

Canada Labour Code
Part II
Occupational Health and Safety

Steve Gauthier
applicant

and

Department of National Defence
respondent

Decision No.: 05-017
March, 30, 2005

This case was heard by appeals officer Douglas Malanka in Pembroke, Ontario, on March 9, 2005.

Appearances

For the Applicant

Steve Gauthier, fire fighter, Fire Department, Department of National Defence (DND) , Canadian Forces Base (CFB) Petawawa; and
Steve Cuffe, Union of National Defence Employees, 1st Vice President, Local 629, Canadian Forces Base (CFB) Petawawa, Ontario.

For the Respondent

Grant McConnell, Base Fire Chief, DND, CFB Petawawa, Ontario; and
Captain Joe Goetz, Base Operations, DND CFB Petawawa, Ontario.

- [1] This inquiry involved an appeal made pursuant to subsection 129(7) of the *Canada Labour Code (Code)* by Mr. Steve Gauthier, a civilian fire fighter employed by DND at CFB Petawawa. Fire fighter Gauthier appealed the decision of health and safety officer (HSO) Tammy Edwards that a danger did not exist for him at the time of her investigation.
- [2] On June 24, 2004, fire fighter Gauthier refused to undergo an annual fitness test called the Fire Fighter Physical Fitness Maintenance Program (FF PFMP) test unless his employer provided him with a heart rate monitor during the evaluation. DND investigated into his refusal to work, but the employer and employee representatives who investigated could not agree that a danger did not exist.

- [3] HSO Edwards was called to investigate fire fighter Gauthier's refusal to work and, following her investigation, decided that a danger did not exist for fire fighter Gauthier. She confirmed her decision in writing on June 29, 2004.
- [4] Fire fighter Gauthier received her written decision on July 13, 2004 and appealed her decision on July 14, 2004, pursuant to subsection 129(7) of the *Code*.
- [5] HSO Edwards submitted a copy of her investigation report prior to the hearing held on March 9, 2005, but did not appear and testify at the hearing. I retain the following facts from her report.
- [6] Mr. McConnell, Fire Chief, advised HSO Edwards that fire fighters over the age of forty must undergo an annual medical examination conducted by their own physician or a physician at Health Canada. They then must complete a FF PFMP test within ninety days of the medical examination.
- [7] To prepare for the FF PFMP test, fire fighters are given one hour per shift for physical fitness training. Fire fighters can use this time to exercise outdoors or in the fitness room equipped with cardiovascular equipment and weights or can practice the FF PFMP test circuit. He stated that not all employees use the time for conditioning and fitness.
- [8] Before a FF PFMP test commences, the candidate must complete a "*Health Appraisal Questionnaire*" to determine if there is any medical reason why the fire fighter may not proceed. A "yes" response to any of the medical questions prohibits the candidate from proceeding further. Before the test commences, the evaluation administrators who administer the FF PFMP test observe the overall physical appearance of the fire fighter. They also take the candidates vital signs which include blood pressure and pulse rate. If there are no anomalies during this "*Pre-Test Screening*" stage, the fire fighter conducts a "*Practice Walk-Through*" of the ten activity stations associated with the FF PFMP test, completes the prescribed warm up, and then receives final "*Pre-Evaluation Instructions*".
- [9] Once this is completed the fire fighter begins the circuit and two evaluation administrators walk beside the fire fighter. One carries a clip board that has a scale taped to it referred to as the *Borg Scale for Ratings of Perceived Exertion* (RPE). HSO Edwards wrote in her decision report that the RPE was described in the "*Operations Manual*" as a valuable and reliable indicator for monitoring an individual's exercise tolerance.
- [10] Once an activity station on the circuit is completed, the fire fighter completes a fifty foot cool down track before moving to the next activity station. While on the fifty foot cool down track, the fire fighter points to a number on the Borg Scale between six and twenty that best represents their RPE. It is necessary for the fire fighter to point to the Borg Scale to communicate the level of RPE because the fire fighter is wearing full fire fighter equipment. Since this includes a self contained breathing apparatus (SCBA) and face mask, it is nearly impossible to communicate verbally.

- [11] Based on RPE indicated by the fire fighter and their visual observation of the fire fighter, the evaluation administrators decide whether or not the fire fighter can continue with the FF PFMP test. The use of the Borg Scale relies on the honesty of the fire fighter.
- [12] Fire Chief McConnell stated to HSO Edwards that the evaluation administrators are qualified to identify signs and symptoms of physical distress as they are trained in cardiac pulmonary resuscitation (CPR) and advanced first aid and have conducted numerous FF PFMP tests. One of the evaluation administrators was paramedic trained.
- [13] Fire fighter Gauthier told HSO Edwards that a fire fighter is given three tries to successfully complete the FF PFMP test and there is a ninety day period between each try if they fail. The ninety day interval gives the fire fighter time to physically train for the next test or to recover from a physical condition that precluded taking the evaluation or that terminated the FF PFMP test prior to its completion.
- [14] Fire fighter Gauthier also told HSO Edwards that fire fighters would lose their job as a fire fighter if they failed to successfully complete the FF PFMP test after a maximum of three tries. He said that he would lie to evaluation administrators when indicating his RPE level on the Borg scale to preserve his job as a fire fighter.
- [15] Fire fighter Gauthier claimed that he should be provided with a heart rate monitor during the evaluation because:
- the heart rate monitor would be more sensitive and accurate for forecasting early heart distress;
 - the evaluation administrators would not have to rely on the candidate truthfully indicating their RPE on the Borg Scale; and
 - a heart rate monitor was used by the Queen's University Ergonomics Research Group when it developed the FF PFMP test.
- [16] In this regard, base safety officer Dave Harris told HSO Edwards that the Queen's University Ergonomics Research Group (Queen's Group), who developed the FF PFMP test, used a heart rate monitor in the pilot tests for the sole purpose of collecting heart rate data. He said that the Queen's University Group did not specify the use of a heart rate monitor during regular FF FMP testing as a means of determining if the fire fighter was experiencing heart stress during a test. In addition, he pointed out that there has general concern that the straps of the SCBA could interfere with the heart rate monitor. If this occurred cardiac stress could be missed or the evaluation could be prematurely and unnecessarily terminated.

[17] HSO Edwards wrote in her decision report that a danger did not exist for fire fighter Gauthier because the absence of a heart rate monitor during a FF PFMP test could not reasonably be expected to cause injury or illness to him. She wrote that she made this finding because:

- employees are provided one hour per shift to maintain physical fitness and to prepare for the FF FMP test. Fire fighter Gauthier admitted to her that he had not always used the time for this purpose;
- employees are subject to on-going health monitoring through medical assessments;
- physical training is provided;
- employees are provided three attempts to successfully complete the circuit; and
- the employer had researched the provision of a heart rate monitor during testing.

[18] Fire fighter Gauthier testified that the FF PFMP test was developed in 1996, but Health Canada has not yet approved its use. He stated that evaluation was forced on employees. He referred me to a letter that Dr. Philip R. Prendergast, Occupational Health Physician, Health Canada, had written to Commander P. C. Leblanc, Commanding Officer, Port Operations and Emergency Services Branch, Canadian Forces Base, Esquimalt, Victoria, BC, on April 14, 2003, regarding his medical opinion pertaining to an employee who was injured during a FF PFMP test on February 3, 2003. I retain the following medical opinion of Dr. Prendergast from the letter:

...
...It appears to me that the evaluation test components of the FF PFMP demands near-maximal if not maximal physical effort on behalf of candidates attempting it.

There are several issues which I feel contributed to Mr. Thompson suffering both injury and illness as a result of the test. I would like to highlight these in order to assist you in preventing future occurrences of this nature:

...
2. The test was conducted in the context of a competition, which, given the nature of the competitions, mitigated against safe testing practices, as evidenced by:

- (a) conducting a pre-test aerial ladder climb;
- (b) failing to take appropriate action for the candidate's pre-test abnormal vital signs;
- (c) failing to utilize the Rating of Perceived Exertion Scale.

[My underline.]

[19] Fire fighter Gauthier stated at the hearing that he complained to Mr. John Biesenthal, assistant base general safety officer, on June 22, 2004, that DND should equip him with a heart rate monitor when undergoing a F PFMP test. He pointed out that a heart rate monitor was used by the Queen's Group when they developed the FF PFMP test.

- [20] Fire fighter Gauthier added that the lens in the SCBA face mask fogs during the performance of the FF PFMP test making it difficult for a fire fighter to properly indicate RPE on the Borg Scale.
- [21] Captain Goetz testified that the test stations that make up the FF PFMP test reflect the actual functions carried out by fire fighters in their work and so they are accustomed to doing the work. He conceded that all of the functions were not done in a short period of time, but reiterated that fire fighters are given time to maintain themselves in good physical condition.
- [22] With regard to the measures in place to deal with a medical emergency during the test, Captain Goetz reiterated that there are two evaluation administrators present whenever a FF PFMP test is conducted and it would be normal for at least four fire fighters to be in the fire hall when FF PFMP tests are conducted. These fire fighters are all proficient in CPR and advanced first aid.
- [23] Captain Goetz also testified that a military ambulance staffed with two paramedic-equivalent trained persons is on site during a FF PFMP test. The ambulance is not equipped with an automatic external defibrillator (AED), but a civilian ambulance equipped with an AED is located approximately three to five minutes away from the CFB Petawawa. If the civilian ambulance is unavailable, the civilian fire department could respond in approximately five minutes and a hospital is located in the nearby town of Pembroke. He added that an AED would be purchased in the future but did not specify when.
- [24] Fire Chief McConnell submitted a series of e-mails regarding the FF PFMP test. I retain the following from the e-mails.
- [25] On June 22, 2001, Platoon Chief Labelle complained to base safety officer Harris that the FF PFMP test is unsafe and unfair as it forces older fire fighters to complete the same FF PFMP test as a fire fighter just starting the trade. He claimed that no male over fifty years old, or female over forty years old, passed the evaluation when Queen's University did the survey and set up the evaluation in 1994.
- [26] On June 27, 2001, Lt. Colonel T.C. Lovett wrote to base safety officer Harris essentially responding to the above noted e-mail from Platoon Chief Labelle. I retain the following excerpts:
- ...The test is a DND/CF initiative and the Base's role is to carryout the test in accordance with the instructions and directions given by the Deputy Minister, ADM(IE), CFFM the operations manual and other correspondence from NDHQ.

...The test is a bona fide occupational requirement based on years of scientific research to reflect actual firefighting tasks expected to be performed by DND/CF firefighters. It consists of a circuit with 10 tasks using typical fire department equipment. This test was designed to comply with the *Canadian Human Rights Act* and replaces an older test that did not comply...

As far as health and safety is concerned, Health Canada has been a key player throughout the development of this test and has set the medical requirements for doing the test. Their doctors have received a briefing specifically on the test...

...As for the harshness of the timed test, the original phase-in for the program started in 98. I just received a message giving an additional three years for the phase-in for civilian fire fighters. This has now allowed for a six year phase-in period for civilian fire fighters...

As for the 8:00 minute standard, it is based on scientific research indicating the physical conditioning needed to perform as a firefighter. Young firefighters are normally well under the standard, usually by 2-3 minutes. Older firefighters are not expected nor should be expected to achieve that kind of time. There are many 50+ year-old firefighters meeting the 8:00 minute standard.
[My underline.]

[27] On May 25, 2004, base safety officer Harris wrote to Chief McConnell regarding work refusals and the FF FMP test. I retain the following excerpt:

...
...I acknowledge that the test is rigorous and has its share of inherent risk, but other than the ladder issue I can see no serious safety concern WRT the physical layout of the test.
[My underline.]

[28] On June 12, 2004, Platoon Chief Labelle complained to base safety officer Harris regarding work refusals and the FF PFMP test. I retain the following excerpts:

We the Fire Fighters at Petawawa have assessed the test are are [*sic*] concerned about the lack of a heart monitor that should be hooked up to us during this very physical test. When we originally helped Queens [*sic*] University put this test together they were using the monitor while we exerted ourselves. Now that the test is in full swing the Fire Fighters are asked to point to a piece of paper on a clip board that most of the time cannot see clearly because the lens of the face piece fogs up, and with full knowledge that your pay check is at the finish line if you pass, and no longer there if you fail. We do not believe that any fire fighter would tell the truth on how he or she is feeling, when knowing your job is on the line. We request that a heart monitor be provided to tell the real story on how the fire fighters are coping, before someone here dies of a heart attack, or other injuries....
[My underline.]

[29] On June 14, 2004, base safety officer Harris responded to Platoon Chief Labelle. I retain the following excerpts:

...
I can understand where a heart monitor would, at the very least, provide significant reassurance for the employee undergoing the test in addition to the reasons cited in your email. As part of the ICR process I have approached the BComd regarding your concern. He does not see this as a particular problem and has directed me to look into this further. So far I have contacted three different Bases WRT the use of heart monitors and the test itself. Apparently the oldest candidate to this test was forty eight years old...None have used heart monitors in subsequent tests...

[My underline.]

[30] On June 16, 2004, base safety officer Harris wrote to Platoon Chief Labelle regarding the use of a heart rate monitor. I retain the following excerpts:

1. I looked into the issue of heart monitors, including contacting CFB Borden who, as you know did a lot of work in this area. I also talked with the PSP staff who have considerable involvement in the testing procedures.
2. Apparently, in about 1997, it was decided not to incorporate heart monitors for the test for two reasons:

(a) placement of the sensors on the chest wall interfered with the SCBA harness, making it uncomfortable for the user and was often the cause of mechanical failure when the sensors were ripped off from the shifting of the harness during testing.

(b) there were several instances of inaccurate readings where the sensors would transmit faulty data resulting in the PSP personnel unnecessarily stopping the test. I imagine the faulty readings could have at least been partially attributed to interference from the SCBA harness?

3. Given the information available to me at this time, I would not recommend the use of heart monitors during testing as they would be of limited value in these circumstances.

[My underline.]

[31] In their summation, fire fighter Gauthier and Mr. Cuffe argued that it's fine to have trained evaluation administrators, ambulance attendants and other fire fighters proficient in CPR and advanced first aid to deal with medical distress or a medical emergency such as a heart attack. They argued, however, that the focus should be on preventing a medical emergency.

- [32] They held that a heart rate monitor would be a more scientific method of determining if a fire fighter was experiencing medical distress than relying on the fire fighter accurately communicating his level of exertion on the Borg Scale. They reiterated that a heart rate monitor was used in the original testing at Queen's University and should be included now.
- [33] Fire fighter Gauthier repeated that the thought of losing his job as a fire fighter would cause him to lie to the evaluation administrators when reporting his RPE after completing each activity station in the FF PFMP test.
- [34] Fire fighter Gauthier and Mr. Cuffe also held that the heart rate monitor could be repositioned on the body somehow so that the strap on the SCBA would not interfere with the monitor. They also held that another type of heart rate monitor could be available which would avoid interference.
- [35] Both maintained that the joint work place health and safety committee had not been consulted relative to the development and implementation of the FF PFMP test. They added that neither the employees nor the union agree with the FF PFMP test because of the absence of a heart rate monitor and because the FF PFMP test, unlike the test for military personnel, is not adjusted for age.
- [36] Finally Fire fighter Gauthier and Mr. Cuffe agreed that an AED would be useful for dealing with a medical emergency, but reiterated again that the focus should be on prevention and not reaction.
- [37] In their summation fire Chief McConnell and Captain Goetz argued that the FF PFMP test was developed at Queen's University under the authority of CFB management. They held that fire fighters are provided time to maintain their physical fitness and the test stations represent typical work for fire fighters. They stated that it would be better to be physically tested under a controlled environment than on the job.
- [38] Chief McConnell and Captain Goetz held that the Borg Scale is a valid method of rating the exertion felt by fire fighters during the FF PFMP test and expressed confidence that this method would identify any imminent medical distress or emergency. Mr. McConnell doubted that any one would lie to an evaluation administrator if they were experiencing chest pain and reiterated that the evaluation administrators are trained to detect medical distress experienced by a candidate.
- [39] Mr. McConnell and Captain Goetz pointed out that a heart rate monitor could be problematic in that it could interfere with the performance of the test activities, or the equipment worn by the candidate could cause the monitor to give faulty readings. If this occurred, it could lead to situations where the monitor could miss a medical distress of the wearer or could cause the evaluation to be prematurely and unnecessarily terminated.

[40] Captain Goetz said that an AED was being purchased in the future to have the same coverage as that which exists in Toronto, Ontario and Edmonton, Alberta.

[41] The issue to be decided in this case is whether or not HSO Edwards erred when she decided that a danger did not exist for fire fighter Gauthier at the time of her investigation. For this, I must consider the definition of danger found in the *Code* and the facts in the case.

[42] Danger is defined in section 122(1) of the *Code* as follows:

122. (1) In this Part,

"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;

[43] In this case, the hazard was the risk of fire fighter Gauthier suffering injury or death as a result of a sudden cardiac arrest or heart attack precipitated by the intense physical exertion connected with the FF PFMP test in the circumstances. The circumstances being the method used to monitor the health of the candidate during the test and the emergency measures in place to deal with a medical emergency, including a sudden cardiac arrest or heart attack, should one occur.

[44] With regard to this, I refer to the letter dated February 3, 2003, that Dr. Prendergast sent to Platoon Commander Leblanc regarding the FF PFMP. In the letter, Dr. Prendergast stated that the FF PFMP test demands near-maximal if not maximal physical effort. Base safety officer Harris similarly wrote in his letter to Mr. McConnell dated May 25, 2004, that the FF FMP test was rigorous and had its share of inherent risk. Based on Dr. Prendergast's opinion reiterated by base safety officer Harris, I conclude for the purpose of my review that the FF PFMP test is an extreme physical test demanding near-maximal if not maximal physical effort and having inherent risk.

[45] In accordance with the definition of danger in the *Code*, a danger existed for fire fighter Gauthier if the hazard could reasonably be expected in the circumstances to cause injury or illness before it could be corrected. As I have already indicated, the applicable circumstances included:

- the method used by DND to monitor the health of the candidate during the test; and
- the emergency measures in place at DND to deal with a medical emergency during a FF PFMP test, including a sudden cardiac arrest or heart attack, should one occur.

- [46] With regard to the first circumstance, being the method used to monitor the health of the candidate during the test, Chief McConnell doubted that fire fighter Gauthier would lie if he was experiencing chest pain.
- [47] I am inclined to agree with Chief McConnell that it is hard to believe that fire fighter Gauthier would be untruthful if he were actually experiencing chest pain. However, this does address the risk caused by the psychological pressure felt by fire fighter Gauthier to successfully complete the test to avoid losing his job as a fire fighter. According to fire fighter Gauthier and Mr. Cuffe, this psychological pressure is heightened for older fire fighters because they are not expected to be able to complete the FF PFMP test until the last or penultimate minute of the test. Should the psychological pressure even delay fire fighter Gauthier in reporting physical distress during the FF PFMP test, a precipitous medical emergency might not be avoided.
- [48] With regard to the use of medical instrumentation for avoiding a medical emergency, as opposed to the use of the Borg Test and visual observations by the evaluation administrators, I am inclined to agree in principle with fire fighter Gauthier's assertion that the use of medical instrumentation is superior. Common sense suggests to me that a method that relies on the direct measurement for assessing appropriate vital signs while the test is being conducted would be superior to a method that relies on the candidate indicating their level of exertion as a surrogate for medical distress. I was also skeptical of the ability of the evaluation administrators to accurately visually assess the fire fighter health who is wearing full gear for the test including a face mask. This stated, beyond HSO Edwards' evidence that the "*Operations Manual*", refers to the RPE as a valuable and reliable indicator in monitoring an individual's exercise tolerance, whatever "*exercise tolerance*" meant, neither party submitted direct factual evidence that was conclusive on this.
- [49] I was unable to give much weight to the assertion by Fire Chief McConnell and Captain Goetz that the current monitoring arrangements were adequate because fire fighters are physically fit and are evaluated prior to undergoing a FF PFMP test. The problem is that none of these guarantees that a sudden cardiac arrest, heart attack or other medical emergency cannot occur at a time of maximal or near-maximal physical exertion.
- [50] Fire Chief McConnell and Captain Goetz submitted evidence that stated that Health Canada was a key player throughout the development of FF PFMP test and setting the medical requirements for it. However, I was unable to give significant weight to this, or the fact that Health Canada was completely briefed on the FF PFMP test, because Fire Chief McConnell and Captain Goetz submitted no direct evidence to confirm Health Canada's approval of the test or its views with regard to the issue before me. For example, there was no direct evidence that Health Canada's review of the current FF PFMP test had determined if the test adequately took into account the physiological pressure on an older fire fighter to successfully complete the FF PFMP test to avoid losing his job as a fire fighter and if the measures to deal with a medical emergency were adequate.

- [51] The evidence of Fire Chief McConnell and Captain Goetz was that the Queen's University Group only used a heart rate monitor to develop the test and it was not intended for use during a FF PFMP test to determine if someone was experiencing heart distress. However, I was unable to give significant weight to this as no direct evidence was submitted in support of this assertion or its interpretation with regard to the issue before me.
- [52] Fire Chief McConnell and Captain Goetz held that the FF PFMP test complied with the *Canadian Human Rights Act* and constituted a bona fide occupational requirement for fire fighters. They argued that the test reflected actual fire fighting tasks expected to be performed by DND/CF fire fighters and was designed by Queen's University as a test for all ages. However, I was unable to give significant weight to this as no direct evidence was submitted in support of this assertion or its interpretation with regard to the issue before me.
- [53] Finally, I was unable to give this much weight to the assertion that a heart rate monitor cannot be used with the FF PFMP test because it could interfere with the test. To the contrary, the evidence was that the Queen's University Group overcame the problem of interference during their development of the FF PFMP test and so I must conclude the problem was solvable. In addition, this argument assumes the doubtful premise that no other practicable method exists that does not rely on the candidate to self monitoring and self reporting on their well being during the test.
- [54] On the subject of measures in place for dealing with a cardiac arrest or heart attack, Captain Goetz stated that an AED will be obtained for the FF PFMP test to be consistent with the situation in Toronto and Edmonton. He did not expand on this, but I take this as evidence suggesting that the employer agrees that there is significant health risks associated with the test and an AED is necessary. However, again, the evidence was insufficient to irrefutably conclude that an AED must be available during a FF PFMP test to ensure that the health and safety of the candidate was protected.
- [55] The testimony of fire fighter Gauthier and Mr. Cuffe was that the health and safety committee had no involvement in the development and implementation of the test and employees did not agree with the FF PFMP test. Neither Fire Chief McConnell or Captain Goetz disputed this claim and, given the little evidence submitted in the case to show that the concerns raised by fire fighter Gauthier were addressed, I am inclined to believe that DND has not conducted a job hazard analysis related to the FF PFMP test in consultation with its employees.
- [56] In this regard, I would refer DND generally to sections 134 and 135 of the *Code* and specifically to paragraphs 134.1(4)(h) and 135(7)(d) and (i) of the *Code* which read as follows:

134.1 (1) For the purposes of addressing health and safety matters that apply to the work, undertaking or business of an employer, every employer who normally employs directly three hundred or more employees shall establish a policy committee and, subject to section 135.1, select and appoint its members.

(4) A policy committee

(h) shall participate in the planning of the implementation and in the implementation of changes that may affect occupational health and safety, including work processes and procedures.

135(7) A work place committee, in respect of the work place for which it is established,

(d) where there is no policy committee, shall participate in the development, implementation and monitoring of a program for the prevention of hazards in the work place that also provides for the education of employees in health and safety matters related to those hazards;

(i) shall participate in the implementation of changes that may affect occupational health and safety, including work processes and procedures; and where there is no policy committee, shall participate in the planning of the implementation of those changes; [My underline.]

[57] In my opinion, the *Code* is remedial in nature and must be interpreted broadly in a manner consistent with the purpose clause of the *Code* which is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment. I would interpret this to mean that, where the evidence from neither party is conclusive, I must err on the side of prevention. In this regard, I refer to sections 122.1, 122.2 and 124 of the of the *Code* which read 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 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.

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

[58] In the case at hand, I find for the following reasons that a danger existed in the circumstances for fire fighter Gauthier at the time of HSO Edwards' investigation and hereby rescind the decision of health and safety officer Tammy Edwards that a danger did not exist for Mr. S. Gauthier. The reason were:

- the FF PFMP test demands near-maximal if not maximal physical effort and has inherent risk of cardiac distress that was elevated by fire fighter Gauthier's age and circumstance;

- the evidence submitted by Fire Chief McConnell and Captain Goetz was inconclusive for a finding that the method used by DND to monitor the health of the candidate during the FF PFMP test was adequate to ensure that the health and safety at work of every person undergoing the test was protected. To the contrary, I was more persuaded that it was not;
- the evidence submitted by Fire Chief McConnell and Captain Goetz was inconclusive for a finding that the emergency measures currently in place to deal with a sudden cardiac arrest or heart attack, if it occurred, were adequate to ensure that the health and safety at work of every person was protected. To the contrary, I was more persuaded that they were not;
- HSO Edwards' decision was not reasonable because she failed to fully consider all of the circumstances concerning the hazard in that:
 - she gave too much weight to the evidence that fire fighters were physically fit, were evaluated by a doctor before undergoing the test, and had three tries to successfully complete the FF PFMP test as this was no guarantee that a problem cannot arise during the test;
 - she relied on the fact that employees were provided one hour per shift to maintain physical fitness and to prepare for the FF PFMP test despite the evidence that not all employees, including fire fighter Gauthier, used this time appropriately. Moreover, there was no evidence that DND had monitored this situation and took disciplinary measures to correct it; and
 - the evidence upon which she relied for concluding that the heart rate monitor had been researched was insufficient.

[59] Having found that a danger existed for fire fighter Gauthier at the time of HSO Edwards' investigation, I am authorized by paragraph 146.1(1)(b) of the *Code* to issue a direction. Paragraph 146.1(1)(b) reads:

146.1(1) If an appeal is brought under subsection 129(7) or section 146, the appeals officer shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it and may

(a) vary, rescind or confirm the decision or direction; and

(b) issue any direction that the appeals officer considers appropriate under subsection 145(2) or (2.1).

[My underline.]

[60] In accordance with subsections paragraphs 146.1(1)(b) and paragraphs 145.2(a) and (b), I hereby issue the following direction to Fire Chief McConnell which is attached as an Appendix.

Douglas Malanka
Appeals Officer

APPENDIX

**In the Matter of the *Canada Labour Code*
Part II — Occupational Health and Safety**

Direction to the Employer Under Paragraph 145(2)(a) And (b).

Following my inquiry conducted pursuant to section 146.1 of the *Code* into the circumstances of the decision of health and safety officer Edwards that a danger did not exist for Mr. Steve Gauthier who appealed her decision pursuant to subsection 129(7), I find in the circumstances that undergoing a Fire Fighter Physical Fitness Maintenance Program test constituted a danger for Mr. Gauthier at the time health and safety Tammy Edwards conducted her investigation.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(a) of the *Canada Labour Code*, Part II, **to protect any person from the danger** immediately; and you are directed pursuant to paragraph 145(2)(b) of the *Canada Labour Code*, Part II, to discontinue the Fire Fighter Physical Fitness Maintenance Program test until you have complied with the direction pursuant to paragraph 145(2)(a) of the *Code*.

Issued at **Gatineau**, this **March 30, 2005**.

Be advised that pursuant to subsection 145(8) of the *Canada Labour Code*, Part II, you are required to inform a health and safety officer at Human Resources and Skills Development Canada in Ottawa, Ontario, no later than April 18, 2005 of the measures taken to comply with the attached direction, and you shall provide a copy of that written response to the health and safety committee at the work place.

Also, be advised that, pursuant to subsection 145(5) of the *Canada Labour Code*, Part II, the employer shall without delay cause a copy of my decision and this direction to be posted and give a copy of it to the health and safety committee.

Douglas Malanka
Appeals Officer # HQ1594

To: Department of National Defence
CFB – Petawawa,
Petawawa, Ontario, K8H 2X3

Summary of Appeals Officer's Decision

Decision No.: 05-017

Applicant: Steve Gauthier

Respondent: Department of National Defence

Key Words: fire fighter, danger, physical fitness test, maintenance program, testing, near-maximal physical exertion, sudden cardiac arrest, heart attack, Borg Scale, heart rate monitor, self contained breathing apparatus.

Provisions: *Code* 122, 124, 128, 129, 145.2 and 146.1.
Regulation

Summary:

A civilian fire fighter employed by DND refused to undergo an annual fitness test called the Fire Fighter Physical Fitness Maintenance Program (FF PFMP) test unless his employer provided him with a heart rate monitor during the evaluation.

The health and safety officer who investigated the refusal to work decided that a danger did not exist at the time of her investigation.

The Appeals Officer found that a danger existed and rescinded the health and safety officer's decision. The appeals officer also issued a direction and directed DND to cease conducting the FF PFMP test on its employees until it demonstrated to a health and safety officer that the method used to monitor fire fighters during the test and the measures to deal with a cardiac emergency were adequate to ensure that the health and safety at work of every person was protected.