

Canada Labour Code
Part II
Occupational Health and Safety

Joseph Munn
applicant

and

Department of National Defence
respondent

Decision No. 05-030
July 7, 2005

This case was heard by Appeals Officer Pierre Guénette, in Victoria, British Columbia (BC), on February 24, 2005.

Appearances

For the applicant

Joseph Munn, Fire Officer, Department of National Defence (DND), CFB Esquimalt, Victoria, BC

Gary Rumenovich, Safety Representative, Occupational Health and Safety (OSH) Committee, CFB Esquimalt

Gino Chicorelli, President, Fire Fighter Union, POESB/Public Service Alliance of Canada, CFB Esquimalt

For the respondent

Commander Paul C. Leblanc, Queen's Harbour Master, CFB Esquimalt

James S. Fisher, Branch General Safety Officer, CFB Esquimalt

Rick Mutas, Base Fire Chief, CFB Esquimalt

Health and safety officer

Melinda Lum, Human Resources and Skills Development Canada, Labour Program, Vancouver, BC

- [1] This case concerns an appeal made pursuant to subsection 129(7) of the *Canada Labour Code* (the *Code*), Part II, by Joseph Munn, an employee of the Department of National Defence at CFB Esquimalt, in Victoria, BC. J. Munn appealed the decision of health and safety officer (HSO) Lisa Mah that a danger did not exist for him at the time of her investigation.

- [2] On November 20, 2003, J. Munn refused to participate in the walk-through familiarization of the Fire Fighters Fitness Test (FFFT). He said that the test would be dangerous to his health because of its time limit.
- [3] The FFFT had been designed for DND by Queen's University as a physical fitness maintenance test for annual testing of both civilian and military fire fighters throughout DND. Implemented by DND, the FFFT contains ten simulated fire fighting tasks and has to be completed within eight minutes. Employees are required to be tested every year. The new FFFT is in compliance with the *Canadian Human Rights Act*.
- [4] On the day of his refusal to work, J. Munn submitted a memorandum advising his employer that he was exercising his right to refuse for the following reasons:
- 1- The current test is not laid out as per the PSP own manuals.
 - 2- The Hazardous Occurrence Investigation Report produced on the Scott Thompson incident dated 12 May 2003; has recommendations that management has never implemented;
 - 3- The BFOR¹ has never been up-dated or re-evaluated.
 - 4- The Fire Fighter Fitness Test does not accurately reflect my duties.
- [5] Following the refusal to work of J. Munn, ten other employees also refused to complete the walk-through familiarization. Fire Chief Beaulieu conducted a joint investigation of the refusal to work made by the eleven fire fighters with the participation of union OSH committee member Garry Rumenovich.
- [6] As Fire Chief Beaulieu and OSH committee member Rumenovich could not agree on the absence of danger, Rick LesQuesne and Joseph Munn continued their refusal to work. Commander Leblanc notified the Labour Program of the continued refusal to work.
- [7] HSO Mah investigated the refusals to work with health and safety officer Melinda Lum. She decided that a danger did not exist for R. LesQuesne and J. Munn and confirmed her decision in writing. Only J. Munn appealed HSO Mah's decision.
- [8] Although HSO Mah could not attend the hearing, she submitted a copy of her investigation Report and Decision prior to it. It included the following appendices provided to her by the employer:
- Refusal to Work Registration Forms
 - Memorandum of Commander P.C. Leblanc dated February 11, 2004
 - Preparation for Fire Fighter Physical Fitness Maintenance Program Evaluation, *Fire Fighter Physical Fitness Maintenance Program Manual*, March 1998
 - Email dated March 29, 2004 from R. Mutas, Base Fire Chief, on fire fighter results

¹ *Bone Fide Occupational Requirement*

- Excerpt from DND General Safety Standards, p.16A-20 to 16A-21
- *Development of a Bona Fide Physical Maintenance Standard for CF and DND Fire Fighters*, Ergonomics Research Group, Queen's University, Kingston, Ontario

[9] I retain the following from HSO Mah's report and from HSO Melinda Lum's testimony at the hearing.

[10] At the time HSO Mah investigated the refusal to work of J. Munn and R. LesQuesne on March 9, 2004, no employees were participating in the FFFT.

[11] G. Rumenovich, who represented both refusing employees, raised the following issues with HSO Mah:

- In February 2003, a fire fighter suffered a disabling injury during an FFFT and the employer did not take corrective action on all the recommendations made by the investigation team as a result of the injury. G. Rumenovich held that undergoing the FFFT would be unsafe until the remaining recommendations were put into place.
- During the last task of an FFFT, the employee must carry a 75-pound spreader tool. However, the spreader tool normally used in the field weighs 40 pounds and is designed to be carried by two persons using a cart. This discrepancy created a danger because DND did not provide training to employees on proper lifting procedures for this heavier tool. Furthermore, it was not representative of the work done by fire fighters.
- An employee undertaking the FFFT may not be completely aware of his/her physical capabilities and may overexert him/herself during the test.
- The face mask that the employee wears during the test diminishes the observer's view of the employee's face by approximately 20%.
- The ladder used in the test is not tested on an annual basis.
- There is no means to contact emergency medical services through "911" from that building.
- A Health Canada physician is not present to observe an employee undergoing an FFFT.

[12] For his part, Commander Leblanc stated to HSO Mah that:

- J. Munn was to do a walk-through familiarization of the FFFT course at the time that he initiated his refusal to work.
- The FFFT has been designed by Queen's University as a physical fitness test for civilian and military fire fighters. It consists of a series of ten tasks to be performed within eight minutes. Employees are required to participate in the FFFT every year.

- A Personnel Support Programs (PSP) staff member observes the fire fighter's physical condition during the test. Following the test, during the cool down period, a PSP staff member monitors the fire fighter's vital signs until they return to pre-test level.
- PSP staff members are trained in first aid skills and they have a cellular phone for emergencies. Also there is a telephone available in the supervisor's office.
- A fire fighter who fails the FFFT has to follow a fitness program to obtain the level of fitness required. This fitness program is supervised by PSP staff members.
- The employer has implemented the health and safety recommendations that were developed following the February 3, 2003 accident.
- The 75-pound spreader tool used in the FFFT is representative of equipment used by fire fighters. Moreover, employees have been provided with training on proper lifting of heavy tools or equipment, including the spreader tool.
- The face mask has to be used for the FFFT to be representative of a fire fighter's regular work.
- The self contained breathing apparatus (SCBA) equipment used by fire fighters is maintained regularly and the employer keeps the maintenance records in the safety department.

[13] On the day of the investigation, HSOs Mah and Lum observed three military personnel participating in the FFFT.

[14] HSO Mah established that PSP staff members are certified physical fitness trainers. A PSP Staff member follows the fire fighter throughout and the fire fighter is required to point on the BORG scale his/her level of physical stress after each task. If a fire fighter indicates a high level of physical stress on the BORG scale, the PSP staff member terminates the FFFT, to prevent overexertion.

[15] HSO Mah was also informed that fire fighters must undergo a valid medical exam within 3 months of taking the FFFT.

[16] Finally, HSO Mah established that the ladder used during the FFFT is inspected prior to each test.

[17] Referring to the definition of danger under the *Code*, HSO Mah decided that a danger did not exist for fire fighters J. Munn and R. LesQuesne.

[18] J. Munn testified at the hearing. I retain the following facts from his testimony:

- HSO Mah did not consider other information obtained from the International Association of Fire Fighters (IAFF) study, regarding two fire fighters in the United States who died following injuries in connection with the test.
- J. Munn did receive some training on proper lifting procedures to be used to carry the spreader tool, but they were always related to a two-person lifting procedure.
- Fire fighters do not have access to equipment to do practice runs.

[19] J. Fisher testified on behalf of the employer that the disabling injury that happened on February 3, 2003 occurred because the FFFT was carried out improperly. Consequently, it was not representative of the test.

[20] J. Fisher argued that a series of exceptional events related to the February 2003 injury would not be repeated during a standard FFFT fitness evaluation.

[21] J. Fisher said that some recommendations made following the February 2003 disabling injury were put in place after consultation with the Canadian Forces Fire Marshall. He added that some of them were not implemented because they would have compromised the integrity of the FFFT and they were not safety related.

[22] R. Mutas testified that there is a 12-week physical fitness program to prepare fire fighters for the FFFT, which is administered and overseen by PSP staff members.

[23] R. Mutas added that the employer provided to fire fighters all the necessary information (manual and program layout) and the opportunity to participate in the program. To his knowledge, J. Munn had not taken advantage of this opportunity.

[24] In his summation, G. Rumenovich argued that the decision of HSO Mah should be rescinded because the FFFT is not representative of the work done by fire fighters.

[25] In his summation, Commander Leblanc argued that the FFFT is representative of tasks performed by fire fighters and confirmed that fire fighters are fit for the job. He added that no disciplinary sanctions are taken against a fire fighter who fails the fitness test.

[26] The issue to be decided in the present case is whether HSO Mah erred when she decided that a danger did not exist for J. Munn at the time of her investigation. To do so, it is essential to consider the definition of danger found in the *Code* and the facts of the case.

[27] Danger is defined in section 122(1) of the *Code* 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.

[28] In this case, the employee identified the danger as the hazard of suffering an injury or illness while undergoing an FFFT. It was a potential hazard, as opposed to an existing one, because J. Munn was not undergoing the FFFT at the time of his refusal or at the time of HSO Mah’s investigation.

[29] To decide that a danger existed in the present case, the definition requires me to ascertain the circumstances when the potential hazard could have been expected to cause injury and to determine that there was a reasonable possibility that such circumstances would have taken place in the future.

[30] One of the circumstances alleged by J. Munn was that DND had not implemented all of the recommendations made following the disabling injury that occurred in February 3, 2003. However, I gave little weight to this allegation because the evidence established that the test was conducted improperly and, in my opinion, was not representative of the FFFT that J. Munn was asked to perform. Moreover, corrective actions related to health and safety had been put in place to address the circumstances connected with the disabling injury.

[31] J. Munn also alleged that the spreader tool used in the FFFT was too heavy and not representative of the kind of spreader tool used by fire fighters. He further held that he had not been provided training to lift the heavier spreader. However, I am satisfied by the evidence of P.C. Leblanc that J. Munn was trained to lift heavy objects such as the spreader tool used in the FFFT.

[32] A third circumstance asserted by the applicant was an IAFF study supporting the position that a testing program is unsafe for fire fighters. While I am of the opinion that the document does not specifically state that conclusion, I noted that it affirms that an adequate support system should be put in place to keep fire fighters physically trained and capable of safely performing the duties.

[33] With regards to the applicant’s argument that the Queen’s University Ergonomics Research Group recommended that the test circuit be completed in a time standard of 8.5 minutes, the evidence confirms that the Group had recommended a standard of 8 minutes.

- [34] J. Munn also alleged that fire fighters may not be completely aware of their own physical capabilities during the FFFT. To support this position, G. Chicorelli provided me with letters from American fire fighters related to instances where fire fighters in the USA were injured, in one case fatally, in connection with fitness testing.
- [35] While the letters deal with events that occurred in the USA and circumstances may differ from the Canadian situation, I nonetheless conclude that fire fighters may not always be aware of their own physical limitations during the FFFT. I am convinced that this situation constitutes a danger for fire fighters when they participate in the FFFT.
- [36] HSO Mah had noted that the employer had a 12-week physical training program to ensure that fire fighters reach the required physical fitness level. In fact, the employer's document entitled "Preparation for Fire Fighter Physical Fitness Maintenance Program Evaluation" specify that "[t]he annual evaluation should only be attempted by fire fighters who have participated in a unit physical training program or personal fitness program."
- [37] I appreciate that the manual uses the word "should", which could be interpreted as discretionary. However, considering the severity of the FFFT and the necessity of a good physical condition to perform the test, the proper interpretation consistent with the purpose clause of the *Code* is that such physical training must be mandatory. Since the employer recognizes the need for fire fighters to be in good physical condition to undertake a FFFT, the employer has an obligation to ensure that fire fighters undergo a physical training program prior to the FFFT.
- [38] It was established at the hearing that J. Munn was not ordered by the employer to go through the 12-week fitness program, but only informed of the program manual, which was distributed to all fire fighters. Also, to the employer's knowledge, J. Munn did not participate in the 12-week fitness program. Given this, J. Munn was, in my opinion, in a situation that could reasonably have been expected to cause him injury during the FFFT.
- [39] The employer stated that the FFFT is designed to be conducted while the employee wears a face piece, to simulate real situations. During the hearing, neither party gave arguments on this issue. It is established that during the FFFT, a PSP staff member supervises the employee and has to make a visual assessment of his/her condition after each task. Yet, the view of the employee's face diminishes by about 20% because the mask tends to fog.
- [40] I am not convinced that the fact that the mask reduces the view of the employee's face would have constituted a danger for J. Munn while he would have performed the FFFT, because there was another control method used to monitor the level of stress of the employee, the Rating of Perceived Exertion Scale (the Borg Scale).
- [41] With regards to phone availability in case of a medical emergency, the employer stated that during the FFFT, the PSP staff member has a cellular phone and a phone is accessible in the supervisor's office. I am convinced that a situation of danger did not exist regarding this issue.

- [42] In conclusion, I find that a danger existed for J. Munn at the time of HSO Mah's investigation because the employer had not ensured that J. Munn had completed the necessary 12-week physical fitness program or an equivalent individual fitness program prior to undergoing the FFFT. In my opinion, HSO Mah's decision was unreasonable because she did not take into consideration the absence of mandatory fitness training.
- [43] I believe that because prior mandatory training is missing, a fire fighter could be in a situation where he/she could go through the tasks of the FFFT without being in good physical condition. Consequently, the fire fighter could be at risk of getting injured.
- [44] Therefore, having found that a danger existed for J. Munn, I rescind HSO Mah's decision rendered on April 19, 2004 that there was no danger for J. Munn to perform the FFFT.
- [45] In addition, since I believe that a danger existed for J. Munn, I am authorized by paragraph 146.1(1)(b) of the *Code* to issue a direction if I consider it appropriate. 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
- ...
- (b) issue any direction that the appeals officer considers appropriate under subsection 145(2) or (2.1).
- [46] In accordance with paragraph 146.1(1)(b) and paragraphs 145.2(a) and (b) of the *Canada Labour Code*, I hereby direct the employer to protect the employees from the danger immediately and to discontinue the FFFT until he has complied with the direction attached in appendix.
- [47] Be advised that, pursuant to subsection 145(8) of the *Canada Labour Code*, you are required to inform in writing a health and safety officer, no later than July 29, 2005, of the measures taken to comply with the attached direction and to provide a copy of that written response to the work place health and safety committee.
- [48] Also, be advised that, pursuant to subsection 145(5) of the *Canada Labour Code*, the employer shall without delay cause a copy of the direction to be posted and to give a copy of it to the health and safety committee.

Pierre Guénette
Appeals Officer

APPENDIX

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

Direction to the Employer Under Paragraphs 145(2)(a) and (b)

On February 24, 2005, the undersigned Appeals Officer conducted an inquiry pursuant to section 146.1 of the *Canada Labour Code*, Part II (the *Code*), into the circumstances of the decision of health and safety officer Lisa Mah that a danger did not exist for Joseph Munn.

The said appeals officer considers that the performance of an activity constitutes a danger to an employee while at work:

There is a danger for Joseph Munn, the refusing employee who appealed health and safety officer Mah's decision, or for any other Department of National Defence fire fighters, to undergo the Fire Fighter Fitness Test (FFFT) without first completing a fitness training program and until the employer has put in place a control program to evaluate the physical condition of its fire fighters prior to the FFFT.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(a) of the *Code*, to protect employees from the danger immediately.

Furthermore, you are directed, pursuant to paragraph 145(2)(b) of the *Code*, to discontinue the Fire Fighter Fitness Test until you have complied with the direction issued pursuant to paragraph 145(2)(a) of the *Code*.

Issued at Gatineau, July 7, 2005.

Pierre Guénette
Appeals Officer

To: Department of National Defence
CFB Esquimalt
Esquimalt, British Columbia

Summary of Appeals Officer's Decision

Decision No.: 05-030

Applicant: Joseph Munn

Respondent: Department of National Defence

Key Words: Fire fighter fitness test, danger, *bona fide* occupational requirement, disabling injury, spreader tool, self contained breathing apparatus, Borg scale, direction

Provisions: CLC 122,128, 129(7), 145, 146
COSHR N/A

Summary

A civilian fire fighter employed by DND refused to participate in the timed walk-through familiarization of the Fire Fighters Fitness Test (FFFT) because he believed that it would be dangerous to his health and safety.

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. Consequently, the appeals officer directed the Department of National Defence to cease conducting the FFFT. This is until it demonstrated to a health and safety officer that fire fighters complete a mandatory fitness training program prior to the FFFT and until the employer has put in place a control program to evaluate the physical condition of the fire fighters prior to the FFFT.