved in cargo operations related to your company's operations.

In the absence of a work site wide requirement for protective headwear all parties must be aware of the specific areas and or types of operation where protective headwear is required. These requirements must have the input of the Work Place Health and Safety Committee, be in written format and be made available to all parties, including Health and Safety Officers from HRDC and Marine Safety. This will allow effective onsite monitoring and the opportunity to discern whether a non-compliance is employer or employee related.

¹ *Samuel L. McGuire and Forest Products Terminal Corporation Ltd.*, Canada Industrial Relations Board, Decision no. 28, August 13, 1999.

I believe this approach has the distinct disadvantage of potentially exposing employees to hazards that may be of a transient nature and thus not formally identified. As an employer you are required to protect from all hazards and thus would be liable regardless of where on the work site the incident occurred.

I must also reiterate that the obligation of the employer to effectively protect the employee from head injury hazard remains paramount. Section 122.2 of the code identifies preventive measures as follows;

Preventive 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 of ensuring the health and safety of employees.

Given this goal it may be prudent, as an employer to explore other proactive measures to achieve the protections required.

I do not believe any perceived lack of uniformity in application of the Code would relieve the employer or indeed myself as a Health and Safety Officer from doing what is required to be in accordance with the Code requirements.

Circumstances that led health and safety officer Gavin Insley to render a decision of absence of danger to Michael Godin

[24] Health and safety officer Gavin Insley established the following facts concerning the circumstances that led him to render a decision of absence of danger to Michael Godin, after investigating Mr. Godin's refusal to work because he had to wear a safety hat. They are reproduced here from his investigation report and testimony at the hearing.

[25] At the time of the work refusal, the vessel M. V. Celine was being loaded with corrugated medium rolls of paper product, using scissors-type head clamps, suspended from a spreader that was hanging from the ship's crane.

[26] Mr. Godin was working on the dock, placing the head clamps in place over the top of the paper rolls. The lifting gear, the spreader and the crane hook were suspended around and above his work location. The work did not start until 20:45 p.m. and the operation was being completed under artificial light, but no reference was made to the lighting during the investigation.

[27] The employer's representative, superintendent Bettle, asked Michael Godin to wear the safety hat issued to him by his employer. After discussing it with him, the employee invoked his right to refuse because he considered that wearing it posed a danger to his safety. Consequently, Mr. Bettle moved the proceedings to Forest Products Terminal Corporation Ltd's office, to conduct an investigation.

[28] Michael Godin stated that he did not feel safe when wearing the safety hat, that it blocked his vision, that someone had been killed with a hard hat on and that he did not want to become another statistic.

[29] Michael Godin also declared that he has emphysema. Wearing the hard hat prevented him from putting on the hood of his thermal coveralls, and this, he feared, could affect his health because he would not be able to keep his head warm. He also felt that the liner issued with the hat did not keep his neck warm.

[30] During health and safety officer Insley's investigation, Mr. Godin explained how his vision was restrained by gesturing with his hand around the peak area of the hat. Asked if he had tried wearing the hat with the peak to the back, he said that he had, but that the peak was catching on his winter clothes and prevented him from lifting his head back.

[31] Mr. Godin said that he had used the hat liner provided by the employer, but that it did not keep him as warm as his hood, especially around the neck. He did not use a scarf on top of the hat liner nor leave his hood unzipped and flat to his back, because he also thought that it would not work well.

[32] The employees had been issued a safety hat North A89/ A89R, ANSI-289.1-1997, class E Type II, LM102043 294.1-92. The liner issued was a North Winterliner Model WL-1.

[33] At the time of the refusal, *i.e.* 20:50 p.m., the temperature in the Port of Saint John was around -10° C and the wind was light. Michael Godin was wearing heavy thermal coveralls over a fleece or knit type sweat top, also with a hood. He was wearing a knit type toque to cover his head. He was heavily clothed for the night winter weather.

[34] Health and safety officer Insley thought that this type of clothing would restrict the employee's movement in any way. With care and attention to his choice of clothing, the employee could both keep warm and have the freedom of movement required to perform his duties while wearing a safety hat.

Circumstances that led health and safety officer Ian Rennie to render a decision of absence of danger to Brian Straight

[35] Health and safety officer Ian Rennie established the following facts concerning the circumstances that led him to render a decision of absence of danger to Brian Straight, after investigating Brian Straight's refusal to work because he had to wear a hard hat. They are reproduced here from his investigation report and testimony at the hearing.

[36] At the time of Brian Straight's refusal, the work being accomplished was the loading of wood pulp bales on board the vessel Looiersgracht.

[37] Superintendent Gerald Inglehart advised all foremen at 7:30 a.m. that there was to be no smoking due to the dangerous goods onboard the vessel and that everyone was to wear their hard hats. At 13:15 p.m., he further instructed the workers who were not wearing hard hats them to put them on.

[38] Brian Straight was namely told to wear his hard hat at 11:00 a.m. He put it on once or twice then took it off. At 13:00 p.m., he was told again to put it on or to go home. He questioned Gary Allport, the Operations Manager, about continuing to work without wearing the hard hat, and was told that doing so would result in disciplinary action.

[39] At 13:25 p.m., superintendent Inglehart told Brian Straight to wear his hard hat. When Brian Straight refused, he was removed from the job. An investigation was conducted in his presence by Sandy Thompson, employer co-chair of the health and safety committee, and Jim Spragg, union representative.

[40] Gary Allport had determined that Brian Straight was refusing to wear the hard hat while working because he felt that it affected his mobility and he advised two replacement employees of the refusal and of the company's policy requiring that employees wear hard hats.

[41] Brian Straight stated that he was not refusing to work. As the vessel was rocking and he was working inside the hook-up ramps with another employee on the outside, he had difficulties hooking up the bundles. So he was refusing to wear the hard hat because it restricted his ability to move around and to hook up the wood pulp bundles.

[42] Health and safety officer Rennie established that the vessel was rocking during the loading operation, partly because of the load condition of the vessel and the maneuvering of the two ship cranes being used to load the vessel. Neither the sea, nor the wind or the weather affected the vessel or the loading operation. The hooks for the wood pulp spreaders had to be worked by two persons at approximately chest height, with the spreader suspended overhead.

[43] After investigating, health and safety officer Rennie decided that wearing a hard hat during the cargo loading operation did not constitute a danger or a hazard to Brian Straight. In health and safety officer Rennie's opinion, there was a hazard of head injury from the overhead wood pulp spreaders and the suspended hooks, and a hard hat provided protection against that hazard. The proper wearing of a hard hat, in conjunction with proper protective clothing, would not restrict the ability to maneuver of employee Brian Straight.

Position of the parties on the three appeals

[44] The employer, Forest Products Terminal Corporation Ltd., the union, Local 273 of the International Longshoremen's Association, which represented employees Michael Godin and Brian Straight for the appeal, and the local joint health and safety committee basically held and submitted the same position on the issues of the employer having to require longshoremen to wear hard hats on the waterfront and longshoremen having to wear them.

[45] On March 12, 2002, Brian Duplessis and Doug Beckingham, cochairmen of the joint local health and safety committee, submitted the following brief to the Appeals Officer in response to the direction issued by health and safety officer Steven Cann to Forest Products Terminal Corporation Ltd. They wrote:

Let us first remark that we take the Health and Safety of our fellow workers very seriously. We have had some difficult items to deal with over the years, including fatalities, on the Saint John Waterfront.

The latest fatality, and hopefully the last, occurred on October 21, 1991. It was the result of an employee being struck by a lift truck. Prior to this fatality there were a number of accidents involving employees required to walk around the terminal. The Health and Safety Committee, after reviewing all accidents, agreed with the recommendation of the accident investigation to require all employees that were required to walk around the terminal to wear a high visibility safety vest. (See Encl. 1)

We have had, over the years, a rash of foot injuries. After reviewing a number of accident reports involving this type of injury, the Joint Health and Safety Committee recommended that every person working on the Saint John Waterfront would be required to wear steel toed work boots. The Employers Association, through the Joint Manpower Committee, issues each employee a \$100.00 voucher for the purchase of this protective footwear.

The other fatality happened on May 17th, 1979 on board of MV Troll Lake. A coroner's jury recommended that "men working in the holds of vessels have a clear, unobstructed view of all loading or unloading operations going on around them." (See Encl. 2, par. 3 & 4)

The reason that we have started our submission this way is to show that when there is an area of concern, i.e.: a recent number of incidents that warrant special attention, then the Joint Health and Safety Committee makes a recommendation(s) to prevent any other incidents.

Please, don't think that the only time that we act is after there is an incident because that is not true. We are constantly reviewing our work areas.

We must say that the comments of Health and Safety Officer Steven Cann's concerning the Local's interpretation of Mr. J. Paul Lordon (See Encl. 3, par. 9) could be interpreted in such a way as to indicate that safety hats are not being worn anywhere on the Saint John Waterfront. This is not true, after doing a risk analysis, safety hats are worn on all container vessels while loading or unloading operations are taking place. Again, we must point out that it was the Joint Health and Safety Committee's recommendation to have the wearing of hard hats mandatory while working on this job.

The committee, while doing the risk analysis, had discovered that there were a few accidents that involved Shipliners performing the lashing skill. There are container plugs, that weigh approx. 4 - 6lbs, lashing rods that vary in weight and other gear that may be moving overhead in the same proximity of the workers. It was with this in mind that the Committee recommended that wearing of the hard hats be mandatory by everyone on these vessels and on the wharf. (See Encl. 4)

The Committee also recommends that hard hats is a requirement, in any area, when there is general maintenance being carried out overhead and there is a risk of tools etc. falling. (See Encl. 4)

In carrying out our risk analysis, we consulted with workers in other major ports. The consistent position expressed by all ports is that flexibility and common sense should prevail in applying the appropriate legislation.

We must also point out that no one knows the work area better than the employees. There are several work procedures in place aimed at reducing the risk of any injury to the employees, i.e.: loose items such as hobs, air bags, risers etc. are not to be placed on top of slings, they are to be slung separately. (See Encl. 5)

We would ask you to allow us the opportunity to continue to address our safety issues and make the recommendations that best address these issues.

[46] On March 25, 2002, in a letter to the Appeals Officer, Pat Riley, Business Agent and Secretary Treasurer of ILA Local 273, expressed his union's support to the appeal filed by Forest Products Terminal Corporation Ltd. in respect of the direction issued by health and safety officer Cann. He wrote:

As the union for employees working in the longshoring industry at the Port of Saint John, I.L.A. Local 273 wishes to support the appeal filed in respect to the Direction issued by Health and Safety Officer Stephen Cann on November 21, 2001.

The Port of Saint John Employers Association / International Longshoremen's Association Local 273 Joint Health and Safety Committee has our full support with regard to the risk analysis that it has conducted and the position that it has adopted regarding the wearing of hard hats at the Port of Saint John. We are aware that the risk analysis was conducted in a most professional manner, taking into consideration a review of all relevant accidents, interviews with port employees and port employers and a study of information from local, national and international sources.

Each work site at the Port of Saint John was examined. Every individual job was scrutinized. The risk of head injury was the focus of the analysis.

Consequently, it was determined by the Joint Health and Safety Committee that the wearing of hard hats at the Port of Saint John should be mandatory on certain jobs; this consistent with the *Canada Labour Code* legislative requirement. For example, an employee sitting in the cab of a truck would not be required to wear a hard hat; an employee working near containers which utilize container plugs would be required to wear one.

The Joint Health and Safety Committee is, in our view, to be commended for taking that position. Since 1979, when Brother Maurice Cormier was killed, there has been widespread and steadfast resistance to the wearing of hard hats at the Port of Saint John.

Witnesses to Brother Cormier's death had indicated that he, while wearing a hard hat in the hold of a vessel, had walked out from under the wing of the hold and then been killed by a falling roll of linerboard. Before proceeding out from underneath the wing, witnesses had seen him look up and erroneously determine that no sling was overhead. His vision had apparently been obstructed by his hard hat and a coroner's jury came to that same conclusion. The same jury also recommended that men working in the holds of vessels have a clear, unobstructed view of all loading or unloading operations going on around them. That recommendation was consistent with the advice that had been passed on from generation to generation of longshoremen, it being that: "A longshoreman should always keep one eye on his work and the other on the danger overhead."

From that day forth, longshoremen were united in their resistance to allowing the Port of Saint John to be declared a hard hat area. Because the choice presented was either to wear a hard hat everywhere at the port or wear one nowhere, longshoremen were totally convinced that the latter was the safest option. Longshoremen maintained that stance throughout the years until 1997. We would note that they supported that stance by referencing the *Canada Labour Code* exemption for utilizing a safety device when that device would create more of a hazard than it would protect the user. We would also note that our position was well known to both Labour Canada and Transport Canada and that neither department enforced the wearing of hard hats throughout those years.

For many of the early years, the Joint Health and Safety Committee did enforce a recommendation made by it which required that anyone wearing any type of hat, that obstructed their overhead vision, was required to either take it off or turn it around backwards. Unfortunately, that recommendation lost its priority as new Committee members and new issues came onto the scene. On a lighter note, the Joint Health and Safety Committee probably also lost the opportunity to take credit for the fad that exists today which sees people wearing their hats backwards to be stylish.

In any event and in 1997, the hard hat issue received a new perspective. The risk analysis suggested by Labour Canada and conducted by the Joint Health and Safety Committee provided a common sense approach to identifying specific jobs that required a hard hat as opposed to anywhere at the Port of Saint John.

Moreover, it diffused the concern about wearing a hard hat when it is more of a hazard than it is a safety device.

That is the biggest difficulty that we have with Health and Safety Officer Stephen Cann's Direction. It returns us to the days of the hazard concern and it is for that reason, more than any other, that we sincerely believe the Direction should be reconsidered. We would submit also that its generality clearly goes beyond the intent of the *Canada Labour Code*.

I.L.A. Local 273 has nothing but respect for the *Canada Labour Code* and those charged with the responsibility of applying it. The longshoring industry is inherently dangerous. Statistics Canada data has determined that it is second to mining with regard to workplace deaths per capita. When you couple that data with the number of accidents per capita, the longshoring industry is arguably the most dangerous. We quite simply need legislated protection and strong enforcement if our members and their families are to receive the necessary protection. That we sincerely believe is a consistent position that we have maintained throughout the years since 1979 and is a consistent position that we will maintain into the future.

In closing, we would ask your consideration of the particular cargoes handled by the Port of Saint John and their relevance to the hard hat issue. Every port, we would suggest, should be looked at in regard to the different cargoes it handles and the loading methods and equipment thus required. A hard hat won't save anyone from a falling roll of liner board but it could prevent a serious injury from a falling container plug. Not all ports handle the same cargoes.

[47] At the hearing, the employer and the union basically jointly submitted the position presented in the correspondence mentioned above. They both strongly objected to having a general direction requiring that hard hats be worn everywhere.

[48] They referred to the employer's accident summary reports from 1997 to 2001, to confirm that in that period, only three head injuries were recorded, and that, uniquely in 1998.

[49] They also made reference to the decision of no danger issued by health and safety officer Luc Sarrasin following a refusal to work related to protective headwear in 1997. They mentioned that the joint local health and safety committee had proceeded to do a risk assessment based on accident statistics and reports, as well as on the tasks to accomplish and the designated work areas, and had identified the areas and tasks where hard hats had to be worn because there was a risk of head injury for the longshoremen.

[50] Although the employee affected by health and safety officer Sarrasin did appeal his decision of no danger to the CIRB, both parties believed that the subsequent decision made by the Board basically left the issue unresolved.

[51] The parties maintained that the type of cargo handled by longshoremen is crucial in deciding if protective headwear should be worn or not. They also argued that the employees' vision should never be restricted by their hard hats, especially when there are overhead loads.

[52] Furthermore, the parties held that hard hats cannot be worn backwards, contrary to what was said on that subject in the CIRB decision. In support of this argument, the union submitted an email sent by Ray Mullin, Corporate Accounts and Training Manager, North Safety Products Ltd, a manufacturer of protective headwear, who stated that the tests required under CSA Standard Z94.1-92 on Industrial Protective Headwear [in section 6.2 - Sampling for Testing, and in section 10 - Retention Test]

are all performed with the peak at the front of the hat. This is how we recommend the hat to be worn. You cannot substitute components or parts of our hat. They are not interchangeable. These types of activities will negate CSA approval.

[53] In short, the parties believed, expressed by as On March 25, 2002, in a letter to the Appeals Officer, Pat Riley, Business Agent and Secretary Treasurer of ILA Local 273, that the risk analysis conducted previously by the joint local health and safety committee

provided a common sense approach to identifying specific jobs that required a hard hat as opposed to anywhere at the Port of Saint John. Moreover, it diffused the concern about wearing a hard hat when it is more of a hazard than it is a safety device.

That is the biggest difficulty that we have with Health and Safety Officer Stephen Cann's Direction. It returns us to the days of the hazard concern and it is for that reason, more than any other, that we sincerely believe the Direction should be reconsidered.

[54] There are three cases but two issues to be decided here. First, I must determine whether to confirm, vary or rescind the direction issued by health and safety officer Stephen Cann to the employer, Forest Products Ltd.

[55] Second, I must decide if I will rescind or confirm health and safety officers Gavin Insley and Ian Rennie's decisions of absence of danger following their investigations of the refusals to work made by employees Michael Godin and Brian Straight because they had to wear a hard hat while performing their work.

[56] The direction, issued under subsection 145(1) of the *Code* by health and safety officer Stephen Cann, stated that the employer had contravened subsections 125(1)(l) and (w) of the *Canada Labour Code* and section 10.4 of the *Marine Occupational Safety and Health (MOSH) Regulations* and required that he ensure that all employees and persons granted access to the work place have and use protective headwear.

[57] These *Canada Labour Code* provisions read:

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;

(w) ensure that every person granted access to the work place by the employer is familiar with and uses in the prescribed circumstances and manner all prescribed safety materials, equipment, devices and clothing;

[58] Section 10.4 of the *Marine Occupational Safety and Health (MOSH) Regulations* read:

10.4 Where there is a hazard of head injury in the work place, the employer shall provide protective headwear that meets the standards set out in CSA Standard Z94.1-M1977, *Industrial Protective Headwear*, the English version of which is dated April, 1977, as amended to September, 1982 and the French version of which is dated April, 1980, as amended to September, 1982. SOR/95-74, s. 89(F).

[59] In the present case, it appears from health and safety officer Cann's report that some containers had been damaged during the voyage, and, as a result, there were loose bits of wood and other materials in and on the lifts. The irregular shape of the cargo had also necessitated the use of a large amount of cargo securing material during the initial stow. Plus, the movement of the vessel during the lifts increased the swing of the suspended loads and thus increased the possibility of loose materials coming off the load.

[60] Health and safety officer Cann stated during the hearing that he had observed loose pieces of wood. "It's those kinds of things that a hard hat could protect from, not from the big pieces of load...", he said. That is why he directed the employer to require that his employees use protective headwear.

[61] There is no doubt in my mind that there are risks of head injuries for longshoremen when they are handling the different cargo. I am also convinced that the employer and the health and safety committee are aware of those hazards, as evidenced by the health and safety committee minutes submitted for the hearing and the different submissions made for the appeal.

[62] Health and safety officer Cann was also concerned that because longshoremen were exposed to hazards of a transient nature, they would not be protected against them if the requirement to wear a protective hard hat was not applied throughout the work site. That is why he wrote to the employer :

I believe this approach [of having the health and safety committee identifying the work areas where protective headwear is required] has the distinct disadvantage of potentially exposing employees to hazards that may be of a transient nature and thus not formally identified. As an employer you are required to protect from all hazards and thus would be liable regardless of where on the work site the incident occurred.

[63] Health and safety officer Cann's concern is totally legitimate. However, as the employer, Forest Products Terminal Corporation Ltd. will have to take into account the requirements of sections 10.1 and 10.2 of the *MOSH Regulations* to determine how to comply with the direction.

[64] Sections 10.1 and 10.2 read:

10.1 Where

- (a) it is not reasonably practicable to eliminate or control a safety or health hazard in a work place within safe limits, and
- (b) the use of protection equipment may prevent or reduce injury from that hazard,

every person granted access to the work place who is exposed to that hazard shall use the protection equipment prescribed by this Part.

10.2 All protection equipment

- (a) shall be designed to protect the person from the hazard for which it is provided; and
- (b) shall not in itself create a hazard.

[65] In other words, two conditions must be met in order for protection equipment – in the present case protective head wear – to be used, that is if a hazard cannot be eliminated or controlled and if that equipment can prevent or reduce the injury that the hazard could cause. Moreover, that protection has to be suitably chosen and shall not, by its very nature, create a hazard.

[66] Head injuries are usually caused by falling objects, or by bumping the head against a fixed object. In the present case, the employer and the joint health and safety committee have examined individual jobs and determined that “the wearing of hard hats at the Port of Saint John should be mandatory on certain jobs”.

[67] Ideally, the employer has to re-assess each and every hazard as often as is required by the arrival in the port of new cargo, new ships, or new cargo handling equipment. However, in an environment like the Port of Saint John, I believe that doing so is extremely demanding and difficult and it would not be “reasonably practicable” to eliminate or control all hazards that could lead to accidents causing head injuries.

[68] The parties maintained that the type of cargo handled by longshoremen is crucial in deciding if protective headwear should be worn or not. They also argued that the employees’ vision should never be restricted by their hard hats, especially when there are overhead loads. I agree with that and I am also convinced that this is what was intended by health and safety officer Cann's direction.

[69] Contrary to what the employer and the joint health and safety committee believe, health and safety officer Cann's direction does not apply indiscriminately to all tasks performed or all areas across the entire Port of Saint John. The reason is that the direction references the *MOSH Regulations*, which in this case applies only, as stated in subsection 1.3(c) of the *MOSH Regulations*, “in respect of employees employed in the loading and unloading of ships.”

[70] Therefore, I am confirming health and safety officer Cann’s direction issued to the employer, for the above mentioned reasons.

[71] Turning now to the appeals made by employees Michael Godin and Brian Straight, I must ask myself whether I should rescind or confirm health and safety officers Gavin Insley and Ian Rennie’s decisions of absence of danger following their investigations of the refusals to work made by the employees because they had to wear a hard hat while working.

[72] Danger is defined as follows in subsection 122(1) of the *Canada Labour Code*:

122(1) "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.

[73] This definition of danger basically means that the determination of what hazard, condition or activity constitutes a danger because it could reasonably be expected to cause an injury can only be based on facts and excludes all hypothetical situations. It also implies that regardless of whether that condition, activity or hazard actually or potentially constitute a danger at the time of the health and safety officer's investigation, steps must be taken to correct or alter it before an injury is sustained by an employee. These two principles have been well expressed in the different decisions made by appeals officer since the coming into force of the "new" Part II of the *Canada Labour Code*, in September 2000.

[74] Michael Godin refused to work because:

he did not feel safe with the safety hat on, that it blocked his vision, that there had been another person killed with a hard hat on and he did not want to be a statistic... he had Emphysema and that, with the hat on, he could not wear the hood of the thermal coveralls that he had on, that this would affect his health as he could not keep his head warm.

[75] At the time of health and safety officer Insley's investigation, Michael Godin was heavily clothed for the night winter weather, wearing heavy thermal coveralls over a fleece or knit type sweat top, also with a hood, and a knit type toque to cover his head. After investigating, health and safety officer Insley decided that with care and attention to his choice of clothing, the employee could both keep warm and have the freedom of movement required to perform his duties while wearing a safety hat.

[76] According to his report and testimony, Mr. Godin was working on the dock, placing the head clamps in place over the top of the paper rolls, and the lifting gear, the spreader and the crane hook were suspended around and above his work location. I believe that this situation constituted a hazard of head injury from which employee Godin had to be protected.

[77] I am convinced that the only way to protect Mr. Godin was to require that he wear a hard hat. And as pointed out by health and safety officer Insley, with the proper choice of clothing, Mr. Godin would have had no vision impediments.

[78] I am therefore confirming health and safety officer Insley's decision that wearing a hard hat while working did not constitute a danger for employee Michael Godin.

[79] Brian Straight refused to work because:

It (wearing the hard hat) restricted his mobility and flexibility of movement when hooking up wood pulp onto the spreader. The ship was rocking and it was causing problem.

[80] At the time of health and safety officer Rennie's investigation, the vessel was rocking during the loading operation, partly because of the load condition of the vessel and the maneuvering of the two ship cranes being used to load the vessel. The hooks for the wood pulp spreaders had to be worked by two persons at approximately chest height, with the spreader suspended overhead.

[81] In health and safety officer Rennie's opinion, there was a hazard of head injury from the overhead wood pulp spreaders and the suspended hooks, and a hard hat provided protection against that hazard. The proper wearing of a hard hat, in conjunction with proper protective clothing, would not restrict the ability to maneuver of employee Brian Straight. I agree with this conclusion.

[82] I am therefore confirming health and safety officer Rennie's decision that wearing a hard hat while working under overhead hazards did not constitute a danger for employee Brian Straight.

[83] Before closing, I will add that health and safety literature on the subject of protective equipment and, more particularly protective headwear, and basic prevention principles establish that the employer must decide if the protective equipment is required and select it after doing a hazard evaluation. He must also train his employees on the purpose of the protective equipment, on its limitations and on its proper use. And in that regard, it is important to bear in mind the statement from Ray Mullin, Corporate Accounts and Training Manager at North Safety Products Ltd, that was presented by the union at the hearing, that is that the protective headwear should not be worn backwards and its peak should always face forwards.

Michèle Beauchamp
Appeals Officer