Date: 20080709

Docket: T-1727-07

Citation: 2008 FC 846

Ottawa, Ontario, July 9, 2008

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

P&O PORTS INC, and WESTERN STEVEDORING CO. LTD.

Applicant

and

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 500

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

APPLICATION

[1] This is an application for judicial review of Decision No. CAO-07-030, dated August 31, 2007 (Decision) and related directions issued by Mr. Richard Lafrance in his capacity as an appeals officer (Appeals Officer) appointed pursuant to section 146 of Part II of the *Canada Labour Code*, R.S.C. 1985, c.L-2 (Code).

[2] The Decision arose as a result of appeals filed by P&O Ports Inc. and Western Stevedoring Co. Ltd. (together the Employers) from three Directions issued by Health and Safety Officers (Safety Officers) in which work activities required by the Employers were found to constitute a danger to an employee. The Respondent in this application, International Longshoremen's and Warehousemen's Union, Local 500 (Union), represents longshore workers employed by the Employers and assigned to grain loading operations on the Employers' vessels.

BACKGROUND

[3] The Employers are stevedoring companies operating, *inter alia*, in the Port of Vancouver where, as part of their operations, they load grain ships. The Employers utilize tarpaulins ("tarps") to cover hatch covers when it is raining during grain loading operations. The hatch cover is opened sufficiently to accommodate the grain spout and the tarps keep rain off the opening of the hatch.

[4] On July 8, 2005, Safety Officer D'sa attended at P&O Ports's grain loading operation to investigate a refusal by an employee represented by the Union to perform tarping operations. Safety Officer D'sa was shown how the traps were rigged and he found that it was unsafe to do so with the hatch covers opened as there was no protection on the side of the opened covers. Shortly thereafter on the same day, Safety Officer D'sa attended a second vessel being loaded by P&O Ports to investigate another refusal by an employee to engage in tarping operations. As a result of his investigations, Safety Officer D'sa found that two dangers existed:

> Working on an open hatch cover with no fencing where the drop is greater than 2.4 m.
> Working close to the edge of a hatch cover with a slippery surface.

[5] P&O Ports was directed, pursuant to paragraphs 145(2)(a) and (b) of the *Canada Labour Code*, "to immediately take measures for guarding the source of danger/protect any person from the danger" and "not to use or operate the place/machine/thing in respect of which the notice of danger...has been affixed pursuant to subsection 145(3), until this direction has been complied with."

[6] A third refusal to perform tarping operations was made by an employee of Western Stevedoring Co. Ltd. on August 16, 2005. Safety Officer Yeung investigated this complaint but, unlike Safety Officer D'sa, he did not view the tarping operation. Following conversations with longshoremen and with company representatives, Safety Officer Yeung made identical findings and issued directions identical to those made by Safety Officer D'sa.

[7] The Employers appealed the decisions of the Safety Officers to the Canada Appeal Office on Occupational Health and Safety on the grounds that the directions made by the Safety Officers were not supported by the findings of fact they made and, alternately, on the basis that the directions should be modified because the Employers had implemented procedures to remove or guard against the potential danger identified by the Safety Officers in their reports.

[8] Hearings were held in Vancouver on September 19 and 20, 2006 and October 19 and 20, 2006. The Appeals Officer issued his Decision on August 31, 2007. This is the Decision under review in this application.

DECISION UNDER REVIEW

[9] The Appeals Officer had to decide whether or not the employees who had refused work were exposed to a danger as defined under Part II of the Code and whether a direction was required to correct the situation.

[10] The Appeals Officer made the following findings:

1. Employees have to work on top of hatch covers to rig and unrig tarps;

2. From time to time, in order to be able to remove accumulated water on the tarps, an employee has to pull and shake the tarps. To be able to channel water out of a pocket that would form between the hatch covers, an employee has to pull upwards to get the water flowing in the right direction and that, to be able to pull upwards, an employee has to stand on the hatch covers;

3. 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;

4. Putting up a sign or painted line or other delimiting visual warning is insufficient to protect an employee from a falling hazard. Wearing non-slip work boots is not sufficient to prevent someone from slipping on round grains of cereals or tripping hazards such as cleats;

5. 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;

6. At the time of the work refusals, in all three cases, the employees were working on top of the hatch covers. With the tripping and slipping hazards 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. Without any fall prevention or protection equipment in place, the danger is real and not speculative. 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;

7. 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 or protection in place.

[11] In his Decision, the Appeals Officer agreed that the activity constituted a danger to the employees, but varied the directions issued by the Safety Officers:

> [The employees who refused work, namely Glen Bolkowy, Steve Suttie, and M.A. St Denis, work] 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 142(2)(*b*) of the Canada Labour Code, Part II, not to conduct work on the said hatch covers until the [sic] this direction is complied with. However, nothing in this subsection prevents the doing of anything necessary for the proper compliance with this direction [emphasis in original].

[12] The Employers note that, as a result of the Appeals Officer's Decision and the directions contained therein, there has been no tarping of vessels, and therefore no loading of grain during rain conditions, in the Port of Vancouver since August 2005.

ISSUES

[13] The issues raised by the Employers in this application are as follows:

1. Did the Appeals Officer err in law with respect to his interpretation and application of the definition of “danger” in section 122(1) and in the application of sections 145(1) & (2) by ignoring or failing to have proper regard to procedures taken by the Employers to correct the condition or hazard or to alter the activity?
2. Did the Appeals Officer err in law with respect to his statutory interpretation and application of the definition of “danger” in section 122(1) and in the application of sections 128(2)(b) and 145(1) & (2) by ignoring or failing to have proper regard to the fact that, with the procedures implemented by the Employers to correct the condition or hazard or to alter the activity to the extent that is reasonable, work on hatch covers is a normal condition of employment for longshore workers?
3. Did the Appeals Officer err in law with respect to his interpretation and application of the definition in sections 122.2 and 125(1) of the Code and sections 10.1 and 10.2 of the Marine Occupational Safety and Health Regulations by requiring the Employers to have fall prevention or fall protection equipment in place without:
    a. Having regard to procedures implemented, or that could have been implemented, to control the potential hazard;
    b. Having regard to the fact that fall protection equipment cannot reasonably be employed on a hatch cover, and therefore its use would not prevent or reduce injury from the potential hazard; and

c. Having regard to the fact that fall protection equipment could itself create a hazard.

4. Did the Appeals Officer base his Decision on an erroneous finding of fact, made in a perverse or capricious manner?

5. Was there a breach of natural justice and procedural fairness?

STANDARD OF REVIEW

[14] In the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Court collapsed the standards of patent unreasonableness and reasonableness *simpliciter* into one standard of reasonableness. The Court also clarified the process for determining the standard of review on judicial review proceedings, stating that the exercise involves two steps:

> First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review: *Dunsmuir*, *supra*, at para. 62.

[15] In *Martin v. Canada (Attorney General)*, [2005] 4 F.C.R. 637, 2005 FCA 156 (hereinafter *Martin*), the Federal Court of Appeal settled the standard of review to be applied in respect of an Appeal Officer's interpretation of the definition of "danger" in Part II of the Code. The Court of Appeal held that the reviewing court should not interfere in a tribunal's interpretation of questions of law arising under its home statute unless that interpretation is patently unreasonable (*Martin* at

paras. 17-18). The patent unreasonableness standard has also been applied in the past to questions of whether an Appeals Officer based his or her decision on an erroneous finding of fact, made in a perverse or capricious manner (*Canada Post Corp. v. Pollard*, 2007 FC 1362 [hereinafter *Pollard*], *Duplessis v. Forest Products Terminal Corp.* (2006), 290 F.T.R. 296, 2006 FC 482).

[16] In light of the past jurisprudence and the Supreme Court of Canada's decision in *Dunsmuir, supra*, I conclude that the standard of review applicable to the Appeals Officer's decision, both as it relates to the interpretation and application of "danger" and the factual findings is reasonableness. I also note that the decisions of Appeals Officers are protected by stringent privative clauses in sections 146.3 and 146.4 of the *Code* (*Maritime Employers' Assn. v. Canadian Union of Public Employees, Local 375*, 2006 FC 66 at para. 33). The purpose of the statute is set out in section 122.1 of the Code, which states, "[t]he 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." The thoroughness of the statutory scheme embodied by Part II of the Code has been found to indicate that a high level of deference to decisions or directions under this Part is appropriate (*Sachs v. Air Canada*, 2006 FC 673). Finally, the Canada Appeal Office on Occupational Health and Safety is a specialized tribunal and is thus entitled to deference with respect to decisions, such as those presently before me, which are within the Board's jurisdiction.

[17] The final issue raised on this application is one of procedural fairness. It is well-settled that the standard of review analysis does not apply to questions of this kind (*Canadian Union of Public Employees v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29) which are always

reviewed as questions of law and, as such, the applicable standard of review is correctness. Where a breach of procedural fairness is found, the decision will be set aside (*Sketchley v. Canada (Attorney General)* (2005), [2006] 3 F.C.R. 392, 2005 FCA 404).

RELEVANT STATUTORY PROVISIONS

[18] The following provisions of the Code are relevant to the present application:

145. (1) A health and safety officer who is of the opinion that a provision of this Part is being contravened or has recently been contravened may direct the employer or employee concerned, or both, to	**145. (1)** S'il est d'avis qu'une contravention à la présente partie vient d'être commise ou est en train de l'être, l'agent de santé et de sécurité peut donner à l'employeur ou à l'employé en cause l'instruction :
(a) terminate the contravention within the time that the officer may specify; and	*a)* d'y mettre fin dans le délai qu'il précise;
(b) take steps, as specified by the officer and within the time that the officer may specify, to ensure that the contravention does not continue or re-occur.	*b)* de prendre, dans les délais précisés, les mesures qu'il précise pour empêcher la continuation de la contravention ou sa répétition.
145. (2) If a health and safety officer considers that the use or operation of a machine or thing, a condition in a place or the performance of an activity constitutes a danger to an employee while at work,	**145. (2)** S'il estime que l'utilisation d'une machine ou chose, une situation existant dans un lieu de travail ou l'accomplissement d'une tâche constitue un danger pour un employé au travail, l'agent :

(a) the officer shall notify the employer of the danger and issue directions in writing to the employer directing the employer, immediately or within the period that the officer specifies, to take measures to

a) en avertit l'employeur et lui enjoint, par instruction écrite, de procéder, immédiatement ou dans le délai qu'il précise, à la prise de mesures propres :

(i) correct the hazard or condition or alter the activity that constitutes the danger, or

(i) soit à écarter le risque, à corriger la situation ou à modifier la tâche,

(ii) protect any person from the danger; and

(ii) soit à protéger les personnes contre ce danger;

(b) the officer may, if the officer considers that the danger or the hazard, condition or activity that constitutes the danger cannot otherwise be corrected, altered or protected against immediately, issue a direction in writing to the employer directing that the place, machine, thing or activity in respect of which the direction is issued not be used, operated or performed, as the case may be, until the officer's directions are complied with, but nothing in this paragraph prevents the doing of anything necessary for the proper compliance with the direction.

b) peut en outre, s'il estime qu'il est impossible dans l'immédiat de prendre les mesures prévues à l'alinéa a), interdire, par instruction écrite donnée à l'employeur, l'utilisation du lieu, de la machine ou de la chose ou l'accomplissement de la tâche en cause jusqu'à ce que ses instructions aient été exécutées, le présent alinéa n'ayant toutefois pas pour effet d'empêcher toute mesure nécessaire à la mise en oeuvre des instructions.

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

146.1 (1) Saisi d'un appel formé en vertu du paragraphe 129(7) ou de l'article 146, l'agent d'appel mène sans délai une enquête sommaire sur les circonstances ayant donné lieu à la décision ou aux instructions, selon le cas, et sur la

	justification de celles-ci. Il peut:
(a) vary, rescind or confirm the decision or direction; and	*a)* soit modifier, annuler ou confirmer la décision ou les instructions;
(b) issue any direction that the appeals officer considers appropriate under subsection 145(2) or (2.1).	*b)* soit donner, dans le cadre des paragraphes 145(2) ou (2.1), les instructions qu'il juge indiquées.
146.3 An appeals officer's decision is final and shall not be questioned or reviewed in any court.	**146.3** Les décisions de l'agent d'appel sont définitives et non susceptibles de recours judiciaires.
146.4 No order may be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain an appeals officer in any proceeding under this Part.	**146.4** Il n'est admis aucun recours ou décision judiciaire — notamment par voie d'injonction, de *certiorari*, de prohibition ou de *quo warranto* — visant à contester, réviser, empêcher ou limiter l'action de l'agent d'appel exercée dans le cadre de la présente partie.

ANALYSIS

Issue 1: Did the Appeals Officer err in law with respect to his interpretation and application of the definition of "danger" in section 122(1) and in the application of sections 145(1) & (2) by ignoring or failing to have proper regard to procedures taken by the Employers to correct the condition or hazard or to alter the activity?

[19] For the purpose of Part II of the Code, "danger" is defined in subsection 122(1) as follows:

"danger" means any existing or potential hazard or condition or any current or future activity	« danger » Situation, tâche ou risque — existant ou éventuel — susceptible de causer des

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.	blessures à une personne qui y est exposée, ou de la rendre malade — même si ses effets sur l'intégrité physique ou la santé ne sont pas immédiats — , avant que, selon le cas, le risque soit écarté, la situation corrigée ou la tâche modifiée. Est notamment visée toute exposition à une substance dangereuse susceptible d'avoir des effets à long terme sur la santé ou le système reproducteur.

Employers' Submissions

[20] The Employers submit that the definition of danger sets out a two-step analysis that must be conducted. First, a safety officer must consider that "the use or operation of a machine or thing, a condition in a place or the performance of an activity" creates a "hazard or condition…that could reasonably be expected to cause injury or illness to a person exposed to it." Second, it must be determined that any such injury or illness can reasonably be expected to occur "before the hazard or condition can be corrected, or the activity altered." Only if these two conditions are satisfied, suggest the Employers, does a "danger" exist which triggers a safety officer's obligation to direct an employer to take measures to correct the danger.

[21] Relying on *Cole and Air Canada*, [2006] C.L.C.A.O.D. No. 4 at para. 70, the Employer's argue that it was incumbent upon the Appeals Officer to determine that the Employers had failed to

either eliminate, control or protect employees from the potential hazard and that it was reasonably likely that the hazard or condition would cause injury before it could be corrected or altered. In *Cole*, Appeals Officer Malanka, relying on Justice Tremblay Lamer's decision in *Martin v. Canada (Attorney General)*, 2003 FC 1158 (F.C.T.D.), and Justice Gauthier's decision in *Verville v. Canada (Correctional Services)*, 2004 FC 767 held as follows:

> **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.

[22] The Employers submit that the Appeals Officer in the present case did not consider the possibility that the hazard could be corrected or the activity altered. Nor did he consider the likelihood that a worker would be injured prior to correction of the hazard. He simply held that "someone could, while pulling on a tarp or lanyard, 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."

[23] The Employers contend that the Appeals Officer failed to properly consider the two metre no-work zone that the Employers were implementing, and he failed to consider any other steps the Employers could implement to deal with a concern that employees may “fall over the side of the hatch cover.” In support of their argument, the Employers note that, during the hearing, the Appeals Officer stated that he was not interested in hearing the Employers’ evidence of what could or could not be safe but was only concerned with evidence of the danger and the refusals. The Employers suggest that this is an indication that the Appeals Officer was not concerned with possible preventive measures, including those implemented by the Employers, which is a consideration required before a finding of danger can be made.

[24] The Employers also argue that if employees are instructed to restrict their work to an area that precludes the possibility of falling, then working on a raised platform does not constitute a “danger” within the meaning of section 122(1) of the Code. They submit that the hazard or potential hazard of working on a raised platform has been corrected in such circumstances and a danger does not exist.

[25] The Employers argue further that the Appeals Officer’s conclusion that employees could fall, notwithstanding the procedure implemented by the Employers, was pure speculation or hypothesis, and did not meet the test for a finding of “danger” as set out by the Federal Court of Appeal in *Martin*, *supra*, wherein it was held at paragraph 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 weigh the evidence to determine whether it is more likely than not that what an applicant is asserting will take place in the future.

Union's Submissions

[26] The Union argues that the Appeals Officer's interpretation of "danger" is in accordance with established jurisprudence. The definition of danger, found in section 122(1) of the Code, was explained by Justice Dawson in *Pollard*, *supra*, at paragraphs 66-68:

> **66** As a matter of law, in order to find that an existing or potential hazard constitutes a "danger" within the meaning of Part II of the Code, the facts must establish the following:
>
> (1) the existing or potential hazard or condition, or the current or future activity in question will likely present itself;
>
> (2) an employee will be exposed to the hazard, condition, or activity when it presents itself;
>
> (3) exposure to the hazard, condition, or activity is capable of causing injury or illness to the employee at any time, but not necessarily every time; and
>
> (4) the injury or illness will likely occur before the hazard or condition can be corrected or the activity altered.
>
> **67** The final element requires consideration of the circumstances under which the hazard, condition, or activity could be expected to cause injury or illness. There must be a reasonable possibility that such circumstances will occur in the future. See: *Verville v. Canada (Correctional Services)* (2004), 253 F.T.R. 294 at paragraphs 33-36.
>
> **68** In *Martin* C.A., [2005 FCA 156], the Federal Court of Appeal provided additional guidance on the proper approach to determine whether a potential hazard or future activity could be expected to cause injury or illness. At paragraph 37 of its reasons, the Court observed that a finding of "danger" cannot be grounded in

> speculation or hypothesis. The task of an appeals officer, in the Court's view, was to weigh the evidence and determine whether it was more likely than not that the circumstances expected to give rise to the injury would take place in the future.

[27] The Union submits that the Employers' interpretation of "before the hazard or condition can be corrected" as requiring a two-step analytical approach is flawed. This phrase, the Union notes, was considered in *Verville, supra,* at paragraph 34, where the Court stated as follows:

> **34** …As mentioned in *Martin, supra,* the injury or illness may not happen immediately upon exposure, rather it needs to happen before the condition or activity is altered. Thus, here, the absence of handcuffs on a correctional officer involved in an altercation with an inmate must be reasonably expected to cause injury before handcuffs are made available from the bubble or through a K-12 supervisor, or any other means of control is provided.

[28] The Union further relies on the discussion of the same phrase in the case of *Employees and Amalgamated Transit Union and Laidlaw Transit Ltd. - Para Transpo Division*, [2001] C.L.C.A.O.D. No. 19 at paras. 34-35:

> **34** In the unreported decision of appeals officer Serge Cadieux in the case of Darren Welbourne and the Canadian Pacific Railway Company, Decision No. 01-008, dated March 22, 2001, appeals officer Cadieux wrote the following in paragraphs 19 and 20:
>
> > [19] The existing or potential hazard or condition of the current or future activity referred to in the definition must be one that can reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected or the activity altered. Therefore, the concept of reasonable expectation excludes hypothetical or speculative situations.
> >
> > [20] The expression "before the hazard or condition can be corrected" has been interpreted to mean that injury or illness is likely to occur right there and then

> > i.e. immediately [*Brailsford v. Worldways Canada Ltd.* (1992), 87 di 98 (Can. L.R.B.); *Bell Canada v. Labour Canada* (1984), 56 di 150 (Can. L.R.B.).]. However, in the current definition of danger, a reference to hazard, condition or activity must be read in conjunction to the existing or potential hazard or condition or the current or future activity, thus appearing to remove from the previous concept of danger the requisite that injury or illness will likely occur right there and then. In reality however, injury or illness can only occur upon actual exposure to the hazard, condition or activity. Therefore, given the gravity of the situation, there must be a reasonable degree of certainty that an injury or illness is likely to occur right there and then upon exposure to the hazard, condition or activity unless the hazard or condition is corrected or the activity altered. With this knowledge in hand, one cannot wait for an accident to happen, thus the need to act quickly and immediately in such situations.
>
> That is, for a danger to exist under the Code, there must be a reasonable degree of certainty that an injury or illness is likely to occur right then and there unless the hazard or condition is corrected or the activity altered. For deciding if a reasonable degree of certainty exists, it is necessary to examine the specific facts in the case.

[29] The Union argues that the Employers' submission that, before determining whether a danger exists, the Appeals Officer was required to determine that the hazard or condition could not be corrected before injury or illness was reasonably likely to result is incorrect. Such an articulation of the definition of danger, the Union suggests, is not consistent with the definition found in *Verville* or *Employees and Amalgamated Transit Union.* The Union also submits that the Code does not require a consideration of what an employer may potentially do in the future to eliminate the hazardous activity. Rather, the Code refers to measures that are actually in place which will immediately mitigate the hazard.

[30] The Union also stresses that the Employers' alleged response to the hazard (specifically the two metre no work zone) was never adopted by either of the Employers and, at the time the Safety Officers issued their directions on July 8, 2005 and August 16, 2005, there were no written work procedures for tarping over hatch covers. The lack of written procedures was noted by the Appeals Officer in his Decision at paragraph 49:

> G. Thompson [Grain Superintendent for Western Stevedoring] 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.

[31] The Union notes that Mr. B. Wall, Manager of the Grain Department at P&O Ports, also testified that there was no set standard procedure applicable to the industry for the rigging, monitoring or unrigging of tarps. Mr. Wall stated that documents entitled "Panamex type tarp rigging procedure" and "Procedure for removing tarps from a Panamex" were prepared and finalized within the month or so before the hearing.

[32] Further, the concept of a two-metre no work zone was put forward by the Employers in the alternative, and not as something they had implemented. This is supported by the Appeals Officer's decision at paragraph 83, where he notes:

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

[33] Furthermore, the Union submits that the Safety Officers concluded not only that the pulling on the tarp while standing near the edge of the hatch cover constituted a danger, but also that a second danger (working on top of a hatch cover with the hatch cover open) existed. Thus, any procedures implemented by the Employer would also have to eliminate, control, or protect employees from this second danger as well.

Conclusions

[34] In my view, the Appeals Officer did not err by failing to consider the procedures the Employers proposed to implement to correct the condition or hazard, or to alter the activity, in his assessment of whether or not a danger existed. It is clear from the Decision as a whole that the Appeals Officer considered whether the procedures that either existed or were proposed to be implemented were sufficient to eliminate, control or protect employees from the potential hazard. The points raised by the Employers (and raised again before the Court in this application) are referred to in the Decision and conclusions are presented in paragraphs 145 to 149:

> [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 the 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 metre 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-metre 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 than [sic] 915 mm as required by the *Tackle Regulations* [*Canada Shipping Act*, R.S. 1985, c. S-9; *Tackle Regulations*, C.R.C., c. 1494, Part III, 8.(2)(ii)].
>
> [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 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 boots has its place in this type of work, those boots 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.

[35] Thus, the Appeals Officer clearly considered the procedures or policies in place, as well as those proposed by the Employers, and determined that the Employers had 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." The Appeals Officer explicitly considered the proposed two-metre no work zone, but found that insufficient evidence had been led to prove that the establishment of such a zone would ensure that employees would not fall off the hatch covers (Decision at para. 146). The Appeals Officer found that this was

especially so given the existence of tripping impediments such as “cleats, holds, etc.” either hidden or not, under the tarps and the addition of grain dust, grain, or water that could cause someone to slip over the side of the hatch cover (Decision at para. 145).

[36] With respect to the other proposed Guidelines, such as the proposals to restrict the work to an area that precludes falling and that steps be taken to remove any product from the surface of the hatch covers before tarps were rigged or taken off, I am also satisfied that the Appeals Officer did not err by failing to take these into consideration when he determined that the Employers had failed to eliminate, control or protect employees from the potential hazard.

[37] The fact that proposals were drafted does not mean that the danger was eliminated or controlled, or that the Employers effectively ensured that employees were personally protected. These proposals, by their very nature, are merely plans or suggestions of procedures to be implemented. They are nothing more than suggested steps to be taken towards eventually eliminating or controlling the hazard or to eventually ensure that employees are protected. It cannot be said that by presenting proposals, which have yet to be implemented, that the danger no longer exists.

[38] In this regard, I agree with the Union that the phrase "before the hazard or condition can be corrected" in the Code does not require a consideration of what the employer may potentially do in the future to eliminate the hazardous activity. Rather, it refers to measures that are actually in place which will immediately mitigate the hazard. A determination of whether or not a danger exists

involves an assessment of the activity or potential hazard as it exists or could be expected to arise, with a view to whether it is likely to cause harm to an employee before the hazard or condition is corrected. Thus, in my view, the Appeals Officer was not required to consider what the employer might do in the future to eliminate the hazardous activity.

[39] It seems to me that the Employers simply disagree with the Appeals Officer's reasons and conclusions on this issue and want the Court to consider the matter *de novo* and reweigh the evidence. In my view, this is not the Court's role in this application. The reasons and conclusions of the Appeals Officer on this point are, in my view, based upon a correct interpretation of the meaning of "danger" under the Code and the relevant jurisprudence and fall within a range of possible, acceptable outcomes. It is possible to disagree with the Appeals Officer, and even to reach a different conclusion, but that does not mean that the Decision was wrong or unreasonable.

Issue 2: Did the Appeals Officer err in law with respect to his statutory interpretation and application of the definition of "danger" in section 122(1) and in the application of sections 128(2)(b) and 145(1) & (2) by ignoring or failing to have proper regard to the fact that, with the procedures implemented by the Employers to correct the condition or hazard or to alter the activity to the extent that is reasonable, work on hatch covers is a normal condition of employment for longshore workers.

Employers' Submissions

[40] The Employers argue that the Appeals Officer failed to have regard to the procedures implemented to protect against the perceived hazard or activity perceived to constitute a danger, and

then failed to conclude that any remaining risks were a normal condition of employment within the meaning of section 128(2)(b) of the Code.

[41] The fact that employees may trip or slip while working on a hatch cover where procedures are in place to ensure that they are not working near the edge of a hatch does not constitute a danger within the meaning of the Code, suggest the Employers, because working on slippery surfaces or surfaces where one might trip is a normal condition of employment with the Employers. The Employers argue that the evidence of employees called by the Union was that the potential to slip or trip on a ship's surface was a normal and regular hazard of longshoring work.

Union's Submissions

[42] The Union points out that the Appeals Officer specifically refers to this issue and argument in paragraph 150 of the Decision and provides discussion and a conclusion in paragraphs 151, 152, 153 and 154. The relevant sequence of questions is also set out in paragraph 99, so that paragraph 152 of the Decision provided a review of paragraph 99. The factual basis for the conclusions is set out in paragraphs 155 and 156.

[43] The Union says that the danger identified in paragraph 156 is the "activity of working from an unguarded elevated structure without any fall prevention or protection in place."

[44] The Union points to the evidence of Mr. Brooks that it is not possible for employees to stand in the middle of the hatch cover and do the work they are given. The situation is dynamic and employees have to move around different hatches, getting up and down, tarping, moving tarps, and removing water. It is not possible to do all of this work and not enter the danger zone.

Conclusions

[45] Paragraph 128(2)(*b*) of the Code provides an exception with respect to a finding of danger where the danger is a normal condition of employment:

128. (1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that	**128. (1)** Sous réserve des autres dispositions du présent article, l'employé au travail peut refuser d'utiliser ou de faire fonctionner une machine ou une chose, de travailler dans un lieu ou d'accomplir une tâche s'il a des motifs raisonnables de croire que, selon le cas :
(a) the use or operation of the machine or thing constitutes a danger to the employee or to another employee;	*a)* l'utilisation ou le fonctionnement de la machine ou de la chose constitue un danger pour lui-même ou un autre employé;
(b) a condition exists in the place that constitutes a danger to the employee; or	*b)* il est dangereux pour lui de travailler dans le lieu;
(c) the performance of the activity constitutes a danger to	*c)* l'accomplissement de la tâche constitue un danger pour

the employee or to another employee.	lui-même ou un autre employé.
2) An employee may not, under this section, refuse to use or operate a machine or thing, to work in a place or to perform an activity if	**(2)** L'employé ne peut invoquer le présent article pour refuser d'utiliser ou de faire fonctionner une machine ou une chose, de travailler dans un lieu ou d'accomplir une tâche lorsque, selon le cas :
(a) the refusal puts the life, health or safety of another person directly in danger; or	*a)* son refus met directement en danger la vie, la santé ou la sécurité d'une autre personne;
(b) the danger referred to in subsection (1) is a normal condition of employment.	*b)* le danger visé au paragraphe (1) constitue une condition normale de son emploi.

[46] The Appeals Officer held as follows at paragraph 152:

> [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 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 of 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 purposes 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.

[47] I have already concluded that the Appeals Officer did not err in failing to consider the procedures implemented, or that could be implemented, by the Employers. The Appeals Officer also held that the Employers failed to eliminate the hazard, control the hazard, or by way of last resort, to provide the necessary protective equipment, clothing or devices and materials to employees. Thus, the hazard that continues to exist cannot be deemed a normal and regular hazard of longshore work, since the Employers failed to eliminate or control the hazard. Also, the equipment provided to the employees, specifically the non-slip work boots, was held to be insufficient to prevent someone from slipping on round grains of cereals. The Appeals Officer held that "While wearing non-slip work boots has its place in this type of work, those booths [*sic*] 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." Thus, the equipment provided was also insufficient to protect the employees from the potential hazard so that any remaining risk of slipping could not be deemed a "normal and regular hazard of longshore work." I find that the Appeals Officer did not err in law in his assessment of whether or not the risk of working on top of the hatch covers, or the risk of slipping on the hatch covers, constituted a normal and regular hazard of longshore work.

Once again, in my view, the Employers are really asking the Court to reweigh the evidence and reach a different conclusion. It might indeed be possible to do that, but I cannot find on this issue

that the Appeals Officer was incorrect in his understanding and application of the law, or that his reasons and conclusions do not fall within a range of possible, acceptable outcomes.

The dangers and risks are identified and the Employers are directed to "take measures to protect the employee and any person from the danger."

Issue 3: Did the Appeals Officer err in law with respect to his interpretation and application of the definition of sections 122.2 and 125(1) of the Code and sections 10.1 and 10.2 of the Marine Occupational Safety and Health Regulations by requiring the Employers' to have fall prevention or fall protection equipment in place without:

a. Having regard to procedures implemented, or that could have been implemented, to control the potential hazard;

b. Having regard to the fact that fall protection equipment cannot reasonably be employed on a hatch cover, and therefore its use would not prevent or reduce injury from the potential hazard; and

c. Having regard to the fact that fall protection equipment could itself create a hazard?

[48] Sections 122.2, 124, and 125(1) of the Code provide 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.	**122.2** La prévention devrait consister avant tout dans l'élimination des risques, puis dans leur réduction, et enfin dans la fourniture de matériel, d'équipement, de dispositifs ou de vêtements de protection, en vue d'assurer la santé et la sécurité des employés.
124. Every employer shall ensure that the health and safety	**124.** L'employeur veille à la protection de ses employés en

at work of every person employed by the employer is protected.	matière de santé et de sécurité au travail.
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,	**125. (1)** Dans le cadre de l'obligation générale définie à l'article 124, l'employeur est tenu, en ce qui concerne tout lieu de travail placé sous son entière autorité ainsi que toute tâche accomplie par un employé dans un lieu de travail ne relevant pas de son autorité, dans la mesure où cette tâche, elle, en relève :
[…]	[…]
(b) install guards, guard-rails, barricades and fences in accordance with prescribed standards; […]	b) d'installer des dispositifs protecteurs, garde-fous, barrières et clôtures conformes aux normes réglementaires; […]

[49] Sections 10.1,10.2 and 10.9 of the *Marine Occupational Safety and Health* ["MOSH"] *Regulations*, S.O.R./87-183, provide as follows:

10.1 Where	**10.1** Toute personne à qui est permis l'accès au lieu de travail doit utiliser l'équipement de protection prévu par la présente partie lorsque :
(a) it is not reasonably practicable to eliminate or control a safety or health hazard in a work place within safe limits, and	a) d'une part, il est en pratique impossible d'éliminer ou de restreindre à un niveau sécuritaire le risque que le lieu de travail présente pour la sécurité ou la santé;
(b) the use of protection equipment may prevent or	b) d'autre part, l'utilisation de l'équipement de protection peut

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.

empêcher les blessures pouvant résulter de ce risque ou en diminuer la gravité.

10.2 All protection equipment

10.2 L'équipement de protection doit à la fois :

(a) shall be designed to protect the person from the hazard for which it is provided; and

a) être conçu pour protéger la personne contre le risque pour lequel il est fourni;

(b) shall not in itself create a hazard.

b) ne pas présenter de risque en soi.

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

10.9 (1) L'employeur doit fournir un dispositif de protection contre les chutes à toute personne qui travaille sur l'une des structures suivantes, à l'exception d'un employé qui installe ou démonte un tel dispositif selon les instructions visées au paragraphe (5) :

(a) an unguarded structure that is

a) une structure non protégée qui est :

(i) more than 2.4 m above the nearest permanent safe level,

(i) soit à plus de 2,4 m au-dessus du niveau permanent sûr le plus proche,

(ii) above any moving parts of machinery or any other surface or thing that could cause injury to an employee on contact, or

(ii) soit au-dessus des pièces mobiles d'une machine ou de toute autre surface ou chose sur laquelle l'employé pourrait se blesser en tombant,

(iii) above an open hold,

(iii) soit au-dessus d'une cale ouverte;

(b) a temporary structure that is more than 3 m above a

b) une structure temporaire qui est à plus de 3 m au-dessus d'un

permanent safe level, or	niveau permanent sûr;
(c) a ladder at a height of more than 2.4 m above the nearest permanent safe level and, because of the nature of the work, that person can use only one hand to hold onto the ladder, the employer shall provide a fall-protection system.	c) une échelle, lorsque la personne travaille à une hauteur de plus de 2,4 m au-dessus du niveau permanent sûr le plus proche et qu'à cause de la nature de son travail, elle ne peut s'agripper que d'une main à l'échelle.

Employers' Submissions

[50] The Employers submit that the Appeals Officer erred in concluding that fall prevention, or fall protection, equipment was required without first determining, pursuant to section 10.1 of the *MOSH Regulations*, whether it was "not reasonably practicable to eliminate or control a safety or health hazard in a workplace within safe limits" as required by subsection (a).

[51] The Employers note that the Appeals Officer found that section 10.9 of the *MOSH Regulations* makes no provision for safe work distances or a safe work zone in the case of an unguarded elevated structure so that fall prevention or fall protection equipment was required by that provision. However, section 10.1, the Employers argue, requires fall protection equipment only where "it is not reasonably practicable to eliminate or control a safety or health hazard in a workplace within safe limits," in accordance with the order of preventive measures set out in section 122.2 of the Code. As above, the Employers argue that the Appeals Officer failed to consider whether the procedure developed by the Employers eliminated or controlled the safety hazard, or

whether measures could be taken to control the safety hazard, before requiring that fall prevention or fall protection equipment be used.

[52] The Employers further submit that the Appeals Officer failed to make any determination as to whether the use of fall protection equipment could prevent or reduce injury from the "hazard" as required by section 10.1(b) of the *MOSH Regulations*. Also, they say that he did not consider whether the use of protection equipment might, itself, create a hazard, as he was required to do under section 10(2)(b) of the *MOSH Regulations*.

[53] The Employers argue that, had such an inquiry been made and the Employers afforded the opportunity to address this issue, evidence would have showed that fall protection equipment cannot reasonably be employed on a hatch cover because there are no overhead structures to which the equipment can be fastened. Moreover, fall protection itself, they suggest, could interfere with the work of longshoremen on hatch covers and thereby create its own hazard.

[54] The Appeals Officer, the Employers argue, failed to engage in the analysis required by the statutory provisions relevant to the use of protective equipment and, as such, his interpretation and applications of these provisions is flawed.

Union's Submissions

[55] The Union agrees that 10.1(a) of the *MOSH Regulations* is a precondition. But, in paragraph 154 of the Decision, the Safety officer makes a specific finding that the pre-conditions are met. The Employers had failed to either eliminate or control the hazard.

[56] The Union points out that the danger is clearly identified by the Appeals Officer, as discussed in the previous section. The direction is given as referred to in paragraph 159 of the Decision. It is for the Employers to devise a solution. The present solution adopted by the Employers is that there is no loading of grain when it is raining. That is not the only solution.

[57] It is the Employers' obligation under the Code to protect employees from dangers. If the Employers take the position that they cannot come up with a solution, that does not mean that the employees must accept the dangers and risks identified.

Conclusions

[58] In my view, the Appeals Officer correctly applied the *MOSH Regulations* and made the findings required by 10.1.

[59] I note that it was not for the Appeals Officer to determine precisely the type of fall-protection system the Employers were required to implement, nor did he. This is consistent with the

Federal Court of Appeal's decision in *Maritime Employers Association v. Harvey* (1991), 134 N.R. 392, [1991] F.C.J. No. 325 (QL) wherein the Court held at pages 3 to 4:

> The applicant also contended that the directions given by the safety officer and upheld by the regional officer were too brief, in that they simply ordered the employer "to immediately take the necessary action to deal with the danger", without further specifying what the employer had to do. The applicant argued that, in order to perform his obligations under s. 145(2) (s), the safety officer should have specifically indicated what action the employer had to take to deal with the danger.
>
> Though the Act does not say so expressly, it is clear that the directions given under s. 145(2) must be specific enough for it to be determined whether the employer has complied with them. However, for the directions to be specific enough they do not have to specify what action the employer must take to deal with the danger encountered by its employees; it will suffice if they indicate what result the employer must attain by clearly identifying the danger encountered by employees and imposing on the employer a duty to take the necessary action to deal with it. While it may be easy in some cases to say exactly what the employer must do to correct a danger, in other cases this may be difficult or even impossible. There may be a wide range of means of arriving at the desired result; or it may be impossible for a person who does not have specialized scientific knowledge to know how to achieve such a result. In such circumstances it is understandable that the employer should be left to choose what means it will take to attain the objective required of it.

[60] The Appeals Officer in the present case did not specify the type of fall prevention or protection equipment that was required. Instead, he found that the employees were exposed to a fall when working 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" and issued the following Directions:

> 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...this direction is complied with. However, nothing in this subsection prevents the doing of anything necessary for the proper compliance with the direction.

[61] It is not for this Court to determine whether or not fall prevention or protection equipment could reasonably be used on a hatch cover, or if they would interfere with the work of longshoremen on hatch covers and thereby create their own hazard. Further, the Appeals Officer, by generally providing a wide range of means by which to implement such a system, or the necessary equipment, was not required to give specific directions as to what action the Employers were required to take to deal with the danger. Thus, the Appeals Officer did not err by not putting the issue to the Employers and allowing them to put forward evidence on whether or by what means such a system could be implemented.

[62] I further note that the Directions issued by the Appeals Officer do not preclude the Employers from altering the procedure for rigging and unrigging tarps, or from implementing technological solutions, in the event that, as the Employers allege, fall prevention or fall protection equipment would interfere with the work of longshoremen and thereby create its own hazard.

Issue 4: Did the Appeals Officer base his decision on an erroneous finding of fact, made in a perverse or capricious manner?

Employers' Submissions

[63] The Employers argue that the Appeals Officer rejected, overlooked, or failed to consider relevant evidence that was fundamental to the issues before him. They submit that although the Appeals Officer cited the written findings of the Safety Officers in his Decision, he essentially ignored those findings when making his Decision. The Employers note that the Safety Officers found that the tarping process was safe, save for one aspect: standing near the edge of the hatch cover to remove water that had collected on a tarp. The Employers submit that the Appeals Officer did not explain why that evidence was ignored or rejected.

[64] Further, at the hearing, the Employers say that the Safety Officers testified that the only aspect of the tarping operation that they determined posed a danger occurred when an employee stood near the edge of a hatch cover while removing water from the tarp. Also, Mr. McGhie, a witness for the Union, gave evidence that Safety Officer D'sa had no opportunity to observe a rigged tarp with water collected in it, because the workers did not rig the tarp. Mr. Suttie, also a witness for the Union, testified that Safety Officer D'sa did not observe the procedures for rigging and unrigging a tarp, since the workers attempted unsuccessfully to rig the tarp as a demonstration for the Safety Officer.

[65] The Employers say that Safety Officer D'sa agreed that the procedure implemented by the Employers, which required longshore workers to remain two metres away from the edge of the

hatch cover, would remove the potential danger. Moreover, witnesses for both the Employers and the Union testified that if tarps are rigged properly water does not collect in them.

[66] The Employers say that Safety Officer D'sa also testified at the hearing to the following:

a. He said that if the tarp was rigged from the edges to the centre of the hatch cover, no potential danger would arise;

b. He did not incorporate any statement of the employees actually performing the activity in question in his report;

c. He said that if the two-metre no work zone was implemented, and employees were not working within the no work zone, there would be no danger within the meaning of the Code;

d. He said that there are no provisions to rig guardrails on either Panamax or MacGregor hatch covers.

[67] In addition, the Employers say that Safety Officer Yeung testified to the following:

a. That he had never seen the tarping or detarping of a MacGregor hatch;

b. That when he attended at the Thomas C. on August 16, 2005, he did not observe the procedure for rigging or derigging tarps, but rather the procedure was described to him;

c. That he copied Safety Officer D'sa's report in respect of the July refusals to work.

[68] The Employers submit that the Appeals Officer failed to consider, and nowhere mentioned in his Decision, that the Safety Officer agreed that if longshore workers were directed not to work near the edge of the hatch cover, then there would be no danger. The Employers submit that the evidence of Safety Officer D'sa, noted by the Appeals Officer in his Decision, regarding an incident of tarps repeatedly snagging on the hatch covers does not relate to the events that led to the Safety Officer's Direction, but rather relates to a subsequent demonstration of the proposed new procedures. According to the Employers, this suggests that the Appeals Officer failed to understand the evidence, or properly consider the evidence that was before him.

[69] The Employers further note that the Appeals Officer accepted the evidence of Safety Officer Yeung even though he made no on-site investigation of the actual tarping procedure. The Employers submit that, contrary to the finding of the Appeals Officer that Safety Officer Yeung's report was "somewhat very similar" to the report of Safety Officer D'sa, a review of both reports reveals that Safety Officer D'sa's report was copied word for word.

[70] The Employers also note that their witness, Mr. Guy Thomson, gave evidence of the following:

a. That there is no need for longshore workers to work near the edge of a hatch cover;

b. That if there was a need to remove water from a tarp prior to closing a hatch cover, the workers would be directed to first attempt to remove it from the deck, and if unsuccessful, to remove it from on the hatch cover, working as close to the centre as possible; and

c. That the process for rigging and unrigging a tarp do not require the workers to get within two metres of the edge of the hatch cover.

[71] Thus, despite evidence that under the new procedures longshoremen would not be required to work near the edge of a hatch cover, the Appeals Officer determined that longshore workers "work at the edge of a slippery hatch cover" (Decision at para. 107).

[72] The Employers further point to the expert testimony of Captain Brian Johnston, who was accepted as an expert in marine safety, regarding the safety of their procedure. Captain Johnston's opinion, they note, was to the effect that no danger exists if a no-work zone of two metres from the edge of the hatch cover is implemented. The Employers state that although the Appeals Officer rejected Captain Johnston's evidence solely on the basis that "he did not provide any technical or engineering evidence that a two metre no work zone is sufficient to protect employees against

falling off a hatch cover while working on top of those hatch covers," at no time during the course of the hearings was there any suggestion that his opinion should be rejected or minimized because he did not provide "technical or engineering evidence." The Employers argue that Captain Johnston's evidence was that of an expert in marine safety. Thus, there was no reason for the Employers to call further technical or engineering evidence when they had presented the evidence of an expert in marine safety on the question of safe work design.

[73] The Employers also submit that a Union representative testified that the Union members of the Joint Safety Committee proposed the two-metre no-work zone in response to the Employer representatives' suggestion of a one-metre no-work zone. Also, witnesses testified at the hearing that any grain or other product leading to slippery conditions on the hatch cover could be washed or swept away before workers removed tarps. The Appeals Officer made findings and issued directions that require that no longshore worker can work on a hatch cover without fall protection equipment. However, there was no evidence, the Employers argue, that would support a conclusion that the use of fall protection equipment was feasible on hatch covers of grain vessels.

[74] The Employers further argue that the Appeals Officer erred in his assessment of the evidence provided by Mr. Bob Wall. In his Decision, the Appeals Officer found that Mr. Wall "recalled that, in 2000, there was an accident where an employee fell off the hatch cover while folding the tarp and suffered injuries." The Employers note, however, that Mr. Wall testified that in his experience, he could recall only one incident that one employee fell off a hatch cover and that Mr. Wall did not give any reasons as to why the fall occurred. Further, at paragraph 155 of the

Decision, the Appeals Officer noted that Mr. Wall testified that "such incidents 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." The Employers submit that no such evidence was given by Mr. Wall.

[75] The Employers also submit that, at paragraphs 66 and 151 of the Decision, the Appeals Officer found that Captain Johnston testified that hatch covers are "often higher than 2.4 metres." The Employers argue that Captain Johnston gave no such evidence. Rather, Captain Johnston testified that hatch covers on most vessels would be less than 2.4 metres high, but that the hatch cover could be as high as 3 metres.

[76] The Employers also argue that there was no evidence to support the Appeals Officer's conclusion at paragraph 145 of the Decision that, even though there was evidence that employees do not work, nor are they required to work, close to the edge of hatch covers, there were tripping impediments that could cause a worker to trip or slip and fall over the side of the hatch cover. They submit that while there was evidence that a longshore worker might slip or trip, there was no evidence that a longshore worker could trip or slide two metres to fall over the edge of a hatch cover.

[77] The Employers argue that Captain Johnston also testified that if longshoremen wore non-slip work boots, this would reduce the likelihood of slipping on a hatch cover. However, the Appeals Officer rejected this evidence holding that “while wearing non-slip work boots has its place in this type of work, those booths [sic] 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.” The Employers say that there was no evidence to support the Appeals Officer's conclusion. Instead, there was evidence that the surface of hatch covers could be washed or swept to remove debris or product before longshore workers rigged or took down the tarp. This is supported by the testimony of Mr. Brooks, who noted that it is the job of the Machine Man to clear the surface to remedy any slippery conditions. Mr. Brooks also testified that slippery conditions and tripping hazards on a vessel are common to the work of a longshoreman and Mr. McGhie, the Union’s witness, testified that ship decks are commonly slippery and that it is not uncommon to work in slippery conditions.

[78] The Employers further argue that the Appeals Officer failed to consider, or reasonably consider, the two-metre no-work zone implemented by the Employers, or any other form of no-work zone that might be implemented, in coming to the conclusion that a danger exists because employees are working on top of a hatch cover and might trip or slip, and so create “the potential of falling off the hatch cover.”

[79] The Employers submit that the Appeals Officer failed to consider the evidence of Safety Officer D'sa that there is no provision to rig guard rails on either Panamax or MacGregor hatch covers.

[80] Lastly, on this issue, the Employers rely on *Gerle Gold Ltd. v. Golden Rule Resources Ltd.*, [1999] 2 F.C. 630 (F.C.T.D.) for the principle that the Appeals Officer's had a statutory duty to provide written reasons, pursuant to section 146.1(2), and that this duty to give reasons includes the

duty to make findings of fact on which the Decision is based and to indicate why the tribunal rejected evidence pertaining to central facts. The Employers argue that the Appeals Officer overlooked and rejected evidence pertaining to the central facts and did not adequately address the rejection of this evidence in his reasons.

Union's Submissions

[81] The Union submits that the Appeals Officer's findings of fact were supported by the evidence and, therefore, he did not make unreasonable findings of fact. The Union also stresses that an appeal of the directions of Safety Officers is a *de novo* inquiry. Thus, the Appeals Officer was not confined to a review of "the record." He was permitted to assess, weigh and accept witnesses' evidence. The Federal Court of Appeal held in *Martin*, *supra*, at paragraphs 27 and 28 as follows:

> **27** Under section 146.1, an appeals officer may "vary, rescind or confirm" a direction of a health and safety officer. If a health and safety officer has made a direction under subsection 145(2) that the appeals officer considers inappropriate, he may rescind that direction. However, because he 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.
>
> **28** An appeal before an appeals officer is *de novo*. Under section 146.2, the appeals officer may summon and enforce the attendance of witnesses, receive and accept any evidence and information on oath, affidavit or otherwise that he sees fit, whether or not admissible in a court of law, examine records and make inquiries as he considers necessary. In view of these wide powers and the addition of subsection 145.1(2), there is no rationale that would justify precluding an appeals officer from making a determination under subsection 145(1), if he finds a contravention of Part II of the Code, notwithstanding that the health and safety officer had issued a direction under subsection 145(2).

[82] With regards to the evidence of the Safety Officers, the Union submits that in response to being asked by the Employers for an opinion as to their proposed two-metre no work zone, Safety Officer D'sa said he had not anticipated being asked to comment on proposed work procedures and that it was a matter for discussion between the Employer and employees as to how to mitigate the dangers he had identified in his direction.

[83] The Union also argues that the Safety Officers were called as witnesses to describe the circumstances at the times of their investigations. The questions in cross-examination sought an opinion from the Safety Officers as to a hypothetical no-work zone, a procedure which did not exist at the time of their investigations or at the time the directions were issued. Thus, the Appeals Officer was not required to review Safety Officer D'sa's views as to what he may have directed had a no-work zone existed at the time of his investigation, and which did not form one of the circumstances leading to the directions that were given.

[84] With respect to the evidence provided by Captain Johnston, the Union notes that when he testified that the Employers' proposed procedures were in line with clearances identified in the *MOSH Regulations*, Captain Johnston was referring to a section of the *MOSH Regulations* dealing with safety nets under access ladders or gangways. The Regulation to which Captain Johnston was referring did not involve the tarping of hatches. The Union also notes that Captain Johnston referred to Cargo Regulations which spoke of safety nets and removal of hatch covers and unprotected deck edges. However, these Regulations have never been enacted.

[85] The Union submits that the essence of Captain Johnston's evidence was that he was asked by the Employers to give an opinion on their proposal for a two-metre no work zone. To give that opinion, Captain Johnston looked at section 2.9 of the *MOSH Regulations* for guidance on safety margins, and on that basis concluded that the Employers proposed procedure was safe. Thus, the Appeals Officer did not err when he concluded at paragraph 146 as follows:

> [146] B. Johnston stated that in spirit of the *MOSH Regulations*, he believed that a two metre 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 metre no work zone is sufficient to protect employees against falling off a hatch cover while working on top of those hatch covers.

[86] Thus, the Union submits that the Appeals Officer accurately described the nature of the evidence given by Captain Johnston and, although Captain Johnston was qualified as an expert and his evidence was admissible, the Appeals Officer was entitled to determine the weight that should be given to that evidence. The Union also notes that the Appeals Officer considered the criteria for expert opinion evidence as set out in *R. v. Mohan*, [1994] 2 S.C.R. 9, and found that decision undermined the value of Captain Johnston's evidence. Thus, given the circumstances set out above, and on the basis of the nature and quality of the evidence given by Captain Johnston, the Union argues that the Appeals Officer did not err in determining that minimal weight should be given to that evidence.

[87] With respect to the Appeals Officer’s findings regarding the slipping or tripping hazards, the Union argues that the evidence indicated that, in spite of the use of non-slip boots, conditions on the top of the hatch covers were slippery due to grain pellets or dust, and that there exist other

impediments that could cause a longshore worker to trip, including holes. Further, Mr. Guy Thompson, a witness for the Employers admitted that “not very much” is usually done to deal with accumulated wetness and grain dust on top of the hatch covers prior to the final loading and closing of the covers. Captain Johnston stated that, if slippery conditions on ships cannot be otherwise addressed, anti-slip footwear should be worn. He also stated that accumulations of grain on the top of the hatch covers could be addressed by getting a crew to clean off the accumulations of grain that may occur during the grain loading process. Thus, on the evidence before him, argues the Union, the Appeals Officer did not make an unreasonable error with regards to the possibility of slipping and tripping on top of the hatch covers.

[88] With respect to the evidence supporting the Appeals Officer's conclusion that there existed a risk of falling off the hatch covers, the Union submits that the evidence before the Appeals Officer was that, at the time of the refusals and the issuance of the directions by the Safety Officers, no set or written work procedure was in place with respect to the rigging, monitoring, or unrigging of the tarps. The evidence before the Appeals Officer was that the no-work zone was part of a proposal formulated by the Employers and had only been finalized a month or so prior to the commencement of the hearing. Further, the evidence was that there had been no agreement between the Employers and the Union with respect to the proposed work procedures. The evidence before the Appeals Officer was that the proposed no-work zone had never been implemented by the Employers.

[89] The Union notes that the evidence before the Appeals Officer included a step-by-step description by the employees as to how they performed the work of rigging, monitoring, and

unrigging tarps over the holds. Further, there was evidence before the Appeals Officer that one of the employees working on July 8, 2005 slipped while pulling on a rope while standing about six inches from the edge of the hatch cover. Also, there was evidence that employees are on top of the Panamex hatch covers while the hatch covers are open. Thus, on the basis of this evidence, the Union submits that the Appeals Officer did not err in concluding that the potential risk of falling while conducting present and future activity on top of the hatch covers placed the refusing employees in a situation of danger under Part II of the Code.

[90] The Union also notes that Safety Officer D'sa provided evidence with respect to tarps snagging on the hatch cover, and that a demonstration of the procedures was held at the time Safety Officer D'sa investigated the refusal to work on July 8, 2005.

[91] As regards the accumulation of water on the tarps, the Union notes that Mr. Brooks, a witness for the Union, testified that as grain is being loaded, the employees watch the tarps to see that water is not getting into the hatch. If water is getting in, the employees have to adjust the tarps to make a trough so that bellies of water flow off the side of the hatch. To deal with water accumulation, adjustments are made by slacking off, retying, and tightening lanyards either from the top of the hatch cover, the deck or both. Thus, the evidence was not as the Employers assert, that "water does not collect," but that employees rig the tarps as best they can to minimize the pooling of water but that there will always be some pooling.

[92] Lastly, the Union notes that the Appeals Officer's finding that the danger was real and not speculative specifically referred to the evidence of Mr. Wall, who described an injury he knew about and which occurred in 2000. According to the report reviewed by Mr. Wall, the individual concerned was in the process of folding up a hatch with a tarp on a closed hatch cover and fell off the side of the hatch cover onto the deck. The individual suffered head and back injuries.

Conclusions

[93] With respect to the Employers' allegation that the Appeals Officer ignored the findings of the Safety Officers, I find that the Appeals Officer sufficiently considered these findings in his Decision. Also, because an appeal before an appeals officer is heard *de novo*, the Appeals Officer was not limited by the findings of the Safety Officers (*Martin*, *supra*, at para. 28). Instead, it was open to him to make findings apart from those made by the Safety Officers and to "vary, rescind or confirm" the directions issued by the Safety Officers, pursuant to subsection 146.1(1) of the Code, and to issue directions deemed by the Appeals Officer to be appropriate, as per subsection 145(2) or 145(2.1) of the Code. I am satisfied that the Appeals Officer correctly exercised his discretion to hear the appeal *de novo* and issued directions in accordance with the power conferred upon him by the Code.

[94] In exercising this discretion, it was open to the Appeals Officer to assess, weigh, and accept or reject the evidence put forward by both parties, including the testimonial evidence of witnesses. It is not the role of this Court to undertake a reweighing of the evidence in the point-by-point,

microscopic manner in which the Employer's urge the Court. In my view, the Employers have failed to establish that the Appeals Officer based his Decision in any material sense upon erroneous findings of fact.

[95] The Employers' arguments on this issue amount to a disagreement with the findings of the Appeals Officer that working on top of the hatch covers constitutes a danger. The Employers undertake a microscopic review of the Decision and, to a large degree, challenge it on the basis of the Appeals Officer's rejection of the testimonial evidence given by witnesses for the Employers. As I have already stated, it was open to the Appeals Officer to assess, weigh, and accept or reject this evidence. Specifically, the Appeals Officer rejected Captain Johnston's evidence, to the effect that no danger exists if a no-work zone of two meters is implemented, because the Appeals Officer was not satisfied, considering the slippery surface and tripping impediments present on the hatch covers, that such a measure would sufficiently protect employees from falling off the edge of a hatch cover. This finding, in my view, has support in the evidence and was not unreasonable.

[96] The Employers' principal complaint and argument throughout is that there was no evidence that employees had to work at or near the edge of a hatch cover. They say the evidence was that there is no need for an employee to go near the edge, so that no danger exists provided the employee does not enter the danger zone.

[97] Specifically, in relation to paragraph 145 of the Decision, the Employees say that if the Appeals Officer is saying that there is a risk of falling over the edge of a hatch cover if an employee

is working outside the two-metre, no-work zone, then there is no evidence to support such a conclusion.

[98] In my view, the Appeals Officer makes it clear in paragraph 145 of the Decision that he has considered the evidence offered by various witnesses that there is no danger if employees do not work close to the edge of a hatch cover. He also makes it clear, however, that, because of tripping impediments and the addition of grain dust and water, someone could reasonably, step and "fall over the side" while pulling on a tarp or a lanyard.

[99] Obviously, the Employers disagree that such a risk exists and they say that the Decision is unreasonable because there is no evidence to support such a risk.

[100] Paragraph 145 has to be read in the context of the Decision as a whole and, in particular, paragraphs 135 to 148, and paragraphs 155 and 156.

[101] When this is done, it is clear that the Appeals Officer considered the Employers' arguments, perspectives and evidence on this central point. But having done this, the Appeals Officer says he cannot accept that there is no danger within the meaning of the Code. He gives various reasons for this:

a. It does not take any special knowledge to understand that working on an elevated structure can be considered a danger (para. 136);

b. Employees have to stand on the hatch covers and they have to grab the tarps and the lanyards, and pull them and shake off excess water before they can fold them, or try to rig and unrig the tarps (paras. 137 and 140);

c. The areas beside the hatch covers are very dangerous if an employee falls off the hatch cover (para. 139);

d. There is a danger of slipping and falling over the edge of a hatch cover because of tripping impediments, grain dust and water, so that when someone pulls on a tarp or a lanyard they could step and fall (para 145);

e. He rejects the notion of there being a safe working distance, and he is not convinced on this issue by the arguments, evidence and opinions put forward by the Employers (para 149).

[102] In my view then, the Appeals Officer does not overlook relevant evidence or argument, and he does not lack an evidentiary basis for the dangers that he sees. This is a case of weighing evidence, assessing risks and considering the arguments and perspectives of both sides.

[103] In the end, I think the Appeals Officer is saying that pulling at, and rigging tarps on the top of hatch covers is inherently dangerous, and that if someone were to fall over the edge the

consequences could be very serious indeed. He is not convinced that this risk, and its serious consequences, can be removed in the ways suggested by the Employers.

[104] As I read the Decision as a whole, I do not think that this is a case of overlooking relevant evidence or basing conclusions on erroneous findings of fact, or basing conclusions on no findings of fact. The Appeals Officer identifies from the evidence before him what he sees as a very serious danger, and he is not convinced that the danger can be removed in the ways suggested by the Employers.

[105] Of course, it is possible to disagree and to come to other conclusions that would also be reasonable on the facts, but, I cannot say that the Appeals Officer's conclusions on this central point do not, reasonably speaking, fall within a range of possible, acceptable outcomes. Hence, I cannot interfere with the Decision on the grounds put forward by the Employers.

Issue 5: Was there a breach of natural justice and procedural fairness?

[106] The Employers argue that the Appeals Officer rejected relevant evidence before him to the effect that there is no need for longshore workers to work near the edge of hatch cover. They note that witnesses with direct experience, including a safety officer, considered that a two-metre no work zone would obviate any danger of working on a hatch cover. This evidence, the Employers submit, was central to the question at issue before the Appeals Officer and was unreasonably rejected.

[107] In support of their argument that the Appeals Officer breached the rules of procedural fairness, the Employers rely on the Supreme Court of Canada's decision in *Université du Québec à Trois Rivières v. Larocque*, [1993] 1 S.C.R. 471, wherein the Supreme Court of Canada held that an erroneous decision to reject relevant evidence which impacts the fairness of the proceeding is a breach of natural justice and an excess of jurisdiction.

[108] The Employers further argue that they had no notice that the Appeals Officer proposed to make a determination that working on top of a hatch cover was a "danger" and that employees working on a hatch cover must be provided with fall protection equipment. They note that they brought their appeal to the Appeals Officer from the decision of the Safety Officers, which only found that one aspect of the tarping process was considered a danger. The Employers argue that, had they had proper notice, they could have led evidence and presented arguments relating to the unreasonableness of the Appeals Officer's conclusion that a risk of falling from a hatch cover exists when a no-work zone is in place, and they could have presented evidence and argument regarding the impracticality of requiring fall protection equipment when there is no ability to use such equipment on a hatch cover.

Union's Submissions

[109] The Union submits that the Employers' arguments on this point amount to a disagreement with the findings of fact made by the Appeals Officer and, in particular, the Appeals Officer's

finding that the Employers failed to take reasonable steps to eliminate the hazard that existed. Relying on the British Columbia Supreme Court's decision in *International Longshore and Warehouse Union Ship and Dock Foremen, Local 514 v. Fraser Surrey Docks Ltd.,* 2007 BCSC 1532, the Union argues that assertions of breaches of procedural fairness cannot be used to undermine findings of fact. The Union argues that the Employers' submissions regarding the *MOSH Regulations* are based merely on a disagreement with the findings of the Appeals Officer and that no breach of natural justice or procedural fairness has been established.

[110] In addition, the Union argues that the directions issued and the definition of "preventative measures" do not engage the *MOSH Regulations*. The directions were issued pursuant to Section 145 of the Code. They further argue that the directions made by the Appeals Officer are consistent with the expectations set out in the case of *Maritime Employers Association v. Harvey*. The Union submits that the Employers knew, or ought to have been aware, of the statutory jurisdiction given to the Appeals Officer and that they cannot now complain of his exercise of that jurisdiction.

Conclusions

[111] First, I find that the Appeals Officer did not breach the rules of natural justice or procedural fairness by rejecting the evidence relating to the two metre no-work zone. The Appeals Officer properly considered the evidence but found that such a measure would be insufficient to eliminate or control the hazard or otherwise protect the employees from falling off the hatch covers. A

rejection of the Employers' evidence on this point does not amount to a breach of natural justice or procedural fairness.

[112] I also find that the Employers have failed to establish that the Appeals Officer breached the rules of natural justice or procedural fairness by ignoring evidence or failing to notify the Employers that he would make a finding that working on top of a hatch cover was a "danger" and that employees working on a hatch cover must be provided with fall protection equipment. With respect to the Appeals Officer's consideration of the requirements of the *MOSH Regulations*, the Employers' own witness, Captain Johnston, provided evidence regarding the *MOSH Regulations*. Thus, the Employers were aware, or ought to have been aware, that the Appeals Officer would consider these Regulations when making his Decision. Further, as the appeals were heard *de novo*, and given the discretion conferred upon the Appeals Officer to vary, rescind or confirm the decision or direction of the Safety Officer's under appeal, the Employers ought to have known that the Appeals Officer could make findings of danger separate and apart from the findings of the Safety Officer.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review is dismissed with costs awarded to the Respondent.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1727-07
STYLE OF CAUSE:	P&O PORTS INC, and WESTERN STEVEDORING CO. LTD. And INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 500
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	June 10, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	Russell, J.
DATED:	July 9, 2008

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