Occupational Health and Safety Tribunal Canada
Tribunal de santé et sécurité au travail Canada

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Cases No. 2005-28
2005-29
2005-31
Decision No. CAO-07-030

Canada Labour Code
Part II
Occupational Health and Safety

P&O Ports Inc.
& Western Stevedoring Co. Ltd.
appellants

and

International Longshoremen's and Warehousemen's Union, Local 500
respondent

August 31, 2007

This appeal was heard by Appeals Officer Richard Lafrance, in Vancouver, British Columbia, on September 19 and 20, 2006 and October 19 and 20, 2006.

Appearances

For the appellants
Thomas A. Roper, Counsel for P&O Ports Inc. and Western Stevedoring Co. Ltd.

For the respondent
Leah Terai, Counsel, International Longshoremen's and Warehousemen's Union (ILWU), Local 50

[1] This decision concerns three appeals[1] filed by two different employers, P&O Ports Inc. and Western Stevedoring Co. Ltd., against directions issued by health and safety officers (HSO) P. D'sa and J. Yeung. Because the circumstances were similar and involved the same employees engaged in the same type of activity, at the request of the parties, the undersigned Appeals Officer decided, pursuant to his authority under paragraph 146.2(*h*) of the *Canada Labour Code* (the *Code*), that it would be preferable and more efficient to hear the three appeals simultaneously.

[1] Canada Appeals Office Case No. 2005-28, *Western Stevedoring Co. v. ILWU, Local 500*; Case No. 2005-29, *P&O Ports Inc. v. ILWU, Local 500;* Case No. 2005-31, *P&O Ports Inc. v. ILWU, Local 500-2*

[2] The issues to be decided in these cases are whether or not the activity of working on the hatch covers of the three ships identified in the work refusals constituted a danger for the refusing employees and if a direction is required to correct the situation.

[3] To arrive at a decision, it is necessary to consider the activity that the employees were engaged in and the circumstances that existed at the time of the health and safety officer's investigation and that may or may not continue to exist to this day.

[4] In light of this analysis, I must decide whether of not to confirm, vary or rescind the directions that the HSO's issued to the appellants. If I find that a contravention of the *Code* existed, I must also consider whether or not to issue a direction under subsection 145(1) or 145(2) of the *Code*.

[5] To do this, I must consider the relevant provisions of the *Canada Labour Code*, Part II, the facts of the case and the relevant jurisprudence.

Case No 2005-29

[6] The first case is about an appeal brought under subsection 146(1) of the *Canada Labour Code*, Part II, by P&O Ports Inc. / Canadian Stevedoring (P&O Ports), on August 5, 2005, against a direction issued by health and safety officer D'sa on July 8, 2005.

[7] Bob Wall, Grain Department Manager, P&O Ports, filed the appeal on August 05, 2005. He did not request a stay of the direction.

[8] The direction issued to Bob Wall, as the employer's representative, states:

DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145(2)(*a*) AND (*b*)

On July 08/05, the undersigned safety officer conducted an investigation following a refusal to work made by Glen Bolkowy who notified of the refusal in the work place operated by P&O Stevedoring, being an employer subject to the *Canada Labour Code*, Part II, at U.G.G., the said work place sometimes known as the IKAN BELLIAK.

The said safety officer considers that the use or operation of a machine or thing/ a condition in any place constitute a danger to an employee while at work.

Due to the following

1. Working on an open hatchcover with no fencing where the drop is greater than 2.4 m.
2. Working close to the edge of a hatchcover with a slippery surface.

Employees are to be protected from the dangers stated above prior to further the process.

> Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(*a*) of the *Canada Labour Code*, Part II, to immediately take measures for guarding the source of danger/protect any person from the danger.
>
> You are HERBY FURTHER DIRECTED, pursuant to paragraph 145(2)(*b*) of the *Canada Labour Code*, Part II, not to use or operate the place/machine/thing in respect of which the notice of danger no. ___ has been affixed pursuant to subsection 145(3), until this direction has been complied with.

[9] The report and documents submitted by HSO D'sa, as well as his testimony and that of other witnesses, establish the following chronology of events leading to the refusal to work on the ship Ikan Beliak.

[10] At 8:00 a.m., on July 8, 2005, a team of three employees working as longshoremen was assigned to load a ship, the Ikan Beliak, with grain. As it was raining at the time, the employees were told by their foreman to rig tarps[2] over the hatch covers of the hold to protect the grain from the rain.

[11] While attempting to rig the tarps over the hatch covers, two of the employees slipped and feared falling over the edge of the cover. There were a number of tripping hazards on the covers, such as tie-downs for containers.

[12] The height between the ship's deck and the top of the hold covers was less than 2.4 meters. In many areas immediately below the covers, there were pipes, pumps and other metal objects that one could fall on and get hurt. When the doors were opened, the height to the bottom of the hold was about 20 m.

[13] The employees had to reach over the edge of the hatch covers to grab the tarp that was brought on board with the pipe used to load the grain. As well, they had to work on the edge of the hatch covers to spread and rig the tarp over them. The employees feared for their safety, as they had to work too close to the edge of the covers to properly rig the tarps. In addition, the covers had become slippery because of grain and grain dust in addition to the rainwater accumulated on them.

[14] After trying to rig the tarps for some time and after two of them slipped on the hatch covers, the longshoremen decided that rigging the tarp was dangerous to their health and safety. They informed their business agent and their immediate supervisor of their work refusal.

[15] After some discussion, around 8:30 a.m., B. Wall, Grain Department Manager, called for a health and safety officer to investigate the refusal.

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[2] The *Webster New World Dictionary*, 1996, defines tarp as short for tarpaulin: 1a) waterproof material; b) a sheet of this used for spreading over something to protect it from getting wet.

[16] By the time health and safety officer D'sa arrived around 10:00 a.m., it had stopped raining. However, B. Wall insisted to have a dry run to demonstrate to HSO D'sa how a tarp was rigged over a hold cover.

[17] HSO D'sa found that it was unsafe to rig the tarps with the hatch covers opened, as there was no protection on the side of the opened covers. He asked that the covers be closed to do the rigging.

[18] HSO D'sa also testified that B. Wall directed the employees to rig the tarps from the deck of the ship. However, as the tarps kept snagging in the hatch covers when they tried to open them, they stopped their attempts after a few tries.

[19] HSO D'sa noted the following facts in his report:

1. The height of the hatchcover was less than 2.4m.
2. When the hatch is open, at the open end, the height from hatchcover to bottom of hold is about 20m.
3. Protection was needed at this end, and guard rails were rigged before opening the hatch.
4. Rigging of tarp was possible with the hatch closed, in a safe manner, working away from the edges towards the centre, and rigging the edges from the main deck.
5. On completion of the rigging operation, the hatchcover can be opened safely.
6. From the experience of all parties involved, including the Safety Officer, it was agreed that the hatchcover surface turns slippery, in the presence of grain dust, spilled grain and rain water. This is especially true, when the grain is spherical in shape, like canola, peas, etc.
7. The hatchcovers need to be closed from time to time, for various reasons.
8. During rain, water collects in the tarp, between the open hatchcovers.
9. There is a need to remove this water prior to closing the hatchcover, as otherwise the water will drain on to the cargo.
10. ln order to remove this water, the method used, is for the employee to pull up on the tarps, standing near the edge of the hatchcover.
11. This part of the operation is considered a danger, as any slip would mean that the employee could fall over the edge, on to the main deck.
12. Such accidents have occurred before.

Case No. 2005-28

[20] The second case is an appeal brought under subsection 146(1) of the *Canada Labour Code*, Part II, by Western Stevedoring, Co. Ltd., against a direction issued by health and safety officer D'sa on July 8, 2005.

[21] Guy Thomson, Grain Superintendent, Western Stevedoring, Co. Ltd., filed the appeal on August 5, 2005. He did not request a stay of the direction.

[22] The direction states:

DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145(2)(*a*) AND (*b*)

On July 08/05, the undersigned safety officer conducted an investigation following a refusal to work made by Steve Suttie who notified of the refusal in the work place operated by Western Stevedoring, being an employer subject to the *Canada Labour Code*, Part II, at Cascadia Terminal, the said work place sometimes known as the M.V. JUPITER CHARM.

The said safety officer considers that the use or operation of a machine or thing/ a condition in any place constitute a danger to an employee while at work.

Due to the following

1. Working on an open hatchcover with no fencing where the drop is greater than 2.4 m.
2. Working close to the edge of a hatchcover with a slippery surface.

Employees are to be protected from the dangers stated above prior to further the process.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(*a*) of the *Canada Labour Code*, Part II, to immediately take measures for guarding the source of danger/protect any person from the danger.

You are HERBY FURTHER DIRECTED, pursuant to paragraph 145(2)(*b*) of the *Canada Labour Code*, Part II, not to use or operate the place/machine/thing in respect of which the notice of danger no. ___ has been affixed pursuant to subsection 145(3), until this direction has been complied with.

[23] The report and documents submitted by HSO D'sa in addition to his testimony and that of other witnesses establish the following chronology of events leading to the refusal to work on the M.V. Jupiter Charm, on July 8, 2005.

[24] While HSO D'sa was investigating the work refusal onboard the Ikan Beliak, he was informed around 10:30 a.m. that there was another work refusal on board the M.V. Jupiter Charm. He went to investigate this second work refusal around 11:00 a.m.

[25] HSO D'sa found that the circumstances prevailing on board the Jupiter Charm were very similar to those on board the Ikan Beliak. Three longshoremen refused to work because they considered it dangerous to rig and unrig a tarp over an open hold, at a certain height and with a slippery surface, because they could fall either in the hold or on the deck and seriously injure themselves.

[26] According to the refusing employees, the employer wanted to carry on with the loading of grain during rain. Due to dust, rain and spilled grain, the hatch covers were becoming slippery and the employees feared that they could slip and even fall into the open hold, from a height of 10 to 20 m. They could also fall on the deck, a height of less that 2.4 m, but where there were pipes and equipment that could seriously injure them.

[27] HSO D'sa noted that, according to Guy Thompson, the operation of loading grain in the rain under tarps had been ongoing for more that thirty years in the Port of Vancouver and since the employees were not required to work at a height of more that 2.4 m, no danger existed.

[28] HSO D'sa established the following facts during his investigation.

1. The height of the hatchcover, from main deck was less than 2.4m.
2. When the hatch is open, at the open end, the height from hatchcover to bottom of hold is about 15m.
3. Protection was needed at this end, but there is no provision to rig guard rails.
4. Rigging of tarp was possible with the hatch closed, in a safe manner, working away from the edges towards the centre, and rigging the edges from the main deck.
5. On completion of the rigging operation, the hatchcover can be opened safely.
6. From the experience of all parties involved, including the Safety Officer, it was agreed that the hatchcover surface turns slippery, in the presence of grain dust, spilled grain and rain water. This is especially true, when the grain is spherical in shape, like canola, peas, etc.
7. The hatchcovers need to be closed from time to time, for various reasons.
8. During rain, water collects in the tarp, between the open hatchcovers.
9. There is a need to remove this water prior to closing the hatchcover, as otherwise the water will drain on to the cargo.
10. ln order to remove this water, the method used, is for the employee to pull up on the tarps, standing on the hatchcover, near the edge.
11. This part of the operation is considered a danger, as any slip would mean that the employee could fall over the edge, on to the main deck.
12. Such accidents have occurred before.

[29] HSO D'sa decided that the procedure employed to rig and unrig the tarps and to remove water from the tarps was dangerous. He identified the two following dangers:

1. Working at a height greater than 2.4 m.
2. Working near the edge, on top of a slippery hatchcover.

[30] HSO D'sa directed the employer to protect the employees against the dangers.

Case No. 2005-31

[31] The third case concerns an appeal brought under subsection 146(1) of the *Canada Labour Code*, Part II, by P&O Ports Inc., against a direction issued by health and safety officer Yeung on August 16, 2005.

[32] Bob Wall, Grain Department Manager, P&O Ports, filed the appeal on August 24, 2005. He did not request a stay of the direction.

[33] The direction, issued to Peter Warner, Superintendent, P&O Ports, states:

> **DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145(2)(*a*) AND (*b*)**
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> On 16 Aug. 2005, the undersigned safety officer conducted an inspection following a refusal to work made by M.A. St.Denis who notified of the refusal in the work place operated by P&O Ports, being an employer subject to the *Canada Labour Code*, Part II, at M.V. THOMAS C, the said work place sometimes known as Pacific Elevator #2.
>
> The said safety officer considers that the use or operation of a machine or thing/ a condition in any place constitute a danger to an employee while at work.
>
> THE USE OF RAIN TARP ON HATCH COVER DURING RAIN CONSTITUTES A DANGER TO AN EMPLOYEE AT WORK.
>
> Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(*a*)of the *Canada Labour Code*, Part II, to immediately take measures for guarding the source of danger/protect any person from the danger.
>
> You are HERBY FURTHER DIRECTED, pursuant to paragraph 145(2)(*b*) of the *Canada Labour Code*, Part II, not to use or operate the place/machine/thing in respect of which the notice of danger no. ___ has been affixed pursuant to subsection 145(3), until this direction has been complied with.

[34] The report and documents submitted by HSO Yeung in addition to his testimony and that of other witnesses establish the following chronology of events leading to the refusal to work on the M.V. Thomas C. on August 16, 2005.

[35] On the evening of August 16, 2005, a team of longshoremen was assigned to load the ship M.V. Thomas C. with grain. As it was raining, the employees were told by their foreman to rig tarps over the hatch covers of the hold to protect the grain from the rain.

[36] The employees considered that it was dangerous to rig and unrig a tarpaulin, because the hatch covers became slippery with the accumulation of dust, spilled grain and rainwater on top of them.

[37] The employees felt that there was a risk of falling on to the deck, from a height between 1.5 and 3 m. In many places immediately below the hatch covers, there were pipes, pumps and other metal objects that one could fall on and get hurt. They also feared falling into the hold when the doors were opened, to a depth of approximately 20 m, thus suffering serious if not fatal injuries.

[38] HSO Yeung testified that he did not witness the activity, per say, of rigging the tarp, but the employees and employer representative present during his investigation described and explained it to him.

[39] HSO Yeung affirmed that the employer did not agree with his recorded fact that the employees have to stand close to the edge to rig the tarp, but that he nevertheless firmly believed there were many circumstances when the employees did have to stand close to the edge to rig or unrig the tarp.

[40] HSO Yeung acknowledged that his report was somewhat very similar to that of HSO D'sa, because the circumstances were so similar to those investigated by HSO D'sa that he reproduced some elements of his report.

[41] HSO Yeung noted the following facts in his report:

1. The height of the hatchcover above deck was less than 2.4m.
2. When the hatch is open, at the open end, the height from hatchcover to bottom of hold is about 18m.
3. Protection was needed at this end, but there is no provision to rig guard rails.
4. Rigging of tarpaulin was possible with the hatch closed, in a safe manner, working away from the edges towards the centre, and rigging the edges from the main deck.
5. On completion of the rigging operation, the hatchcover can be opened safely.
6. From the experience of all parties involved, including the Safety Officer, it was agreed that the hatchcover surface turns slippery, in the presence of grain dust, spilled grain and rain water. This is especially true, when the grain is spherical in shape, like, peas, canola etc.
7. The hatchcovers need to be closed from time to time, for various reasons.
8. During rain, water collects in the tarpaulin, between the open hatchcovers.
9. There is a need to remove this water prior to closing the hatchcover; otherwise the water will drain on to the cargo.
10. ln order to remove this water, the method used, is for the employee to pull up on the tarps, standing near the edge of the hatchcover.
11. This part of the operation is considered a danger, as any slip would mean that the employee could fall over the edge, on to the main deck or the hold.
12. Such accidents have occurred before.

[42] HSO Yeung decided that a danger existed in the procedure employed to rig and unrig the tarpaulins and remove water from the tarps. He directed the employer to protect the employees from the danger.

Appellant's witnesses

[43] I retain the following from B. Wall, Grain Department Manager for P&O Ports Inc.

[44] B. Wall stated that the tarps are usually rigged with the hatch covers closed, otherwise the grain would be exposed to the rain. In addition, normally the employees should not have to stand on the edge of the doors to rig the tarps. It can be done from the main deck. However, occasionally, if needed, the employees may go on top of the hatch cover, but they should not be closer than 1.5 to 2 m to the edge.

[45] B. Wall acknowledged that the hatch covers could become slippery as grain and water may accumulate on the hatch covers. Nevertheless, he asserted that if the tarps were properly set, no water should accumulate and if it did, it could be removed by tightening the lanyards that are attached to the tarp from the main deck. He commented that the employees should be wearing non-slip boots to work on the ships.

[46] B. Wall explained that meetings had recently been held with the union to discuss tarping procedures, but no consensus was reached. He also recalled that, in 2000, there was an accident where an employee fell off the hatch cover while folding the tarp and suffered back injuries.

[47] G. Thompson, Grain Superintendent for Western Stevedoring, presented a very similar testimony as B. Wall regarding the circumstances of the work refusal on board the M.V. Jupiter Charm.

[48] According to G. Thompson, water should not accumulate if the tarps are properly installed, but if it does accumulate, the hatch covers can become slippery. Nonetheless, the employees generally do not have to work close to the edge, as the tarps can be tightened from the main deck using the lanyards that are attached to them.

[49] G. Thompson testified as well that there were no written procedures on how to tarp over the hatch covers at the time of the refusals. Since then, the employers proposed procedures prepared in consultation with the union and the British Columbia Maritime Employers Association (BCMEA). A few meetings were held, but no consensus could be reached.

[50] In G. Thompson's view, there was nothing different on the day of the refusal than on any other days when the employees had used tarps to load grain while it was raining.

[51] According to P. Warner, Superintendent for P&O Ports Inc., the hatch covers can become slippery with water and grain debris, but the employees should not have to work close to the edge. They ought to work in the center of the hatch covers, away from the edges. In the proposed work guidelines, a two meter no work zone is to be delineated around the edge of the hatch covers in the future.

Expert testimony

[52] B. Johnston testified for all three cases as an expert in marine safety. According to his resume, he retired from the Canadian Coast Guard, where he was a Senior Nautical Marine Surveyor, Ship Safety. His area of expertise was tackle inspection and loading processes. He was a project officer for compiling parameters and test processes and wear limits relative to loading gear on board ships. After his retirement, he participated in the investigation of accidents to persons and equipment. As well, he reviewed technical aspects of escape chute systems. Lastly, he participated in several instructional seminars for Transport Canada pertaining to the survey of cargo gear.

[53] Ms. Leah Terai, Counsel for the respondent, accepted B. Johnston as an expert in marine safety.

[54] B. Johnston stated that the practice of tarping has been in place since the early sixties. The employees are trained on the job to do the work and are supervised by knowledgeable persons.

[55] B. Johnston believed that the critical issued in this case is that the employees have to be at a reasonable distance from the edge of the hatch covers to be able to work safely. The *Tackle Regulations*[3] specifies that there must be a reasonable space to make it safe to work in the area.

[56] In addition, according to B. Johnston, one must look at the employee's and supervisor's experience, but exceptional circumstances must also be taken into consideration. The employees must use their own good judgment and it is up to the supervisor to remind them not to go into an unsafe zone.

[57] B. Johnston stated as well that, taking into consideration

- subsection 2.9(2) of the *Marine Occupational Safety and Health Regulations* [4] *(MOSH Regulations),* which prescribes a safety net of about 6 feet wide under access ladders or gangways, and
- the proposed *Cargo, Fumigation and Tackle Regulations*, under the *Canada Shipping Act, 2001*, providing that safety nets be provided and extend 1.8 m on both sides of a safe way passage and access way,

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[3] Enabling Statute: *Canada Shipping Act*, R.S. 1985, c. S-9; *Tackle Regulations*, C.R.C., c. 1494

[4] Enabling Statute: *Canada Labour Code*, R.S. 1985, c. L-2; *Marine Occupational Safety and Health Regulations*, SOR/87-183

2.9(1) A safety net shall be fitted under every part of an access ladder or gangway except where
(*a*) the ladder or gangway and the approaches thereto are constructed in a manner that makes the fitting of a safety net unnecessary; or
(*b*) the fitting of a safety net is not practicable.
(2) Every safety net referred to in subsection (1) shall
(*a*) extend on both sides of the access ladder or gangway for a distance of 1.8 m;
(*b*) be kept taut at all times; and
(*c*) meet the standards referred to in subsection 2.15(2).

one can conclude that a worker working not closer than 2 m from the edge of a hatch cover should be safe and not in any particular danger of falling.

[58] B. Johnston thought that water accumulation on the hatch covers because of improper rigging of the tarps must be addressed as soon as possible and require more manpower so that it can be done from the main deck.

[59] As well, employees must wear non-slip boots to work on hatch covers and, even then, the covers should be kept clean by the ship's crew. Working on top of hatch covers has been an operational condition for a very long time and employees should know to work away from the edges.

[60] B. Johnston believed that the *MOSH Regulations* requirements on fall protection systems are to provide fall protection equipment where employees have to work on an unprotected structure above 2.4 m. In his opinion, there was no need for fall protection equipment in this case, as the employees only had to work far from the edges of the hatch covers.

[61] B. Johnston thought that the employer’s proposed guidelines on the two types of hatch covers, as in the three cases at issue, can address any employees' concerns as to the risk of falling off the hatch covers. The guidelines deal with the issue of slipping by having the hatch covers properly cleaned as required and the employees wear non-slip working boots.

[62] In addition, by aligning the work conditions with the *Tackle Regulations* and the proposed *Cargo, Fumigation and Tackle Regulations*, B. Johnston alleged that a 2 m safe working distance from the edges of the covers was sufficient to protect the employees against the occasional tripping or slipping. In his mind, fall protection systems would be very difficult to use.

[63] B. Johnston believed that height did not constitute a danger for an employee, whatever the activity, as long as he stood one to two meters away from the edges of the hatch covers.

[64] B. Johnston said that when he participated in the review of the proposed *Cargo, Fumigation and Tackle Regulations*, the working group considered the employees' activities and made sure they had enough working space.

[65] B. Johnston believed that advising the employees or delineating the safe working zone was sufficient to protect employees from falling over the edge of the hatch covers. He thought that, in general, longshoremen had a good sense of being aware of where they were on the covers.

[66] B. Johnston considered that the tripping hazards, such as cleats, attach points, etc., especially when they were covered by tarps, were normal predicaments, but in any case, the employees rarely had to work on top of hatch covers. He acknowledged as well that, in most cases, the height of the hatch covers on the newer ships was about 2.4 m or more.

[67] B. Johnston said that the areas immediately beside the hatch covers were very dangerous if someone was to fall off the covers, as items such as steel pipes, pumps, steps, etc. were usually found there. It was one more reason why, to be safe, employees had to work away from the edges.

Respondent's witnesses

[68] I retain the following from the testimony of J. Brooks, who testified for the ILWU. J. Brooks, a member of the ILWU, works as a longshoreman and is a spokesperson for the health and safety committee as well as a member of the Grain Committee. As a longshoreman, J. Brooks has been loading grain on ships for more that 30 years. He has performed tarp rigging repeatedly and is quite familiar with the process.

[69] J. Brooks testified that, when it rains, the tarp is brought on the hatch covers using the grain loading pipe. The longshoremen have to climb on to the covers to unfold and spread the 40 by 60-foot tarp. Once the tarp is spread, the lanyards, which are tied to the tarps about every 3 feet, are tightened from the main deck.

[70] J. Brooks further explained that as the loading progresses, employees have to adjust the lanyards if rainwater accumulates on the tarps. This is done at times from the main deck, although, employees sometime have to climb on top of the hatch covers, depending on the adjustment needed.

[71] J. Brooks further explained that once loading is done, if water has accumulated on the tarp and formed a pocket in the opening of the hold, employees have to climb on top and pull on the tarp to remove the excess water in order to be able to close the hatch cover. They pull on the lanyards and shake the tarp to empty the water pockets. Sometimes, it can be done from the center of the hatch cover or they have to stand close to the edge of the opened hold or of the hatch cover. After that, the longshoremen untie the lanyards and remain on top of the closed hatch covers to fold the tarp and tie it to the loading pipe to get it off the ship.

[72] J. Brooks acknowledged that if the tarps are properly rigged, no water should accumulate. However, over such large areas and given wind conditions and pouring rain, it is very difficult to keep the tarps tight and water bellies often form on them. He also recognized that in most case, perhaps 80% of the time, pooling of water on the tarps is not an issue.

[73] J. Brooks pointed out that during the HSO's investigation, they tried to demonstrate how to rig tarp from the main deck, as requested by B. Wall, but were not successful in doing so. This is not something they usually do. The tarp kept being snagged and torn in the hatch covers when they opened the covers.

[74] Regarding the guidelines that are now proposed by the employer, J. Brooks wondered where the 2-meter no work zone came from. He remembered that the employer originally wanted a one-meter zone. Union members figured that a 2-meter zone was a better protection from the risk of falling off the hatch covers. However, he asked himself if it really was safe? Who knows exactly what a safe distance from the edge would be, with

the type of work being done and the various working conditions, given the different types of hatch covers and ships?

[75] A. Laumonier testified as the third local vice president of the ILWU. He is also a union health and safety coordinator and a member of the Grain Committee. This Committee was set up by the BCMEA and the ILWU to discuss particular grain-related health and safety issues. He clarified that it is a health and safety committee set up under the collective agreement, and not a committee established under the *Canada Labour Code*, even if they did not obtain a ministerial exemption under section 130 of the *Code*.

[76] A. Laumonier explained that the grain committee met on various occasions to try to settle the tarp issues as related to health and safety, but never came to an agreement. The ILWU disagreed with the proposed guidelines with regard to fall protection. In this type of industry, a visual aid to determine a no work zone is insufficient and there needs to be a mechanical aid, such as a barrier, to limit the zone.

[77] D. McGhie, who has been working as a longshoreman for 38 years, was one of the refusing employees. He clarified that he and his two partners decided to refuse to work after one of them slipped because of accumulated water mixed with grain residues. They believed that it was dangerous because they were working within six inches of the edge of the hatch cover and they could fall off the over if they slipped again.

[78] D. McGhie explained that they had to lean over the edge of the hatch cover to pull on the tarp to bring it on board the ship. The reason being that the gallery, where the grain comes from, was too low and the pipe used to load the grain and to carry the tarps on ships could not reach the proper height to bring in the tarp on top of the hatch cover. He confirmed that he did not ask his foreman to have a mobile crane to bring up the tarp on the ship instead of using a pipe that could not reach high enough.

[79] G. McGhie clarified that when the HSO came to investigate the refusal to work, it was still raining and the tarp had been partially rigged. The HSO concluded that there was danger, because the work was to be performed too close to the edge of the hatch covers.

[80] S. Suttie, Business Agent for the ILWU, confirmed that there were two work refusals on the day in question and that he participated in the investigation of both work refusals with the health and safety officer. In addition, he confirmed that the employees were not successful in their attempts to demonstrate the rigging of the tarp from the main deck, as the tarp kept getting snagged in the moving covers.

Appellant’s arguments

[81] T. Roper, Counsel for both appellants, submitted that since HSO D’sa's and Yeung's reports were so remarkably similar, the same grounds for appeal apply for all three directions.

[82] T. Roper submitted that the decisions of health and safety officers D’sa and Yeung should be rescinded on the grounds that their investigations were flawed because they did not have all the necessary information to render a decision. As they had not seen the tarp

being rigged or removed in the rain, they did not witness the only fact that they considered posed a danger to the employees, namely removing water by pulling on tarps while standing near the edge of the hatch cover. Furthermore, T. Roper alleged that the three directions contained errors of facts and law.

[83] In the alternative, T. Roper submitted that the employer's proposed guidelines for rigging tarps on the hatch covers corrects the alleged danger. Consequently, no danger exists, if it ever did.

[84] Citing the decision made by the Canada Industrial Relations Board (CIRB - known previously as the Canada Labour Relations Board or CLRB) in *Simon v. Canada Post Corp.*[5], T. Roper argued that the right of an employee to refuse work for safety reasons is not meant to be used as a tool to gain labour relations advantage or exert labour relations pressure.

[85] Referring to the CLRB decision in *Brailsford v. Worldways Canada Ltd.*[6], T. Roper argued that the right to refuse work is designed to be exercised in situations where employees are faced with immediate danger, when injury is likely to occur right there and then if the danger is not removed.

[86] T. Roper submitted that longshoremen have been tarping vessels for over 30 years and this was not a situation that cropped up unexpectedly. The employees were not being asked at the time of the refusal to do what the health and safety officers found to be the danger.

[87] T. Roper added that there was no evidence that the longshoremen were asked, at the time of the refusal, to remove water from the tarps by "pulling up on the tarps, standing near the edge of the hatch cover."

[88] T. Roper contended that R. McGhie' evidence was inconsistent with the findings of the HSOs, as well as with B. Wall's testimony with regard to which hatch covers was in use at the time of the refusal or the equipment used to bring the tarp on board the ship. He cited the following excerpt from the British Columbia Court of Appeal decision in *Faryna v. Chorny*[7] to argue that I should give no weight to R. McGhie's testimony:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

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[5] *Simon v. Canada Post Corp.* (1993) 91 di 1, CLRB Decision No. 988
[6] *Brailsford v. Worldways Canada Ltd.* (1992), 87 di 98, CLRB Decision No. 921
[7] *Faryna v. Chorny* [1952] 2 D.L.R. 354 British Columbian Court of Appeal, pages 356, 357

[89] In addition, T. Roper submitted that the timing of the work refusal and the lack of any credible explanation as to why the "emergency measure" of a work refusal was necessary in the three cases can only lead to the conclusion that the work refusals had an improper purpose: to bring to a head the ongoing discussions between the employer and the union on the safety of rigging tarps on ships when it rained.

[90] T. Roper argued that it is necessary that a person be able to show the circumstances in which there is a reasonable probability that the injury will occur, as stated in the Federal Court decision in *Juan Verville*[8].

[91] T. Roper submitted that there was no objective evidence to show that a hazard was present or would come into being, that the tarp would belly or there were unusually slippery conditions and that the employees would be required to remove water from the tarp. He concluded that, under the circumstances, the speculative possibility that an employee could be injured while tarping a grain vessel did not meet the definition of "danger" under the *Code*. He cited the following excerpt of the Federal Court of Appeal decision in *Douglas Martin*[9] to support this position:

> I agree that a finding of danger cannot be based on speculation or hypothesis… The task of the tribunal in such cases is to weigh the evidence to determine whether it is more likely that not that what an applicant is asserting will take place in the future.

[92] In the alternative to the arguments presented, T. Roper submitted that the only risk that may have arisen in the tarping procedure was slippery conditions on the hatch covers. He contended that the risk was a normal condition of employment for which no refusal was permitted under paragraph 128(2)(*b*) of the *Canada Labour Code*. He added that any risk of slipping was mitigated by the requirement for longshoremen to wear non-slip foot wear.

[93] T. Roper also argued that there are inherent dangers in working as a longshoreman, as testified by J. Brooks, and that the Courts[10] and other tribunals[11] have ruled that if the alleged danger constituted a normal condition of employment, the employee could not refuse to work.

[94] T. Roper maintained that, in the three directions issued by the health and safety officers, the hypothetical threat of working near the edge of the hatch cover in a situation that was within the normal level of danger inherent to the job did not constitute a danger under the *Code*.

[95] Furthermore, T. Roper submitted that the employer's proposed guidelines for rigging tarps on the two types of hatch covers corrected any alleged danger claimed by the health and safety officers, the longshoremen and the union.

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[8] *Juan Verville and Service Correctionnel du Canada, Institution Pénitentiaire de Kent,* 2004 FC 767
[9] *Douglas Martin and Public Service Alliance of Canada and Attorney General of Canada,* 2005 FCA 156, par. 37
[10] *Juan Verville, supra*
[11] *Zafar v. Canadian National Railway Co.* (1996) 102 di 154

[96] Consequently, T. Roper submitted that the three directions should be rescinded because:

- the investigations were flawed and incomplete;
- the decision to issue a direction was incorrect since there was no present and immediate danger;
- the perceived danger was part of the job; and
- the work refusals were based on hypothetical and speculative situations and dealt with labour relations issue.

Respondent's arguments

[97] In response to T. Roper's arguments that I should rescind the directions because the investigations were flawed and incomplete, Leah Terai argued that, as noted in paragraphs 59 to 64 of the Canada Appeals Officer (CAO) decision in *Hogue-Burzynski*[12], an appeal before an Appeals Officer is *de novo.* The Appeals Officer is not limited to making a determination based on whether or not the health and safety officer's investigation was complete or incomplete. In addition, the Appeals Officer may consider potential hazards or conditions as well as any current or future activities related to the work refusal.

[98] Citing paragraphs 31 and 32 of the *Juan Verville* decision, *supra*, L. Terai submitted that the current amended version of the *Code* includes "potential" and "future activities" and the *Code* is no longer limited to specific factual situations existing at the time of the employee's refusal.

[99] L. Terai noted as well the following interpretation of danger, given by Appeals Officer Malanka in *Charmion Cole and Lynn Coleman and Air Canada*[13]:

> [70] Taking the above noted *Code* provisions and the findings of Justices Tremblay -Lamer and Gauthier, it is my opinion that a danger exists where the employer has failed, to the extent reasonably practicable, to:
>
> - eliminate a hazard, condition, or activity;
> - control a hazard, condition or activity within safe limits; or
> - ensure employees are personally protected from the hazard, condition or activity;
>
> and one determines that:
>
> - the circumstances in which the remaining hazard, condition or activity could reasonably be expected to cause injury or illness to any person exposed thereto **before the hazard, condition or activity can be corrected or altered**; and
> - the circumstances will occur in the future as a reasonable possibility as opposed to a mere possibility or a high probability.

[12] *Bernadette Hogue-Burzynski et al. and Via Rail Canada*, CAO Decision No. 2006-15
[13] *Charmion Cole and Lynn Coleman and Air Canada*, CAO Decision No. 2006-04, par. 70

[100] In view of the above mentioned jurisprudence, L. Terai submitted that the work activity of placing, monitoring and removing the tarps for both types of hatch covers fell within the *Code* definition of danger. She further argued that the activity described by the employees and the conditions under which it was carried out could reasonably be expected to cause injury to the employees involved.

[101] With regard to the working conditions, L. Terai held that, at the time of the refusals, neither employer had in place procedures for the safe handling of the tarps. Therefore, the risk of handling the tarps was not normal and depended on the method used to do so, as stated in the following excerpt of par. 55 of *Juan Verville, supra*:

> The customary meaning of the words in paragraph 128(2)(*b*) supports the view expressed in those decisions of the Board because normal refers to something regular, to a typical state or level of affairs, something that is not out of the ordinary. It would therefore be logical to exclude a level of risk that is not an essential characteristic but which depends on the method used to perform a job or an activity.

[102] L. Terai referred as well to Appeals Officer Malanka's decision in *C. Brazeau and Securicor Canada Ltd.*[14], where he applied the definition of "danger" as set out in *Juan Verville, supra*:

> [175] In accordance with paragraphs 36 and 55, it is my view that a danger exists if the facts establish that a potential hazard could reasonably be expected in the circumstances to cause injury or illness and that both will occur in the future as a reasonable possibility, as opposed to a certainty or likelihood. The danger remains in effect, or pending, until remedial and preventive measures are taken to alter the circumstances such that risk of injury due to the potential hazard is eliminated or reduced to the extent that is reasonable. If measures are taken to alter the potential hazard and circumstances, such that risk of injury is eliminated or reduced to the extent that is reasonable, and a danger continues to exist, that danger may constitute a permanent attribute of the work and be considered to be a normal condition of employment.

[103] L. Terai pointed out that, in paragraph 218 of the same decision, Appeals Officer Malanka retained the following from Appeals Officer Cadieux's decision in *Parks Canada Agency and Mr. Doug Martin and Public Service Alliance of Canada*[15]:

> [217] For interpreting paragraph 128(2)(*b*), I refer to the following decisions referred to by parties:
>
> …

[14] *C. Brazeau et al. and Securicor Canada Ltd.*, CAO Decision No. 2004-049
[15] *Parks Canada Agency and Mr. Doug Martin and Public Service Alliance of Canada*, CAO Decision No. 02-009

Appeals officer Cadieux stated in paragraph 180 of *Parks Canada Agency and Doug Martin, supra*:

> [180] However, I do agree with Mr. Raven's proposition that
>
> > The fact that risk or danger may be inherent to the work itself does not mean that the worker should be expected to assume all risks to his health and safety as part and parcel of his job. The employer must take the necessary measures to decrease the risk to a minimum.
>
> [218] I retained from the above noted citations that employers must take the necessary measures to decrease the risk to a minimum. In connection with this sections 122.2 and 124 of the *Code* specify the following:
>
> > 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.
>
> [219] Where, despite best efforts, an employer is unable to eliminate or reduce a hazard connected with certain work, that hazard is deemed to be an intrinsic or essential characteristic of the work and normal to the work. Paragraph 128.2(*b*) of the *Code* specifies that an employee cannot refuse to work where the danger is a normal condition of the work.
>
> [220] However, this does not mean that employees engaged in the work must put their health or safety or life on the line and accept all the risks of the job regardless of the consequences. To the contrary, when the employer has not discharged its responsibilities under sections 124 and 125 of the *Code*, it is dangerous for the employee to work under these conditions and the danger does not constitute a normal condition of work referred to in paragraph 128(2)(*b*) of the *Code*.

[104] In view of that jurisprudence, L. Terai submitted that the employers had no evidence to prove that despite their best efforts, they were unable to take preventive measures contemplated in section 122.2 of the *Code* or to decrease the risk to a minimum.

[105] L. Terai argued that, as set out in paragraph 221 of *Brazeau, supra*,

> when the employer has not discharged its responsibilities under sections 124 and 125 of the *Code*, it is dangerous for the employees to work under these conditions and the danger does not constitute a normal condition of work referred to in paragraph 128(2)(*b*) of the *Code*.

[106] L. Terai said that, given the activity described by the employees, there was a risk that the employers should have addressed.

[107] L. Terai indicated that, according to the employees' testimony, they work at the edge of a slippery hatch cover, in circumstances where they risk falling from the top of the hatch to the main deck, a distance of sometime more that 2.4 m, in an area where all kinds of pipes and pieces of equipment that can injure whoever falls on them can be found.

[108] In that respect, L. Terai argued that the employer failed to implement paragraph 125(1)(*b*) of the *Code* regarding the installation of guards, guard rails and other safeguards, in accordance with such prescribed standards as set in paragraph 10.9(*a*) of the *MOSH Regulations*, which reads:

> **10.9** (1) Where a person, other than an employee who is installing or removing a fall-protection system in accordance with the instructions referred to in subsection (5), works from
>
> (*a*) an unguarded structure that is
>
> (i) more than 2.4 m above the nearest permanent safe level,
>
> (ii) above any moving parts of machinery or any other surface or thing that could cause injury to an employee on contact, or
>
> (iii) above an open hold,
>
> the employer shall provide a fall-protection system.

[109] L. Terai argued that B. Johnston, who testified as an expert in support of the employers' case, based his opinion on the reports written by the health and safety officers. He did not meet the criteria set out by the Supreme Court of Canada[16] as being necessary to assist the trier of facts in the case at hand:

> (1) Expert Opinion Evidence
>
> (b) Necessity in Assisting the Trier of Fact
>
> In *R. v. Abbey*, *supra*, Dickson J., as he then was, stated, at p. 42:
>
> > With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary" (*Turner* (1974), 60 Crim. App. R. 80, at p. 83, *per* Lawton L.J.)

[16] R. *v.* Mohan, [1994] 2 S.C.R. 9

> This pre-condition is often expressed in terms as to whether the evidence would be helpful to the trier of fact. The word "helpful" is not quite appropriate and sets too low a standard. However, I would not judge necessity by too strict a standard. What is required is that the opinion be necessary in the sense that it provide information "which is likely to be outside the experience and knowledge of a judge or jury": as quoted by Dickson J. in *R. v. Abbey*, *supra*. As stated by Dickson J., the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature. In *Kelliher (Village of) v. Smith*, [1931] S.C.R. 672, at p. 684, this Court, quoting from *Beven on Negligence* (4th ed. 1928), at p. 141, stated that in order for expert evidence to be admissible, "[t]he subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge."

[110] L. Terai contended that B. Johnston did not provide information beyond the experience and knowledge of the health and safety officers or the Appeals Officer. In this case, there was nothing technical about the issue of whether there was a danger. The facts necessary to form a conclusion were not outside the experience or knowledge of ordinary people. B. Johnston's testimony put him in the role of the employers' advocate, as opposed to providing objective assistance to the Appeals Officer.

[111] L. Terai further argued that B. Johnston's opinion that the activity in question did not pose a danger is a question to be determined by the Appeals Officer. As such, this opinion should not be permitted to displace the decision-making authority of the Appeals Officer.

[112] With regard to the employers' proposed procedure, L. Terai submitted that the proper way to determine what is required to protect the employees' safety is in consultation with the health and safety committee, as prescribed under the *Code*. This has not been done.

[113] As to the two meter no work zone suggested in the employers proposed procedure, L. Terai claimed that the employers relied on B. Johnston to demonstrate that it was acceptable, but, in fact, B. Johnston relied on a regulatory discussion paper that has never been enacted.

[114] As well, L. Terai argued that B. Johnston based his opinion on section 2.9 of the *MOSH Regulations*, which states:

> 2.9 (1) A safety net shall be fitted under every part of an access ladder or gangway except where
>
> (*a*) the ladder or gangway and the approaches thereto are constructed in a manner that makes the fitting of a safety net unnecessary; or
>
> (*b*) the fitting of a safety net is not practicable.
>
> (2) Every safety net referred to in subsection (1) shall

(*a*) extend on both sides of the access ladder or gangway for a distance of 1.8 m;

(*b*) be kept taut at all times; and

(*c*) meet the standards referred to in subsection 2.15(2).

[115] L. Terai claimed that B. Johnston failed to mention that people use the access gangway mentioned in *the MOSH Regulations* to climb or walk, with handrails in place. These are not places where workers pull on lanyards, pull and hold tarps tight or shake and bounce tarps free of water. The provisions relied upon with respect to the safety net simply bears no relationship to the present circumstances.

[116] In conclusion, L. Terai submitted that the decision of danger and the directions issued to the employers should be confirmed, as a danger existed for the employees who refused to work.

Appellant's rebuttal

[117] In rebuttal, T. Roper commented Leah Terai's arguments methodically. I retain the following from the comments he made.

[118] T. Ropers agreed that an appeals before an Appeals Officer is *de novo*. However, he opined that the Appeals Officer must not put aside the HSO's investigation, but, rather, take the HSO's findings into consideration.

[119] T. Roper observed repeatedly that, while L. Terai considered that the entire activity of rigging, monitoring and taking down the tarps was a danger to the employees, the HSOs noted in their directions that the danger resided in the activity of working on an elevated structure as well as on the edge of the hatch doors.

[120] Nevertheless, T. Roper pointed out and maintained throughout his rebuttal that there was no evidence that the employees were asked to work near the edge of the doors, or the hold for that matter.

[121] With regard to the purported danger, T. Roper commented that no danger existed, because, in accordance with the definition of danger in the *Code*, the activity could be modified before the exposure to danger.

[122] T. Roper maintained that it was the employees' duty not to expose themselves to danger. While he agreed that the employees had from time to time to work on the hatch covers and remove water accumulating on the tarps, he opined that they only had to stay away from the door edges in order to avoid the potential danger. Therefore, no danger would exist.

[123] T. Roper observed that there was no evidence that the employees were ordered to work close to the edge. The alleged danger was hypothetical, as the activity could be modified any time before employees were exposed to danger, in that they could work away from

the edge. He argued that, as stated in the *Juan Verville* decision, *supra*, the work refusal cannot be triggered by a hypothetical danger, but by a real and perceived one.

[124] T. Roper commented that the whole thing was orchestrated by the union, to bring to head longstanding discussions about the tarpaulin rigging procedures. There was no real emergency on the day of the refusals.

[125] Finally, T. Roper reiterated that the directions should be rescinded, as no danger existed for the employees who refused to work. However, if confirmed, they should not apply to the entire grain loading operation, but only to the work places that were investigated, namely the three ships were the refusals occurred.

Analysis and decision

[126] As indicated at the beginning of the present decision, I will deal here with the three appeals that I heard concurrently at the request of the parties.

[127] As an Appeals Officer, my mandate under subsection 146.1(1) of the *Code* is to inquire into the circumstances and the reasons of the decisions or directions. I may vary, rescind or confirm them and I may issue directions that I consider appropriate under subsection 145(2) or (2.1).

[128] In addition, as stated in the *Douglas Martin* decision, *supra*, an Appeals Officer "now has all the powers of a health and safety officer, he may also vary it to provide for what he considers the health and safety officer should have directed." Consequently, the Appeals Officer can issue directions under subsection 145(1)(a) or (b) of the *Code*.

[129] With regard to the *de novo* issue, Justice Rothstein clearly stated, in paragraph 28 of the *Douglas Martin supra* decision, that an appeal before an Appeals Officer is *de novo*.

[130] In addition, as Justice Gauthier explained in paragraph 32 of the Verville *supra* decision, "[w]ith the addition of words such as "potential" or "éventuel" and future activity, the *Code* is no longer limited to specific factual situations existing at the time the employee refuses to work." I view this to mean that in addition to the evidence gathered by the HSO, I may receive evidence that takes into consideration the potential hazards or conditions as well as any current or future activities in relation to the circumstances surrounding the work refusal, whether or not this evidence was or could have been available to the HSO conducting the investigation.

[131] The issues to be determined in these instances are two fold.

- The first issue is to determine if the employees who refused to work, were exposed to a danger, as defined under Part II of the *Code*.
- The second issue is to determine if directions are required under the circumstances.

[132] In order to render a decision on these issues, I must consider the definition of "danger" stipulated in the *Code*, the relevant jurisprudence, as well as all the facts and circumstances of the cases at hand.

[133] The *Canada Labour Code*, Part II, defines "danger" as follows in subsection 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[.]

[134] Appeals Officer Malanka appropriately summarized in *Charmion Cole and Lynn Coleman and Air Canada, supra*, Justice Gauthier's determination about the danger. I fully agree with him when he writes:

> [70] Taking the above noted *Code* provisions and the findings of Justices Tremblay -Lamer and Gauthier, it is my opinion that a danger exists where the employer has failed, to the extent reasonably practicable, to:
>
> - eliminate a hazard, condition, or activity;
> - control a hazard, condition or activity within safe limits; or
> - ensure employees are personally protected from the hazard, condition or activity;
>
> and one determines that:
>
> - the circumstances in which the remaining hazard, condition or activity could reasonably be expected to cause injury or illness to any person exposed thereto before the hazard, condition or activity can be corrected or altered; and
> - the circumstances will occur in the future as a reasonable possibility as opposed to a mere possibility or a high probability.
>
> [My underline.]

[135] T. Roper stated that health and safety officer D'sa clearly indicated in his direction that it was the activity of working close to the edge of an elevated structure of more that 2.4 meters that was the danger. He acknowledged that the employees might occasionally have had to work on top of the hatch covers, however, they were not asked to work near the edge of the covers on that day. Therefore, there was no danger.

[136] The job of rigging and removing tarps was described in detail by the testifying employees and recapitulated by L. Terai in her submission. I have no reasons to doubt their testimony, nor do I believe that it takes any special technical knowledge to understand that working on an elevated structure, at a height of more or less 2.4 meters above moving parts of machinery or any other surface or thing that could cause injury on contact, or above an open hold, could be considered as a danger.

[137] The main issue raised by the employees was that when they rig or remove tarps, they have to stand on the hatch covers. In order to be able to fold them so that the tarps can be

removed from the ship, they have to grab the tarps or lanyards, pull on them and shake off any excess water before they can fold them.

[138] T. Roper argued that, as testified by J. Brooks, if the tarps were properly set up, no water would accumulate. However, he did acknowledge that for various reasons, employees may have to climb on the hatch covers to adjust the tarps by pulling on the lanyards or the tarps and that, on rare occasions, the water may accumulate and require the employees to shake it off, either by pulling on the lanyards or the tarp itself. This was usually done from the main deck or, occasionally, from the top of the hatch covers. But, he argued, the employees never had to stand close to the edge.

[139] B. Johnston testified as well that the employees have occasionally had to work on top of hatch covers. He acknowledged also that, in most cases, the height of the hatch covers on the newer ships was about 2.4 m or more. He further stated that the areas immediately beside the hatch covers were very dangerous if someone was to fall off the covers, as items such as steel pipes, pumps, steps, etc. were usually found there.

[140] Consequently, I find that the employees do have to work on top of hatch covers, to rig and unrig tarps. I believe as well that, from time to time, in order to be able to remove accumulated water on the tarps, one would have to pull and shake the tarps. It seems reasonable to believe that to be able to channel water out of a pocket that would form between the hatch covers, one has to pull upwards to get the water flowing in the right direction. It is also very believable that to be able to pull upwards, one has to stand on the hatch covers.

[141] T. Roper claimed that, even if the employees had to go onto the hatch covers, the employers have now delineated in the proposed work procedure a no work zone around the perimeter of the hatch covers, where the employees are never to go. He argued that it is up to the employees to respect that zone and not expose themselves to the danger of falling.

[142] I recognize that employees do have duties under subsection 126(1) of the *Code* with regard to their safety. However, subsection 126(2) also states:

> 126.(2) Nothing in subsection (1) relieves an employer from any duty imposed on the employer under this Part.

[143] In addition, paragraph 125(1)(*b*) of the *Code* states:

> 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,
>
> (*b*) install guards, guard-rails, barricades and fences in accordance with prescribed standards[.]

[144] The prescribed standards pertaining to this paragraph of the *Code* refer to Part X of the *MOSH Regulations*, more specifically to the following:

> 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.
>
> 10.3 All protection equipment provided by the employer shall
>
> (*a*) be maintained, inspected and tested by a qualified person; and
> (*b*) where necessary to prevent a health hazard, be maintained in a clean and sanitary condition by a qualified person.
>
> 10.9 (1) Where a person, other than an employee who is installing or removing a fall-protection system in accordance with the instructions referred to in subsection (5), works from
>
> (*a*) an unguarded structure that is
> (i) more than 2.4 m above the nearest permanent safe level,
> (ii) above any moving parts of machinery or any other surface or thing that could cause injury to an employee on contact, or
> (iii) above an open hold,
>
> the employer shall provide a fall-protection system.

[145] Even though witnesses for the appellants as well as B. Johnston testified that, as long as the employees do not work close to the edge of the hatch covers, there is no danger, I find that it is reasonable to believe that with the existing tripping impediments such as cleats, holds, etc. hidden or not under the tarps and the addition of grain dust, grain or water, someone could, while pulling on a tarp or lanyards, trip or slip and fall over the side of the hatch cover and potentially be injured on contact by pieces of machinery or other surface or things such as pipes

[146] B. Johnston stated that in the spirit of the *MOSH Regulations*, he believed that a two meter no work zone around the perimeter of the covers was sufficient to protect the

employees against falling off the covers. However, he did not provide any technical or engineering evidence that a two-meter no-work zone is sufficient to protect employees against falling off a hatch cover while working on top of those hatch covers. As mentioned by L. Terai, B. Johnston failed to mention that although safety nets are required by the *MOSH Regulations* on each side of a gangway, those same gangways must be securely fenced throughout to a clear height of no less that 915 mm as required by the *Tackle Regulations*[17].

[147] Finally, I agree with A. Laumonier that putting up a sign or painted line or other delimiting visual warning is insufficient to protect an employee from a falling hazard. As stipulated in subsection 122.2 of the *Code*, prevention measures should consist first in the elimination of the hazard, then in the reduction of the hazard and finally in the provision of personal protective equipment. A warning sign is not a prevention measure.

[148] B. Johnston did not convince me that the fact of wearing non-slip work boots was sufficient to prevent someone from slipping on round grains of cereals. While wearing non-slip work boots has its place in this type of work, those booths are normally for protection against wet and greasy or oily surfaces, not against rolling objects such as grains of cereal or tripping hazards such as cleats.

[149] All this being said, in reading the *MOSH Regulations*, I find there is no mention of any safe working distances from the edges of an unguarded elevated structure. The regulation is quite clear and requires protective equipment for employees who work from an unguarded structure that is more than 2.4 m above the nearest permanent safe level, above any moving parts of machinery or any other surface or thing that could injure them on contact, or above an open hold.

[150] However, T. Roper argued that the perceived danger was part of the job. As well, the evidence provided by both parties indicates that working on top of hatch covers is what they call a normal operational condition of work for longshoremen and that this has been ongoing for at least 30 years or more.

[151] In the *Juan Verville* decision, *supra*, the Honourable Justice Gauthier wrote that "normal" refers to something regular, to a typical state or level of affairs, something that is not out of the ordinary. " While it may have been normal in the past to work on top of hatch covers without any fall protection, things have evolved, ships are larger, hatch covers now stand higher than in the past, often higher than 2.4 meters as mentioned by B. Johnston. In addition those covers are surrounded by all kinds of mechanical equipment, by pipes and other such parts.

[152] I believe that before an employer can say that a danger is a normal condition of work, he has to identify each and every hazard, existing or potential, and he must, in accordance with the *Code*, implement safety measures to eliminate the hazard, condition, or activity; if it cannot be eliminated, he must develop measures to reduce and control the hazard, condition or activity within safe limits; and, finally, if the existing or potential hazard still remains, he must make sure that employees are provided with the necessary personal

[17] Enabling Statute: *Canada Shipping Act*; R.S. 1985, c. S-9; *Tackle Regulations*, C.R.C., c. 1494, Part III, 8.(2) (ii)

protective equipment, clothing, devices and materials against the hazard, condition or activity. This of course, applies, in the present case, to the risk of falling as well as to the risk of tripping and slipping on the hatch covers.

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

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

[155] Evidence from both parties demonstrated that at the time of the work refusals, in all three cases, the employees were working on top of the hatch covers. Furthermore, with all the tripping and slipping hazards impediments present on the covers, it is reasonable to believe that the risk of tripping or slipping while working on the hatch covers is a reasonable possibility and increases the potential of falling off the hatch cover. I find that without any fall prevention or protection equipment in place, the danger is real and not speculative. As indicated by B. Wall, such accidents have occurred in the past and such a fall would most likely result in an injury, before the hazard could be corrected or the activity altered.

[156] The evidence demonstrated that it is not the use of tarps that is the danger, but the activity of working from an unguarded elevated structure without any fall prevention of protection in place. Consequently, I find that the potential risk of falling while carrying present and future activity on top of the hatch covers of the three ships placed the refusing employees in a situation of danger as described under Part II of the *Code* and, therefore, the employer is directed to protect the employees.

[157] T. Roper argued that if the directions should be confirmed, they should not apply to the entire grain loading operation, but only to the work places that were investigated, namely the three ships were the refusals occurred.

[158] While I agree with T. Roper that a direction applies specifically to the object(s) of the investigation, may it be a machine, thing, condition or the performance of an activity, I believe that an employer that receives such a direction should in all fairness implement it universally in his work place in like circumstances; otherwise, the same situation will only repeat itself in a vicious circle.

[159] Therefore, in accordance with subsection 146(1) of the *Canada Labour Code*, I vary the two directions issued to P&O Ports Inc. by HSO D'sa and the one issued by HSO Yeung to Western Stevedoring Co. Ltd., to direct the employers to protect the employees or any other person from the risk of falling off the said hatch covers.

[160] The two employers are also required to report to health and safety officers D'sa and Yeung or any other health and safety officer, within 10 days of reception of this decision, on the measures taken to comply with the directions.

Cases No: 2005-28
2005-29
2005-31
Decision No: CAO-07-030

IN THE MATTER OF THE *CANADA LABOUR CODE* PART II – OCCUPATIONAL HEALTH AND SAFETY

On July 08, 2005, health and safety officer D'sa conducted an investigation following a refusal to work made by Glen Bolkowy in the work place operated by P&O Ports Inc. being an employer subject to the *Canada Labour Code*, Part II, at U.G.G., the said work place sometimes known as the IKAN BELLIAK.

Further to an appeal filed in accordance with subsection 146.(1) of the *Canada Labour Code*, the undersigned Appeals Officer, by virtue of subsection 146.1 of the *Canada Labour Code*, inquired into the circumstance of the direction issued by health and safety officer D'sa under the authority of paragraphs 145(2) *a*) and *b*) of the *Canada Labour Code*, to P&O Stevedoring, also known as P&O Ports Inc. on July 8, 2005.

Having analysed the circumstances, facts, the Act and the relevant labour case law, the undersigned Appeals Officer, by virtue of subsection 146.1(1)*a)* of the *Canada Labour Code* varies the said instruction.

DIRECTION TO - Robert Wall ,Manager, Grain Department, P&O Ports Inc., 777 Centennial Road Vancouver B.C. V6A 1A3 - UNDER PARAGRAPH 145(2)(*a*) AND (*b*)

The said Appeals Officer considers that the following activity and condition on board the IKAN BELLIAK constitutes a danger to an employee while at work.

> *Glenn Bolkowy works from the hatch covers, an elevated unguarded structure, that is 2.4 m in height or above moving parts of machinery or other surface or thing that could cause an injury to a person on contact, without any fall prevention or fall protection equipment in place.*
>
> *This exposes the employee to a fall, where it is reasonable to believe that he would be injured before the activity could be altered.*

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(*a*) of the *Canada Labour Code*, Part II, to immediately take measures to protect the employee and any person from the danger.

You are HEREBY FURTHER DIRECTED, pursuant to paragraph 145(2)(*b*) of the *Canada Labour Code*, Part II, not to conduct work on the said hatch covers until the this direction is complied with. However, nothing in this subsection prevents the doing of anything necessary for the proper compliance with the direction.

Varied in Ottawa August 31, 2007

Richard Lafrance
Appeals Officer

Cases No: 2005-28
2005-29
2005-31
Decision No: CAO-070-030

IN THE MATTER OF THE *CANADA LABOUR CODE* PART II – OCCUPATIONAL HEALTH AND SAFETY

On July 08/05, health and safety officer D'sa conducted an investigation following a refusal to work made by Steve Suttie in the work place operated by Western Stevedoring, being an employer subject to the *Canada Labour Code*, Part II, at Cascadia Terminal, the said work place sometimes known as the M.V. JUPITER CHARM.

Further to an appeal filed in accordance with subsection 146.(1) of the *Canada Labour Code*, the undersigned Appeals Officer, by virtue of subsection 146.1 of the *Canada Labour Code*, inquired into the circumstance of the direction issued by health and safety officer D'sa under the authority of paragraphs 145(2) *a*) and *b*) of the *Canada Labour Code*, to Western Stevedoring on July 8, 2005.

Having analysed the circumstances, facts, the Act and the relevant labour case law, the undersigned Appeals Officer, by virtue of subsection 146.1(1)*a)* of the *Canada Labour Code* varies the said instruction.

DIRECTION TO - Guy Thompson, Grain Superintendent, Western Stevedoring, 15 Mountain Highway, North Vancouver, B.C., V7J 2J9 - UNDER PARAGRAPH 145(2)(*a*) AND (*b*)

The said Appeals Officer considers that the following activity and condition on board the M.V. JUPITER CHARM constitutes a danger to an employee while at work.

> *Steve Suttie works from the hatch covers, an elevated unguarded structure, that is 2.4 m in height or above moving parts of machinery or other surface or thing that could cause an injury to a person on contact, without any fall prevention or fall protection equipment in place.*
>
> *This exposes the employee to a fall, where it is reasonable to believe that he would be injured before the activity could be altered.*

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(*a*) of the *Canada Labour Code*, Part II, to immediately take measures to protect the employee and any person from the danger.

You are HEREBY FURTHER DIRECTED, pursuant to paragraph 145(2)(*b*) of the *Canada Labour Code*, Part II, not to conduct work on the said hatch covers until the this direction is complied with. . However, nothing in this subsection prevents the doing of anything necessary for the proper compliance with the direction.

Varied in Ottawa August 31, 2007

Richard Lafrance
Appeals Officer

Cases No: 2005-28
2005-29
2005-31
Decision No: CAO-070-030

IN THE MATTER OF THE *CANADA LABOUR CODE* PART II – OCCUPATIONAL HEALTH AND SAFETY

On 16 August 2005, health and safety officer Yeung conducted an investigation following a refusal to work made by M.A. St Denis in the work place operated by P&O Ports Inc. being an employer subject to the *Canada Labour Code*, Part II, at Pacific Elevator #2, the said work place sometimes known as the M.V. THOMAS C.

Further to an appeal filed in accordance with subsection 146.(1) of the *Canada Labour Code*, the undersigned Appeals Officer, by virtue of subsection 146.1 of the *Canada Labour Code*, inquired into the circumstance of the direction issued by health and safety officer Yeung,< under the authority of paragraphs 145(2) *a*) and *b*) of the *Canada Labour Code*, to P&O Ports Inc, also known as P&O Stevedoring on August 16, 2005.

Having analysed the circumstances, facts, the Act and the relevant labour case law, the undersigned Appeals Officer, by virtue of subsection 146.1(1)*a)* of the *Canada Labour Code* varies the said instruction.

DIRECTION TO - Peter Warner, Superintendent, P&O Ports, 777 Centennial Road, Vancouver, B.C. V6A 1A3 - UNDER PARAGRAPH 145(2)(*a*) AND (*b*)

The said Appeals Officer considers that the following activity and condition on board the M.V. THOMAS C. constitutes a danger to an employee while at work.

> *M.A. St Denis works from the hatch covers, an elevated unguarded structure, that is 2.4 m in height or above moving parts of machinery or other surface or thing that could cause an injury to a person on contact, without any fall prevention or fall protection equipment in place.*
>
> *This exposes the employee to a fall, where it is reasonable to believe that he would be injured before the activity could be altered.*

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(*a*) of the *Canada Labour Code*, Part II, to immediately take measures to protect the employee and any person from the danger.

You are HEREBY FURTHER DIRECTED, pursuant to paragraph 145(2)(*b*) of the *Canada Labour Code*, Part II, not to conduct work on the said hatch covers until the this direction is complied with. However, nothing in this subsection prevents the doing of anything necessary for the proper compliance with the direction.

Varied in Ottawa August 31, 2007

Richard Lafrance
Appeals Officer

Summary of Appeals Officer Decision

Decision: CAO-07-030

Appellant: P & O Ports Inc. and Western Stevedoring Co. Inc.

Respondent: International Longshoreman's and Warehousemen's Union, Local 500

Provisions: *Canada Labour Code*, 146

Keywords: Hatch covers, ships, slippery surface, varied.

Summary:

On August 5th, 2005 P & O Ports Inc. and Western Stevedoring Co. Ltd. appealed three directions issued to them on July 8th, 2005 by health and safety officer P. D'Sa and J. Yeung. The health and safety officers found that a danger existed when the workers conducted duties on ships working to close to the edge of hatch covers when surface was slippery, and that fencing needed to be installed for drops more than 2.4 meters. The Appeals Officer varied two of the directions.