Occupational Health
and Safety Tribunal Canada

Tribunal de santé et
sécurité au travail Canada

Ottawa, Canada K1A 0J2

Case No.: 2008 – 03
Decision No. : OHSTC-09-010

CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY

John Radovich
appellant

and

Western Stevedoring
respondent

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March 31, 2009

This case was decided by Appeals Officer Katia Néron.

For the appellant

Frank Morena, Secretary Treasurer, International Longshore and Warehouse Union Ship and Dock Foremen, Local 514

For the respondent

Brian Whitfield, Manager, Labour Relations, British Columbia Maritime Employers Association

Canada

I – Appeal filed under subsection 129(7) of the *Canada Labour Code*, Part II

[1] This case concerns an appeal filed on February 13, 2008, pursuant to subsection 129(7) of the *Canada Labour Code*, Part II (*Code*), by Frank Morena, Secretary Treasurer, International Longshore and Warehouse Union (ILWU) Ship and Dock Foremen, Local 514, on behalf of John Radovich, an employee of Western Stevedoring, Vancouver, British Columbia.

[2] This appeal was filed against the decision of absence of danger rendered on February 7, 2008, by Transport Canada - Marine Health and Safety Officer (HSO) Harvinder Singh following his investigation of J. Radovich's refusal to work of the same date.

II – Summary of the evidence

[3] This case proceeded by way of written submissions.

[4] The following is a summary of the facts as extracted from the five documents provided by the appellant as well as from the four documents provided by the respondent, including photographs submitted by both parties.

[5] On February 7, 2008, J. Radovich was working as the Head Foreman for Western Stevedoring at the Lyntern West Seaboard terminal in the port of North Vancouver. The employees under his supervision were to load twenty-eight inches high packaged lumber bundles using forklifts to drive onto a vessel named M/V Skaugran.

[6] The M/V Skaugran is a Ro-Ro type vessel[1] designed specifically for the transport of packaged lumber. The M/V Skaugran has done this type of transport from British Columbia since it was commissioned in 1979.

[7] Lumber bundles transported on the vessel range in height from twenty-four to thirty inches. Twenty-four inches to twenty-six inches are considered the shorter variety. Twenty-seven inches to thirty inches are considered the taller variety.

[8] Each lumber bundle is placed on a four inches high wooden pallet making it possible to slip the forks of the lift into the pallet in order to lift and move the bundles during loading operations.

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[1] Ro-Ro vessels are not conventional ships with holds. Rather, they have decks which are a floating warehouse permitting the roll-on and roll-off of the forklifts during loading operations.

[9] The vessel is designed with a ramp that is lowered onto the dock for loading operations. In this manner, forklift operators are able to drive directly onto the vessel with their loads.

[10] The vessel is designed with three decks and three ramps to allow cargo loading by forklift. The vessel is loaded from bow (forward) to stern (aft).

[11] As well, in order to keep the vessel level during loading, the vessel is equipped with an inclinometer and a manometer. The function of the inclinometer is to determine and maintain the trim of the vessel while the function of the manometer is to determine the list. The vessel's water ballasts are adjusted to keep the vessel trim and prevent listing during the entire loading operation.

[12] Loading is performed on the vessel's three decks. The lumber bundles are stacked eight bundles high, held tightly together and lashed in place with steel cables upon completion. Once the decks are completely loaded, lumber is then loaded down the ramps. All three ramps are accessed from the stern end (aft) of the vessel.

[13] Ramp #3 is a fixed ramp manufactured with a 6.2 degree upward slope as opposed to the other two ramps which slope downward. The upward slope of ramp #3 presents a fall hazard for the stowed lumber bundles.

[14] In addition, the plastic straps that wrap around each package of lumber tend to break.

[15] To deal with the aforementioned hazards, there are established practices that were described to me as follows.

[16] While the forklift holds the lumber bundles in place, two employees, known as "block persons", place a 4×4×12 inch wooden block, known as a "kicker", underneath each side of the first bundle. This is done under each row of lumber bundles stacked on the ramp in order for them to lean back slightly up the ramp. As well, the employees are instructed to move completely out of the way after placing the kickers before the forks are pulled out and the forklift moves away, so that block persons not be struck by the moving forklift.

[17] In addition, each kicker – made of hard core wood – is never used more than once.

[18] Furthermore, when employees notice broken straps on loads that are still on the dock, they replace them with metal bands before the bundles are moved.

[19] At the time of the refusal, the forklifts used in loading operations weighed 30,000 pounds with masts serving to protect the drivers.

[20] In the year preceding February 7, 2008, there were occasions where lumber bundles thirty inches in height were loaded six bundles high on ramp #3 of the M/V Skaugran or same type of vessel.

[21] There have been no reports of block breaking or load falling incidents during loading operations. As well, there have been no known injuries to forklift operators stemming from the fall of loads on ramps.

[22] A hazard and risk assessment for logs, steel, lumber, pulp and paper and general cargo was conducted in 2006 with the results appearing in a 2007 publication entitled "Stevedoring Standard Operating Procedures Handbook". Union representatives and stevedoring companies participated in the development of this document. ILWU locals and the Canadian Longshore Union took part in the assessment. The Foremen's Local 514 did not participate.

[23] The aforementioned handbook states at section 7.3, under title "Lumber Vessel Stevedoring Tool Box talks", that the Foreman is required to review safety issues at the beginning of each shift. This document was implemented and distributed to all Western Stevedoring Foremen.

[24] The handbook however does not formulate safety procedures specific to Ro-Ro loading on a ramp with an upward slope, such as ramp #3 on the M/V Skaugran. Furthermore, the handbook offers no specific information as to materials, such as plastic straps, that need to be checked prior to conducting loading operations, nor does it specify the maximum height at which bundles can be stacked on the ramp to ensure load stability in light of the conditions under which such activity is conducted.

[25] Section 7 of the aforementioned handbook refers to Ro-Ro operations and reads in part as follows:

7.3 Lumber Vessel Stevedoring Tool Box Talk Focus

LISTEN FOR INSTRUCTIONS from the HATCH FOREMAN or HATCHENDER
WHEN WORKING ON SCOWS, Personal Flotation Devices (PFDs) with Hi-Vis MUST be worn.
Hi-Vis Apparel MUST be worn at all times
PAY ATTENTION – Watch out for cables and lifting equipment (Lifting Heads, Turnbuckles, Cable Knobs, Lashing, etc.). **SERIOUS INJURY COULD RESULT**.
[...]
WHEN WALKING ON CARGO, WATCH where you are standing or walking, **WATCH OUT FOR VOIDS IN LUMBER**

PACKAGES AND UNEVEN SURFACES (slips, falls or loss of footing).
PAY ATTENTION when re-banding and/or rebuilding lumber packages. **WATCH** for **PINCHPOINTS**.
[...]

> [...]
> **7.4.1.4. Ship Head Foreman or Hatch Foreman** must conduct Safety Tool Box Talks with their Hatch Crew to reinforce safe work practices throughout the shift (e.g. voids package lumber, pinch points, staying out of the bight, accessing different level of the stow, etc. Refer to 7.3.
> [...]
> **7.4.2.15. For Ro/Ro Vessels, Workers receive direction from the Deck Foreman** (e.g. traffic patterns/congestion of mobile equipment, placement of stickers and blocks, building of stable tiers[2] - placing of kicker on deck of each tier, loading pattern, staying out of the bight[3] and place of the chains as necessary).
> [...]
> **7.4.3.3. Workers** must be aware of work surroundings (e.g. paths of cargo being lifted onto the vessel, paths of the lift trucks that are building loads, etc.).
> [...]
> **7.4.5 Lift Truck / Lumber Truck Operators – Ro-Ro Vessels**
> [...]
> **7.4.5.2. For Ro/Ro Vessels, Workers receive direction from the Deck Foreman** (e.g. traffic patterns and congestion of mobile equipment, placement of stickers/blocks, building of stable tiers, placing of kicker on deck of each tier, loading pattern, staying out of the bight/place. Sidetrack loads not more than three high).
>
> **7.4.5.3. Lift Truck and Lumber Truck Operators** receive direction from the Deck Foreman regarding placement of lumber packages and building a stable tiers. [...] [underline added]

[26] Prior to proceeding with loading operations on ramp #3, J. Radovich had been instructed by his supervisor, Peter Vieweg, Superintendent, to direct employees to stow packages of lumber at six bundles high on this ramp. J. Radovich refused to do so because he always loaded at the height of five bundles the packaged lumber of the taller variety coming up ramp #3 and the shorter variety at the height of six packs. He believed that to deviate from the aforementioned loading practice would increase the hazard of lumber falling that could result in injuries to the employees or anyone else in close proximity to the cargo loading operation. In a statement dated February, 8, 2008, and filed by the appellant, J. Radovich provided further explanation regarding the potential hazard:

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[2] A "tier" is a stack of lumber.
[3] "Staying out of the bight" is marine colloquialism meaning to stay clear of potential hazard. This would apply to Labourer's being away when the lift truck pulls out the forks while on the ramp.

- placing the 4×4×12 inch hard core wood blocks directly beneath the plastic bands strapping the first bundle of each pile of packaged lumber would put stress on the plastic straps and, combined with the cold weather that existed at the time, create the probability that they could fail;

- in addition, given the employer's request that the packaged lumber bundles be stacked higher, the limited projection angle of the tiers of lumber to the back on ramp #3 compared to the natural angle on the two others ramps, coupled with the fact that the packages of lumber being loaded were of various heights, lengths, widths, narrows and custom cut, could increase the probability of the 4×4×12 inch blocks or the plastic straps failing and the packaged lumber toppling down the ramp and potentially strikeing the forklift or worse the block person placing a block under an adjacent pile of lumber packages.

[27] He added that the alleged danger, as described above, needed to be addressed at the time and/or corrected by the employer.

[28] In another statement submitted on June 26, 2008, in response to a series of questions from the Appeals Officer (letter dated June 19, 2008), J. Radovich stated that there were times when the forklift operators lacked experience or training to perform the Ro-Ro operations when loading packaged lumber both at Vancouver and Fraser Surrey Docks. Nonetheless, he stated that the operators who used the forklifts at the time were experienced in performing the loading activity.

[29] In the same statement however, J. Radovich stated that he had concerns regarding the maintenance, use and operation of the forklifts and concerning the interaction between the employees placing the kickers and the forklift operators when working in a confined/restricted area.

[30] At the time, J. Radovich had approximately twenty years of supervisory experience in the forest products handling sector and in industry.

[31] P. Vieweg became a Foreman at Western Stevedoring in 1971. For the past 37 years, he has worked as a Foreman, relief Head Foreman and Head Foreman. He became Ship Superintendent at Western Stevedoring in 2006.

[32] Both J. Radovich and P. Vieweg stated that they have work experience on the safe piling of lumber.

[33] Given the respective experience of J. Radovich and P. Vieweg, their statements are granted much weight and credibility.

[34] In response to J. Radovich's refusal to direct the employees to perform the loading on ramp #3, P. Vieweg instructed the latter to instead take charge of the loading on ramp #1 until such time as the matter could be resolved. He then contacted the Vice President of Operations to discuss the matter. Afterwards, he advised J. Radovich that since the matter could not be resolved, the decision had been made to call in a Transport Canada – Marine HSO to investigate the matter.

[35] Upon his arrival at the work site, HSO Singh inspected the area where the loading operation was being conducted. He then went to the ship's office and conferred with P. Vieweg, J. Radovich and F. Morena before making his ruling.

[36] HSO Singh determined that there was no danger to the employees based on the following findings:

- the upward slope of ramp #3 was no more than ten degrees. In HSO Singh's opinion, this was safe;

- the vessel was trimmed by head to keep the slope angle on the ramp at a minimum;

- the deck strength was adequate;

- although, it was wet and snowy, the deck was sheltered, grated, and not slippery;

- in HSO Singh's opinion, the forklift operator is not in danger from the load toppling since the load is being lifted and placed on top by the forklift at such a limited angle;

- the vessel was designed and certified;

- the vessel was loaded on other decks to a maximum height much higher than five lumber bundles high.

III – Summary of the submissions

A) Appellant's submissions

[37] I retain the following from the written submissions provided by F. Morena, on behalf of J. Radovich.

[38] F. Morena claims that HSO Singh's decision to interfere on the matter fails to take into account the fact that he (HSO) had been informed that

subsections 127.1(1) through 127.1(11) of the *Code* on the *Internal Complaint Resolution Process* had not been followed by the employer, thus making it premature on the part of the health and safety officer to conduct his investigation.

[39] F. Morena also argues that Mr. Radovich's rights were circumvented by the employer when the latter unilaterally opted to call in Transport Canada – Marine directly instead of first trying to resolve the matter by referring it to the work place health and safety committee.

[40] Mr. Morena then referred to point #10 in HSO Singh's investigation report, Appendix B, where it is written:

> Person Accompanying Health and Safety Officer: None.

[41] Based on this statement, he stated that one must conclude that HSO Singh's decision was based solely on his own observations since he conducted his inspection of the loading operation work area alone. By conducting his investigation in this manner, it was Mr. Morena's opinion that HSO Singh's did not properly examine J. Radovich's concerns at issue at the time. By not accepting or exploring J. Radovich's observations based on his extensive experience as a stevedoring foreman and by not seeking expertise, as required, in order to have sufficient knowledge of all the factors involved, F. Morena argued that HSO Singh did not apply a balanced test before making his ruling.

[42] Mr. Morena added that HSO Singh's investigation report offers no rationale explaining how he reached his findings and the basis for his decision of absence of danger. For example, how did he determine that the angle of the slope on ramp #3 was safe with regards to the loading activity at issue, or how the vessel trimmed by the head kept the slope on ramp #3 to a minimum, or what was the angle – downward slope or upward slope – at the other decks where the packages of lumber were being stowed higher than five bundles high.

[43] F. Morena also stated that HSO Singh did not provide his rationale for concluding that the packaged lumber would not topple or endanger the employees. In F. Morena's opinion, the slope angle on ramp #3 on the vessel M/V Skaugran is substantial and thus, the higher the packaged lumber is stacked, the greater the increase in instability and the greater the probability of having the pile topple on the forklift operator or a block person "laying" blocks on this ramp.

[44] In F. Morena's opinion, HSO Singh's decision also fails to consider the various types of packaged lumber products being piled, how they are to be piled and whether a limiting height of the packaged lumber pile was being

determined as well as whether there were written safety work practices in place or if industry work practices were being contravened.

[45] With reference to the employee alleging a hazard of plastic straps failing, F. Morena referred to P. Vieweg's statement provided on April 3, 2008. In this statement, P. Vieweg states: "*Often the plastic straps wrapped around the lumber break*". F. Morena stated that it is a fact that plastic straps tend to break and that it explains why the broken straps are replaced with steel banding. He added that there is no mention in HSO Singh's investigation report that he inspected the strapping on the packages of lumber.

[46] As well, Mr. Morena argues that HSO Singh's decision fails to take into account the definition of danger in the *Code* which imports the question of whether immediate or future activity may be capable of causing injury. He then stated that HSO Singh erred in limiting the danger to the specific factual situation existing at the time, therefore making a decision to not properly apply subsection 122(1). To support these arguments, F. Morena referred to the following precedents:

- *Verville v Canada (.Correctional Services)*[4];
- *C. Brazeau, B. Martin, B. Thoms, B. Woods, A. Ozga and P. Gour and CAW-Canada v. Securicor Canada Ltd.*[5].

[47] He added that HSO Singh's decision fails to consider section 122.2 dealing with preventive measures that should be implement by the employer to prevent accidents and injury to employees, which is the actual purpose of the *Code*. F. Morena stated that even though no injuries were ever caused by performing the work activity according to the work method required by the employer, this does not prove that a danger as defined under the *Code* did not exist at the time of the work refusal, especially since no specific written safety procedures were developed by the employer for this work activity in order to inform and educate employees. He then referred to the purpose section of the *Code* as well as to the *R. v. Chrima Iron Works Ltd*[6] decision, more particularly at paragraphs 32, 39 and 43.

[48] Also, with reference to the above decision, F. Morena stated that an employer's liability for occupational health and safety violations is based on specific actions and omissions, not on its general performance in the past. To suggest that there is no evidence of the probable occurrence of an injury amounts, in F. Morena's opinion, to suggesting that an

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[4] *Verville v Canada (Correctional Services)* 2004 FC 767

[5] *C. Brazeau, B. Martin, B. Thoms, B. Woods, A. Ozga and P. Gour and CAW-Canada v. Securicor Canada Ltd.*, [2004] C.L.C.A.O.D. No. 52, Appeals Officer Douglas Malanka, Decision No. 04-049, December 16, 2004

[6] *R. v. Chrima Iron Works Ltd,* [2007] O.J. No. 726, rendered by Justice Rogerson.

unblemished history of compliance and lack of safety incidents could be the product of pure luck. In other words, according to Mr. Morena, a seemingly good track record isn't proof of due diligence.

B) Respondent's submissions

[49] I retain the following from Brian Whitfield, on behalf of Western Stevedoring.

[50] B. Whitfield argued that since J. Radovich refused to direct the employees to stack the lumber on ramp #3 more than five bundles high, he in fact refused to do his work and, as a result, did exercise his right to refuse to work pursuant to subsection 128(1) of the *Code*.

[51] He added that subsection 127.1(1) provides that the rights conferred by sections 128, 129 and 132 are an exception to section 127.1.

[52] He also argued that when HSO Singh attended at the site, he insisted that a union representative attend at the scene before making a ruling. This is why F. Morena, a union representative in health and safety matters, was present at the site at the time and then had the opportunity to make representations as to how the operation was not safe.

[53] B. Whitfield stated that the issue was very straightforward and clearly could not be resolved at the time with the assistance of F. Morena. This is why the decision was made to call Transport Canada – Marine directly and why HSO Singh properly conducted his investigation and made a ruling.

[54] With respect to the fact that there is no written safety procedure that specifically applies to the Ro-Ro loading activity performed on a ramp with an upward slope, B. Whitfield stated that the written procedures in place were based on hazard assessments that included all identified hazards arising from Ro-Ro operations, as well other operations, and involved consultations with the ILWU with the exception of Local 514 which had opted not to participate. He also stated that no specific hazard regarding loading six high on the ramp in question was identified through this process.

[55] B. Whitfield also submitted a statement from Superintendent P. Vieweg dated June 27, 2008. In this statement, P. Vieweg states the following:

> [...] The procedure of loading the ramp way 6 high is not a written procedure but <u>is a practice that has been undertaken for over 20 years</u>. It was established many loadings ago by the Stevedoring Companies in conjunction with the vessel's Owners Supercargoes and sea staff. <u>It has been developed and implemented safely over the years and has been done safely as demonstrated by the unblemished record of no one ever</u>

being hurt. Foremen are expected to do daily Toolbox talks with Longshoremen before the shift on safety issues. During the loading at all times, the Foremen would be expected to ensure they know the procedure. ie. No labourers there when the Lift truck driver pulls the forks out etc. [underline added]

[56] B. Whitfield also argued that the higher the packaged lumber is piled on ramp #3, the less chance of the bundles falling down. He then stated that the four inches high wooden pallet with the four inches high kicker beneath it thereby provide eight inches of lift to the front of the load. In his opinion, this prevents the load from leaning down the ramp. He also stated that no danger has ever been alleged with bundles being piled five high. With the addition of one more bundle, more weight is added to the pile and, as the pile leans slightly back, the forces of gravity make it less likely to topple forward. To support these arguments, he referred to P. Vieweg's statement of April, 3, 2008. In this statement, P. Vieweg also states:

> [...] The load is actually less likely to topple over on the ramp when it is 6 bundles high, then 5 bundles high, because the stack leans back "up" the ramp slightly.
>
> The load on the rampway is lashed with steel cables half way down the ramp and at the bottom, it is secured halfway down by closed doors, and is held tight against piles of lumber stacked 8 bundles high at the bottom.

[57] B. Whitfield also provided photographs. However, on these photographs, as admitted by B. Whitfield, it is difficult to get a bearing on the ramp in relation to level.

[58] Regarding J. Radovich's concerns relative to maintenance, use and operation of materials handling equipment and the interaction between employees placing the kickers and the forklift operator, B. Whitfield stated that there was and is no issue whatsoever with respect to those and that this issue was not raised during the work refusal. He then pointed out that the only issue raised by J. Radovich at the time, as indicated in his first statement dated February 8, 2008, was the lumber falling down.

IV) Reasons

A) Issue

[59] The issue to be addressed in the present case is whether or not HSO Singh erred in deciding that there was no danger at the time of the employee's refusal to work.

[60] To do so, I will have to determine if stacking the twenty-eight inches lumber packages on ramp #3 at six bundles high created a danger to the

employees at the time with respect to the potential hazard of the packages of lumber piled on this ramp falling, resulting – as alleged by the employee – from the leaning angle of the packaged lumber on the ramp as well as from the potential failing of the kickers or the plastic straps considering the stress exercised on them, this in conjunction with the cold weather conditions that existed at the time. I will explain later in this decision the reasons for my opinion that this constitutes the sole issue to be addressed in this case.

B) Analysis

[61] To address the appellant's submission, I have first to clarify whether J. Radovich exercised his right to refuse to work at the time or formulated a complaint pursuant to the *Code*, since it appears that there is some confusion with regards to this issue.

[62] Pursuant to subsection 127.1(1) of the *Code*, an employee who believes on reasonable grounds that there has been a contravention of the *Code* or that there is likely to be an accident or injury to health arising out of, linked with or occurring in the course of employment shall, before exercising any other recourse available under this Part, <u>except the rights conferred by sections 128, 129</u> and 132 of the *Code*, make a complaint to his supervisor. The employee, or his supervisor, then has to follow the *Internal Complaint Resolution Process* established by subsections 127.1(2) to 127.1(8). Subsection 127.1(1) reads as follows:

> 127.1(1) An employee who believes on reasonable grounds that there has been a contravention of this Part or that there is likely to be an accident or injury to health arising out of, linked with or occurring in the course of employment shall, before exercising any other recourse available under this Part, <u>except the rights conferred by sections 128, 129</u> and 132, make a complaint to the employee's supervisor.
>
> [underline added]

[63] Another employee right under the *Code* is the right to refuse to work in a situation of danger pursuant to subsection 128(1) of the *Code*. This provision reads in part as follows:

> 128(1) Subject to this section, <u>an employee may refuse</u> to use or operate a machine or thing, to work in a place or <u>to perform an activity, if the employee while at work has reasonable cause to believe that</u> [...]
>
> (*c*) <u>the performance of the activity constitutes a danger to the employee or to another employee</u>.
> [underline added]

[64] With reference to the two aforementioned provisions, I am of the view that the right to refuse to work exercised pursuant to section 128 is

distinguishable from the right to make a complaint exercised pursuant to subsection 127.1(1). As indicated under subsection 127.1(1), the right conferred by section 128 is excluded from the obligation created by subsection 127.1(1). In addition, when an employee exercises a refusal to work under subsection 128(1), it is because he believes that the performance of the work activity – which the employee believes to constitute a danger – shall not continue. This is different from an employee making a complaint under subsection 127.1(1). In such a situation, the work at issue continues to be performed except where the investigation as prescribed under this subsection concludes that a danger exists.

[65] J. Radovich stated that when his superintendent gave him the instruction to direct employees to stow the packages of lumber at six bundles high on ramp #3, he refused to do so because he believed that performing this task in this manner on this ramp was unsafe with regards to the alleged danger as described by him in his statement of February 8, 2008.

[66] Based on the above, it is clear that J. Radovich wanted the work activity at issue to be stopped at the time of the order because he believed that there was a danger to the employees required to perform this activity in the manner he was directed to order.

[67] I am of the opinion that when refusing to comply with his Superintendent's order, J. Radovich did exercise his right to refuse to work pursuant to section 128.

[68] With reference to this provision, the *Code* also prescribes a work refusal process which is different from the *Internal Complaint Resolution Process* established by subsections 127.1(2) to 127.1(8). That process is described as follows.

[69] After being informed of an employee's refusal to work and if he agrees that a danger exists, the employer shall, pursuant to subsection 128(8) of the *Code*, take immediate action to protect employees from the danger and inform the work place health and safety committee or the heath and safety representative of the matter and the action taken to resolve it.

[70] If on the other hand the matter is not resolved, the employer shall, pursuant to subsection 128(10) of the *Code*, immediately upon being informed of the employee's continued refusal, go through the following process:

> 128(10) [...] <u>investigate the matter in the presence of the employee who reported it and of</u>

(*a*) at least one member of the work place committee who does not exercise managerial functions;

(*b*) the health and safety representative; or

(*c*) if no person is available under paragraph (*a*) or (*b*), at least one person from the work place who is selected by the employee. [underline added]

[71] Pursuant to 128(13) of the *Code*, after completion of the above mentioned investigation and only if the employer disputes the danger as reported by the employee – or after having taken steps to protect employees from the danger and being informed that the employee continues to believe that the danger exists and continues to refuse to work – the employer then shall bring the matter to the attention of a health and safety officer for the latter's investigation. Subsection 128(13) reads as follows:

> 128(13) If an employer disputes a matter reported under subsection (9) or takes steps to protect employees from the danger, and the employee has reasonable cause to believe that the danger continues to exist, the employee may continue to refuse to use or operate the machine or thing, work in that place or perform that activity. On being informed of the continued refusal, the employer shall notify a health and safety officer.

[72] The health and safety officer's investigation shall be conducted as prescribed by subsection 129(1) of the *Code*. This provision reads as follows:

> 129(1) On being notified that an employee continues to refuse to use or operate a machine or thing, work in a place or perform an activity under subsection 128(13), the health and safety officer shall without delay investigate or cause another health and safety officer to investigate the matter in the presence of the employer, the employee and one other person who is
>
> (*a*) an employee member of the work place committee;
>
> (*b*) the health and safety representative; or
>
> (*c*) if a person mentioned in paragraph (*a*) or (*b*) is not available, another employee from the work place who is designated by the employee. [underline added]

[73] Subsection 129(3) of the *Code* reads however as follows:

> 129(3) A health and safety officer may proceed with an investigation in the absence of any person mentioned in subsection (1) or (2) if that person chooses not to be present. [underline added]

[74] The evidence is to the effect that upon being informed by J. Radovich of his refusal to work and after having brought the matter to the Vice

President of Operations attention, it was decided to call Transport Canada – Marine Safety instead of first investigating the matter. By taking this course of action, I am of the view that the employer failed to follow the process prescribed under subsection 128(10). Given this, HSO Singh should have requested the employer to comply with this provision before conducting his own investigation. For instance, he could have simply advised the employer to call him back if the matter was not resolved after completion of the investigation under subsection 128(10).

[75] The evidence also demonstrates that HSO Sing did not conduct his investigation in the presence of the persons prescribed by subsection 129(1) of the *Code*. With reference to this provision, I am of the view that the health and safety officer's investigation must be conducted, from beginning to end, in the presence of all persons mentioned in this provision, except if these persons choose not to be present.

[76] Notwithstanding what precedes, following his investigation HSO Singh rendered a decision of absence of danger under subsection 129(7) of the *Code* and this decision is now brought before me.

[77] Subsection 146.1(1) of the *Code* specifies that when an appeal is brought under subsection 129(7), the appeals officer shall inquire into the circumstances of the decision rendered by the health and safety officer and the reasons for it. This means that my inquiry should focus on the circumstances existing at the time of the refusal.

[78] On February 8, 2008, J. Radovich provided a statement explaining his concerns with regards to his February 7, 2008, refusal to work. In his June 26, 2008, statement, J. Radovich identified three additional concerns that he states needed to be addressed. Those three other concerns have been formulated in response to a series of questions from me and had not been identified in February 2008, at the time of the refusal to work. They are not therefore issues to be determined *per se* in the context of this appeal. However, I found the answers to my questions useful to properly understand the loading activity that takes place on the type of vessel involved.

[79] Nevertheless, because of the seriousness of those three additional concerns, I strongly suggest that the employer conduct an investigation into them with the participation of the work place health and safety committee. I am also of the view that the practices that are already established to protect the employees with regards to one or the other of those concerns as well as the new ones, if any, that would be established following the aforementioned investigation, must be cast in written procedures.

[80] Based on the above reasons and with reference to J. Radovich's statement of February 8, 2008, I am of the opinion that the only issue that has to be addressed in this case is whether or not a danger existed at the time for the employees to stack the twenty-eight inches lumber bundles on ramp #3 at six bundles high, considering the potential hazard for bundles piled on this ramp to fall because – as alleged by the employee – of the leaning angle of the packaged lumber on the ramp as well as the potential failing of the kickers or the plastic straps considering the stress exercised on them in conjunction with the cold weather conditions that existed at the time.

[81] To make my decision regarding this issue, I must consider the following: the evidence, the relevant legislation as well as the relevant case law.

[82] The purpose of the *Code*, pursuant to section 122.1, reads as follows:

> 122.1 The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies. [underline added]

[83] In addition, section 122.2 of the *Code* reads as follows:

> 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.
> [underline added]

[84] The general duty of every employer, pursuant to section 124 of the *Code*, is also to ensure that the safety at work of every person employed by him is protected.

[85] As well, a "danger" as defined at subsection 122(1) of the *Code* is "any existing or potential hazard (…) or any current or future activity that could reasonably be expected to cause injury (…) to a person exposed to it before the hazard (…) can be corrected or the activity altered, whether or not the injury (…) occurs immediately after the exposure to the hazard or activity".

[86] With respect to the applicable test to establish the presence of an existing or potential danger as defined pursuant to subsection 122(1) of the *Code*, Madam Justice Gauthier of the Federal Court, at paragraph 36 in *Juan Verville*, *supra*, stated the following:

> [36] In that respect, I do not believe either that it is necessary to establish precisely the time when the potential condition or hazard or the future activity will occur.. I do not construe Tremblay-Lamer's reasons in Martin above, particularly paragraph 57, to require evidence of a precise time

> frame within which the condition, hazard or activity will occur. Rather, looking at her decision as a whole, she appears to agree that the definition only requires that one ascertains in what circumstances it could be expected to cause injury and that it be established that such circumstances will occur in the future, not as a mere possibility but as a reasonable one. [underline added]

[87] In paragraph 32 of the *Verville* decision, *supra*, Madam Justice Gauthier also clarified the terms "potential" or "future activity" as follows:

> [32] With 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.

[88] As well, Mr Justice Rothstein of the Federal Court of Appeal in the *Douglas Martin and Public Service Alliance of Canada and Attorney General of Canada*[7] decision, stated:

> [37] I agree that a finding of danger cannot be based on speculation or hypothesis. However, when attempting to ascertain whether a potential hazard or future activity could reasonably be expected to cause injury before the hazard could be corrected or the activity altered, one is necessarily dealing with the future. Tribunals are regularly required to infer from past and present circumstances what is expected to transpire in the future. The task of the tribunal in such cases is to weight the evidence to determine whether it is more likely than not that what an applicant is asserting will take place in the future.
>
> [underline added]

[89] Madam Justice Gauthier also stated in *Juan Verville, supra*, that there is more than one way to establish that one can reasonably expect a situation to cause injury. In paragraph 51 of her decision, she writes:

> [51] Finally, the Court notes that there is more than one way to establish that one can reasonably expect a situation to cause injury. One does not necessarily need to have proof that an officer was injured in exactly the same circumstances. A reasonable expectation could be based on expert opinions or even on opinions of ordinary witnesses having the necessary experience when such witnesses are in a better position than the trier of fact to form the opinion. It could even be established through an inference arising logically or reasonably from known facts. [underline added]

[90] Given these aforementioned rulings of the Courts and the issue in the present case, I am of the opinion that in order to conclude that a danger existed at the time, it must be established that the conditions in which the alleged hazard, described by the employee as falling lumber from the piles on ramp #3 resulting from the leaning angle of the packaged lumber on

[7] *Douglas Martin et al v. Attorney General of Canada*, 2005 FCA 156

this ramp as well as the failing of the kickers or the plastic straps – which could reasonably be expected to cause injury to any person exposed thereto – will occur in the future not as a mere possibility but as a reasonable one.

[91] The evidence shows that the aforementioned hazards are controlled by the following measures.

[92] First, the broken plastic straps are replaced with metal bands prior to the loading.

[93] In addition, the hazard of the packages or bundles of lumber falling because of the upward slope of ramp #3 is controlled by the placement of 4×4×12 inch kickers under each side of each pile of the packages of lumber stowed on this ramp. It is to be noted that each four inches high wooden pallet on which each package of lumber is placed is at the same height at the front as well as at the back, therefore giving a real lift of only four inches at the front of each pile of lumber contrarily to what B. Whitfield stated. However, no evidence was presented to convince me that the placement of the kickers is not sufficient to give to the load a projection angle to the back on ramp #3 or that this leaning angle is not sufficient to ensure the stability of the load on that ramp.

[94] As well, each hard core wood kicker is never used more than once.

[95] In addition, the fact that no block failing or load falling incidents have ever been reported over all the years the loading operation at issue has been performed in the manner described shows that the aforementioned preventive measures are effective in reducing the potential hazard of falling lumber on ramp #3 resulting from the upward slope of this ramp as well as from the failing of the kickers or plastic straps as alleged by the employee.

[96] However, the evidence is to the effect that these measures are performed based on established practices and are not cast in specific written procedures. I am of the view that written procedures specific to the loading on ramp #3 would ensure that there would be no modification or misunderstanding on the safe manner of performing this activity. This would also ensure, in my opinion, maximum protection to the employees and, as well, be in line, as indicated by F. Morena, with the purpose of sections 122.1, 122.2 and 124 of the *Code*. Nevertheless, there is no evidence before me that employees in general or J. Radovich in particular, were unaware of those measures. On the contrary, the evidence is that those precautionary measures were taken at the time.

[97] The evidence is also to the effect that the twenty-eight inches high packages of lumber that had to be loaded on ramp #3 at the time were loaded on the decks eight bundles high. By stacking the same variety of lumber two bundles lower, this rationally had the effect of reducing the weight applied to the straps. I then believe that the stress on the plastic straps securing them was less on the packages of lumber that have to be loaded, as required, six bundles high on ramp #3 than on the ones that were loaded on the decks under the same cold weather conditions.

[98] Furthermore, I was not presented with any evidence that the kickers placed beneath each pile of packaged lumber and under the plastic bands strapping the first bundle possibly increased, in combination with the cold weather, the stress on the plastic straps to a point that they would possibly fail.

[99] As well, there is no evidence that the plastic straps were integral to the stability of the load or to what extent they contributed to keeping each bundle packaged together under the circumstances alleged by the employee.

[100] Having no convincing evidence to the contrary, I am therefore of the view that there only existed a mere possibility that piling the packaged lumber six bundles high on ramp #3, at the time, increased the hazard of falling for the packaged lumber to a degree of danger as defined by the *Code*.

C) Decision

[101] Based on the above reasons and as provided by subsection 146.1(1) of the *Code*, I consequently confirm HSO Singh's decision of absence of danger rendered on February 7, 2008.

Katia Néron
Appeals Officer