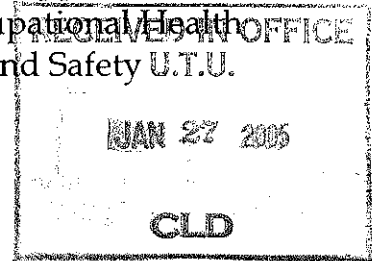


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Canada Appeals Office
on Occupational Health
and Safety U.T.U.



Priority Post

File Name: U.T.U. (Davey)
Document No.: 2003-27

January 26th, 2006

Mr. Michael A. Church
CaleyWray
111 Richmond Street West
Suite 1205
Toronto, Ontario
M5H

Subject: Appeal under the *Canada Labour Code*, Part II

Dear Mr. Church:

Enclosed is my decision on the appeal of the decision issued by health and safety officer Helen Kosola. Please be advised that you, or the other party to this review, may seek judicial review of this decision under the Federal Court Act.

The decision will be translated in French and a copy sent to you under separate cover.

Yours truly,

for 
Richard Lafrance
Appeals Officer

c.c. T.S. Secord D.W. Letain
 R. Davey H. Kosola
 K. Flemming

Enc.

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Canada Appeals Office
on Occupational Health
and Safety

**CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY**

Ray Davey and the
United Transportation Union
Applicant

and

Canadian Pacific Railway
Respondent

Decision No. 06-001
January 26, 2006

This case was heard by Appeals Officer Richard Lafrance, in Thunder Bay, Ontario on August 15, 2005

Appearances

For the applicant

Michael Church, Counsel,
Kim Dudley, engineer, Canadian Pacific
Ray Davey conductor, Canadian Pacific
Ray Pakylak, employee representative, Health and Safety Committee

For the respondent

Karen Fleming, Counsel,
Danny Letain, Manager of Operations, Canadian Pacific

Health and safety officer (HSO)

Helen Kosola, Human Resources and Skills Development Canada, Labour Program,
Thunder Bay, Ontario

Health and Safety Officer's Report and testimony

- [1] This case concerns an appeal made by Ray Davey, employee of Canadian Pacific Railway and the United Transportation Union. The appeal was made pursuant to subsection 129 (7) of Part II of the *Canada Labour Code* (the Code), of a decision of absence of danger rendered by HSO Helen Kosola on April 2, 2003, following the employee's refusal to work.
- [2] The work refusal was based on the concern of being involved in an accident while being transported by taxi in inclement weather conditions, to Ignace Ontario a distance of approximately 235 km. The reason for the work refusal was that at the time of the work refusal, the taxi encountered such heavy fog that the visibility was drastically reduced.
- [3] HSO Kosola testified at the hearing and submitted her investigation report of the work refusal, of which I retain the following.
- [4] HSO Kosola arrived to investigate the work refusal on April 1st, 2003 at approximately 14:00hrs. She conducted her investigation at the Thunder Bay, CP Depot in the presence of the refusing employees, R. Davey and K. Dudley, the employer's representative, D. Letain and a member of the health and safety committee, R. Pakylak.
- [5] She conducted her investigation at the employer's work place, the CP Depot of Thunder Bay, because in her mind, the work refusal was based on a weather condition, therefore, it was not necessary to view the place indicated in the work refusal. The reason she did so was because the weather conditions had improved considerably since the work refusal and everyone was now present at the Depot.
- [6] R. Davey (conductor) and K. Dudley (engineer) employed by Canadian Pacific Railway, were called in around 1:00 a.m. to report for a turn around combination service (TCS) deadhead¹. That is, travel by taxi to Ignace, Ontario (app. 235 km), to take charge of a train and bring it to Thunder Bay.
- [7] As it was foggy and wet snow was falling at the time, R. Davey contacted Rail Traffic Control (RTC) in Calgary, to ask why they were sent out to Ignace by taxi in such bad weather. RTC replied that they had no information about a possible snowstorm and told them to proceed to Ignace by taxi.
- [8] Because of the fog the visibility was reduced even more once they passed beyond the city streetlights. The driver had to reduce his speed from 90 km/h to 50km/h. At one point, a transport truck approached them and both employees feared that it would cross into their lane, as the centre line was not visible.

¹ Term used to describe travel as passenger by a railway employee in the course of his employment. The travel involved is usually on passenger or freight trains or by other modes of transportation as circumstances or conditions dictate.-Termium, Government of Canada's terminology and linguistic database.

- [9] About 17 km from the city, the employees asked the taxi driver to turn around and go back to Thunder Bay as they felt it was too dangerous to continue. The taxi driver stopped on the highway to turn around, but the employees raised the concern of being hit by an oncoming vehicle and asked him to continue and find a safe place to turn around. The driver had a hard time to find a side road to turn, but he eventually found a safe place to turn around and come back to Thunder Bay.
- [10] Upon their arrival at the Depot, their supervisor, D. Letain, verified with the Ontario Provincial Police (OPP) that there were no road closures in effect. Having confirmed that there were no road closures in effect, he advised the employees that if the highway is open, the company's expectation is that the crew will be transported by highway; if the highway is closed, then transportation will be by train. Both employees were informed that they were expected to proceed by taxi, taking cautions and adjusting speed travel to the conditions as needed.
- [11] D. Letain even offered to drive them himself. As both employees believed it was dangerous to drive on the highway in such foggy conditions, they exercised their right to refuse to work.
- [12] The primary reason given for refusing to travel by taxi to Ignace was that there was extreme fog and freezing rain on the road to Ignace and that they may be exposed to a traffic accident.
- [13] In her decision, HSO Kosola noted the following:
- A public highway is not a work place under the control of an employer.
 - The employer does not control the weather conditions to which an employee may be exposed.
 - The Ontario Provincial Police have the authority to close the highway under extreme weather conditions.
 - Environment Canada described the weather in Thunder Bay at the time of the refusal as, partial fog depositing ice.
 - There was no weather advisory from the OPP cautioning against travel.
 - Weather conditions in Thunder Bay at the time of the investigation were cloudy with some clear breaks.
 - The employer consults with Environment Canada weather watch before making a decision to dispatch a crew.
 - Information gathered that day by the employer was that the highway was open and weather conditions would not preclude travel by car.
 - If necessary, employees are able to make radio contact en route.

- The taxi driver had eighteen months experience as a taxi driver.
 - he had driven CP employees to Ignace 7 or 8 times.
 - he had no particular concern with regard to the weather as they left the terminal.
 - he was prepared to continue to Ignace even though he had to reduce his speed down to 60 km/h, as he believed that the conditions could clear up further down the road.
- The taxi company uses more experienced drivers as well as newer vehicles to do the highway runs.
- They take into consideration the number of hours the driver has already been on shift, and the drivers know to exercise caution and drive at a speed suited to the conditions.

[14] HSO Kosola rendered her decision based on the following rationale:

- The work refusal was based on a perceived danger that the employees would be exposed to a traffic accident while traveling in conditions described as fog and freezing rain.
- The conditions described were not occurring at the time of the investigation; however, the Code allows for a future activity to be taken into consideration. In order to declare that a danger existed at the time of the investigation, the health and safety officer must form an opinion, based on the facts gathered that:
 - the future activity in question will occur;
 - an employee will be exposed to the activity when it occurs; and
 - there is a reasonable expectation that the activity will cause injury or illness to the employee exposed thereto; and the injury or illness will occur immediately upon exposure to the activity.

[15] HSO Kosola found that there was no danger to the employees at the time of her investigation of the refusal to work. In her view, the perception of danger expressed by the employees was based on a hypothetical potential that may never actually occur.

[16] She believed that adequate measures were in place to minimize the risk associated with traveling by taxi on the highway during inclement weather conditions such as fog and freezing rain.

Applicant's case

[17] K. Dudley, who was traveling with R. Davey and also refused to work, testified and corroborated the circumstances as described by HSO Kosola.

- [18] In addition, he indicated that in order to be able to see the median line, he had to open the car door and look at the road beside the car. He estimated the vision at that point to be around 20 to 30 feet. To make matters worse, the taxi's headlights were not properly aligned. They were directed upwards and glaring into the fog.
- [19] He further indicated that it was about the same time as he checked for the median line that a transport truck almost hit them and had to swerve to avoid them. At that point, being afraid for their safety, they told the driver to turn around and go back to Thunder Bay.
- [20] K. Dudley indicated that the driver seemed confused and stopped in the middle of the road to orient himself. At their insistence that this was dangerous, the driver continued on the road and finally found a break in the line on the side of the road indicating a side road. He pulled over to that road to turn around and waited until a transport truck passed and they followed it back to Thunder Bay.
- [21] R. Davey also testified and upon questioning by Karen Fleming, Counsel for CP; he answered that they did not try to contact RTC by radio as the radio was in the trunk of the taxi. He did not believe that the small hand held radio was powerful enough to reach RTC. Those radios are for use on the train to maintain contact on the train, or within the reach of the base radio in the yard and are unreliable on long distance contacts.
- [22] R. Davey pointed out that highway 17 out of Thunder Bay, is a very busy highway at any time of the day or night in any weather, as this is the only major highway in and out from Thunder Bay to the province of Manitoba to the west.
- [23] He indicated that when they finally returned to the terminal, they asked to go to Ignace by deadheading on a train, but D. Letain, Operations Manager, refused. Instead, he offered to drive them himself to Ignace, which they refused as they felt that the weather conditions were most likely still the same and therefore there was still a danger of getting into an accident along the way.
- [24] R. Pakylak testified that as a member of the health and safety committee he was involved in a number of similar cases dealing with TCS deadheads. He related to past and present incidents dealing with snow, fog, and even accidents with animals (i.e. moose) to indicate that it was not unusual for employees to be exposed to driving hazards due to inclement weather conditions or animals.

Respondent's case

- [25] Karen Fleming, Counsel for CP Rail, introduced Danny Letain as a witness, who at the time of the refusal was Manager of Operations in Thunder Bay. I retain the following from his testimony.
- [26] D. Letain was called in around 3:30 a.m. to handle the work refusal. He maintained that the weather conditions on his way in to the rail yard were foggy and he had to slow down his speed to about 60 km/h. However, he did not believe that the conditions were severe enough to stop him from driving.

- [27] Upon being informed of the reasons for the work refusal, he inquired if the Ontario Provincial Police (OPP) had closed the road. As the road was not closed, he told the refusing employees that they were expected to travel to Ignace by taxi. As well, he offered to drive them himself to Ignace, which they refused.
- [28] He did not contest the facts (fog, driving conditions etc.), presented by the refusing employees. As well he confirmed that the headlights on the taxi had to be realigned the next day.
- [29] When asked about the radios, he mentioned that those small 12 volt radios should be able to contact RTC by linking up to transmission towers, however, there are some dead zones in the system where the radios do not make contact. The radios on board the locomotive are more reliable.
- [30] Although crews are allowed to deadhead on board trains, he did not believe at the time that the crew could make the return trip without taking the required rest period and this would have delayed the train too much. The reason for this, is because it takes more time to travel by rail than by taxi.
- [31] Even though the crew said that they would come back without taking the prescribed rest period, he did not want the crew to come back without taking the rest period. He preferred to have them drive to Ignace and make the return trip within the set time limit of 12 hours.
- [32] When questioned by M. Church about this, he agreed that upon reconsideration, they might have had enough time to deadhead on a train and do the return trip on time.

Appellant's arguments

- [33] Michael Church, Counsel for the applicant, initially argued that the decision of "no danger" rendered by HSO Kosola was the wrong decision because:
- she did not take into consideration the potential hazard;
 - she did not find a CP official policy on the transportation of employees during various weather conditions.
- [34] In addition, M. Church argued that the untimeliness of the investigation into the work refusal based on weather conditions, as well as the removal of the investigation away from the location of the work refusal, renders the decision a nullity as the officer had insufficient data on which to base her decision.
- [35] He further argued that contrary to what HSO Kosola stated in her report that "CP had adequate measures in place to minimize the risk associated with traveling by taxi on the highway during inclement weather conditions"; in reality CP has no formal policy respecting the transportation of employees during hazardous weather conditions.

- [36] Referring to Justice Tremblay-Lamer in the case *Douglas Martin v. Attorney General of Canada*², paragraph 55, M. Church argued that “any potential hazard or condition or future activity can constitute a danger”, if the hazard or condition is capable of coming into being or action, it should be covered by the definition.
- [37] M. Church also referenced Justice Gauthier in *Verville v. Canada*³, paragraph 34 to 36, to argue that the injury or illness may not happen immediately upon exposure, but it needs to happen before the condition or activity is altered. He further argued that the definition does not require that the injury or illness could reasonably be expected to occur every time but that it must be capable of causing injury at any time and not necessarily every time. In addition, he argued that it is not necessary to establish precisely the time when the potential condition or hazard or the future activity will occur, but only that such circumstances will occur in the future, not as a mere possibility but as a reasonable one.
- [38] M. Church held that while the risk of being injured in an accident is present anytime an employee travels by car, that risk is normally low. However, when a car is required to travel through inclement weather, the risk of an accident is significantly increased. Inclement weather may include freezing rain, dense fog, or heavy snow.
- [39] M. Church maintained that on the night in question the risk of an accident was reasonably likely because:
- Mr. Dudley and Mr. Davey observed that the centerline was not visible.
 - The driver had to reduce his speed by nearly half.
 - The driver stopped in the middle of the road to orient himself.
 - The driver had difficulty finding a side road to turn around.
 - The incident took place at night on a stretch of highway that is not illuminated.
- [40] This is so, even if the taxi driver is to be “driving to conditions.” This is because the standard of “driving to conditions” is inherently subjective. This poses the risk of different drivers driving at different speeds in reduced visibility conditions. Therefore, there is reasonable likelihood of an accident even if the taxi driver “drives to conditions.”
- [41] With regard to the road closure by the OPP, M. Church noted that HSO Kosola indicated in her report that the Ignace OPP detachment reported clear roads. However, he indicated that Ignace is 235 km from Thunder Bay and it is likely that they were not aware of the weather conditions along every portion of the highway between the two cities.
- [42] M. Church again citing the *Verville* supra decision, paragraph 36, further argued that the potential hazard or condition or future activity in question would likely present itself, although the specific time it will occur need not be established. He

² (*Martin v. Canada (Attorney General)*, 2003 FC 1158 (CanLII) (T.D.))

³ *Verville v. Canada (Correctional Services)*, [2004] F.C.J. No. 940 (QL) (T.D.)

pointed out that in the case at hand, the employer frequently requires his employees to travel by taxicab from one depot to another. Furthermore, it is reasonably probable that at some time, CP employees will be required to travel by car to a different location through inclement weather.

[43] On the issue that an employee will likely be exposed to the hazard, condition or activity when it presents itself M. Church citing the decision of Appeals Officer Douglas Malanka in *Chapman and Canada*⁴, argued that it is reasonably likely that the employees will be subjected to the danger resulting from an automobile accident.

[80] Taking all of this into account, and with reference to the aforementioned criteria, it is my opinion that, for a finding of danger in respect of a potential hazard or condition or future activity, the health and safety officer must form the opinion, on the basis of the facts gathered during his or her investigation, that:

- *the potential hazard or condition or future activity in question will likely present itself;*
- *an employee will likely be exposed to the hazard, condition or activity when it presents itself;*
- *the exposure to the hazard, condition or activity will likely cause injury or illness to the employee exposed thereto; and,*
- *the injury or illness will likely occur before the hazard or condition can be corrected or activity altered.*

[44] With regard to the issue that “the exposure to the hazard, condition or activity that will likely cause injury or illness to the employee exposed to it, needs not be likely to cause injury every time it occurs, it just requires that injury is reasonably possible anytime it occurs”; M. Church citing the *Verville* supra decision, paragraph 36, stated that for all the same reasons as above, traveling by car through inclement weather conditions creates a reasonable likelihood of traffic accidents that can cause injuries and fatalities. An accident will not happen every time a car travels through inclement weather conditions; however, an accident is reasonably likely to occur anytime a car travels through inclement weather conditions.

[45] On the issue that the injury or illness will likely occur before the hazard or condition can be corrected or activity altered, M. Church argued that unless CP changes its policy requiring employees to travel by car through inclement weather conditions, the injury or fatality is likely to occur before the activity is corrected. CP has the power to correct the activity before an accident occurs.

[46] He finally argued that the situation of danger was real, and that it will very likely repeat itself. Accident reports presented during the appeal demonstrate that the risk of having an accident in an automobile is real and not speculative. This is especially true in inclement weather conditions.

⁴ *Chapman and Canada (Customs and Revenue Agency)*, [2003] C.L.C.A.O.D. No. 17

[47] M. Church requested that the decision of the health and safety officer be rescinded as the circumstance of R. Davey's transportation constituted a danger. In addition, he requested that the employer be directed to create a standardized policy that will enable employees to travel by train, or deadhead, when required to travel for work through inclement weather conditions.

Respondent's rebuttal

[48] In her rebuttal, K. Fleming, stated that it was CP's view that while the employees may have been at risk while driving in the taxi, they were not in a situation of danger as defined in the Code.

[49] She further argued that the work refusal was not valid in this case, as the employees did not follow proper procedure. They did not exercise their right to refuse at the time they claimed they were in danger in the taxi, but later on at the CP depot in Thunder Bay. Therefore, CP could not properly investigate the work refusal.

[50] With regard to the timing of the investigation by the HSO, K. Fleming, citing Appeals Officer Douglas Malanka in the *Correctional Service Canada decision*⁵, paragraph 36 and 37, stated that the Code uses the present tense and therefore the HSO must investigate and render a decision based on the conditions at the time of the investigation. It follows in the same line of thought, that the Appeals Officer under sub. 146.(1) must inquire into the circumstances at the time of the investigation of the decision rendered by the HSO.

[51] However, she also mentioned that Appeals Officer Malanka, in the same decision, pointed out that the health and safety officer may look back at the circumstances at the time of the work refusal to decide if the hazard or condition is in fact capable of reoccurring, but it is not to decide if a danger existed at the time of the refusal.

[52] Citing as well paragraph 35 of the same decision, she argued that even though the potential hazard or condition may be capable of coming into being, the concept of reasonable expectation excludes hypothetical and speculative situations. She stated that in this case, the work refusal was based on a hypothetical and speculative situation.

[53] K. Fleming also cited Appeals Officer Serge Cadieux in paragraph 14 of his decision with *Bell Canada*⁶ arguing that it is clear that refusing to work in non-specific working conditions, such as refusing to work every time it rains, is not a reason to justify a danger as intended by the Code. She maintained that the right to refuse is an individual right were employees are entitled to refuse to work only when the specific conditions of the work they are required to perform could injure them or make them ill.

⁵ *Stewart R. Doell and Lorne Knihniski – Treasury Board (Correctional Service Canada) No. 04-014,*

⁶ *Pierre George Pépin vs Bell Canada, Decision No. 03-010, April 23, 2003*

[54] She argued that contrary to the applicant's position that the exposure to the hazard, condition, or activity would likely cause an injury, there was no evidence that the injury was likely to occur.

[55] She finally stated that the decision of absence of danger of the health and safety officer was correct and that I should confirm it.

[56] There are two issues to be decided upon before I review the evidence concerning the work refusal and decide if the health and safety officer erred in rendering a decision of no danger.

- CP submits that I should dismiss the work refusal on the basis that the employees exercised their right to refuse to work when they came back to CP's depot rather than on the road, at the time when they came upon the heavy fog. They did not follow the proper procedure and this made it impossible for the employer to investigate the work refusal.
- The applicant suggests that the untimeliness of the investigation into a work refusal based on weather conditions, as well as the removal of the investigation away from the location of the work refusal, renders the decision a nullity.

[57] With regard to the first issue, I consider that when the employees decided to stop and turn around to come back to the employer's work place, they did in fact initiate at that time, the process to refuse to work. The fact that they did not or could not communicate this instantaneously to the employer is irrelevant.

[58] They did however report the circumstances to the employer as soon as they arrived at the employer's place. Their supervisor did his investigation and decided that there was no danger for them to continue to work. They in turn maintained their right to refuse to work and the employer called in a health and safety officer to investigate the continued work refusal. I believe that the work refusal procedure was followed, and I see no reason why I should not dismiss CP's submission with regard to this. Therefore I dismiss CP's submission.

[59] With regard to the issue of the untimeliness as well as the removal of the investigation away from the location of the work refusal, M. Church argued that because of this the HSO did not have sufficient objective data on which to base her decision. According to him, the failure of the HSO to conduct a proper investigation is an error of jurisdiction.

[60] I agree with M. Church that an investigation of a work refusal dealing with weather conditions should be investigated immediately. However, one must be realistic and review the events as they occurred and the reason why they occurred in the time frame described.

[61] According to the HSO Kosola's report, CP reported the work refusal to HRSDC Labour Program almost two hours after the refusal, and it took another hour or so to

contact a health and safety officer who could go investigate the work refusal in Thunder Bay. Consequently, the weather conditions had changed by that time. Moreover, by the time the HSO contacted D. Letain, the refusing employees had been sent home, and another crew, who had been informed about the work refusal, accepted to travel by taxi to Ignace and had left the depot. As the refusing employees were not exposed to the alleged danger, it was agreed that they would be called back for 13:30 that day so that the HSO could conduct her investigation in the presence of the employees.

- [62] While subsection 129(1) of the Code states that the HSO must conduct an investigation without delay or cause another HSO to do so, one must look logically at the situation at hand. With the delay in reporting the work refusal in addition to the delay of getting hold of a HSO, even if it did take a few hours before the HSO could get in contact with D. Letain, I am of the opinion that the rights of the refusing employees were not infringed as the investigation was still conducted in a timely fashion.
- [63] Finally, with regard to the issue that the HSO conducted her investigation away from the area where the refusal to work occurred, the evidence indicates that the work refusal was based on the weather conditions at a specific time and place. Since so much time had elapsed after the work refusal, the HSO decided to conduct her investigation at the Depot office in the presence of all the parties involved. Weather conditions in the whole area had changed considerably since the time of the work refusal and since it was not the physical location that was in question, but the weather conditions that had since then changed, there was no need to view the place in question. Therefore, for the reason stated above, I dismiss the applicant's submission with regard to this.
- [64] In order to decide if the HSO erred in rendering a decision of absence of danger, I must take into consideration the definition of "danger" in the Code, the relevant jurisprudence as well as the facts and circumstances of the case at hand.
- [65] Based on the testimonies of the two employees, which I have no reason to doubt, the main facts that I retain from this case are:
- the employees were traveling by taxi on an unlit road;
 - the headlights on the taxi were improperly aligned, therefore reducing visibility;
 - because of the fog and improper alignment of the taxi's headlights they could not see the median line;
 - there was very heavy fog and freezing rain present;
 - visibility was impaired to the point of being reduced to 20 to 30 feet or less;
 - there was a near collision with a transport truck and the taxi; and finally
 - because of the poor visibility, the taxi driver had difficulty to orient himself and find a safe place to turn around.
- [66] Based on these facts, I must determine if under the circumstances, there was a danger as defined in the Code.

[67] The Code defines danger as follows:

“danger means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system;”

[68] In paragraph 36 of the *Verville* supra case, Justice Gauthier indicated that it is not necessary to establish precisely the time when the potential condition or hazard or future activity will occur. It is required to ascertain 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. As she stated, there must be a reasonable possibility as opposed to a mere possibility for the circumstance to occur in the future. Black’s law dictionary⁷ defines “reasonable” as: “Fair, proper, or moderate under the circumstances.” I believe this to indicate a moderate degree of probability of the occurrence as opposed to a mere or high probability.

[69] Therefore, the above decision, establishes that the danger can be prospective to the extent that the hazard or condition or activity is capable of coming into being, not as a mere possibility but as a reasonable one, and that the action is reasonably expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected or the activity altered.

[70] I believe that when you have to drive or be driven in a car on the roads at certain times during the year there is a reasonable likelihood that there will be inclement weather conditions. Therefore, this is not a hypothetical and speculative situation. In my opinion the risk of a car accident is present at all times, but can, to some extent, be avoided depending on the driver’s abilities, mechanical conditions of the vehicle, road conditions and finally weather conditions. The risk of an accident can increase substantially with the deterioration of any of these elements and can reach a certain level were danger is present.

[71] The evidence demonstrated that the employees are called on a regular basis to travel long distances in taxis, night or day, sometimes in inclement⁸ weather conditions. While the risk of being involved in a traffic accident is usually relatively low, it increases as mentioned above with the deterioration of any of the elements mentioned. In this case, the vehicle’s lights were improperly aligned, and in addition there was heavy fog to the point of reducing the visibility to less than 20 to 30 feet. As well, the taxi driver had difficulty to orient himself and find a side road to turn on.

[72] In those conditions, it is reasonable to believe that the potential hazard will occur and will cause injury and the consequences of such an accident can be dreadful.

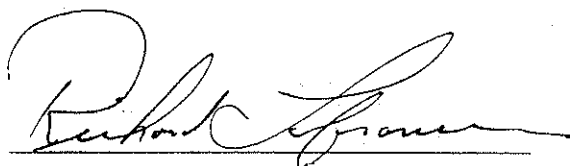
⁷ Black’s Law Dictionary, Seventh Edition, 1999

⁸ The term “inclement” is defined in the Webster’s New World Dictionary, 1996 as: rough; severe; stormy [inclement weather]

- [73] On the basis of the principles established by these decisions, I find that the facts demonstrate that:
- a potential hazard could reasonably happen, the hazard being that of a traffic accident and
 - an employee could reasonably be exposed to it as the employees are present in the vehicle being driven in inclement weather;
 - it could reasonably be expected that this hazard (a traffic accident), would cause injury or illness to the employee; and finally
 - it is reasonable to believe that the injury or illness would occur before the hazard or condition could be corrected or the activity altered.
- [74] K. Fleming stated that the HSO must investigate and render a decision based on the conditions at the time of the investigation. However, Appeals Officer Malanka also pointed out that the health and safety officer may look back at the circumstances at the time of the work refusal to decide if the hazard or condition is in fact capable of reoccurring. As mentioned above, it is reasonable to believe that similar conditions will present themselves again and that the hazard will in fact reoccur.
- [75] I do not view this as a similar situation as the one brought up by K. Fleming in the *Bell Canada* supra case where she argued that it is clear that refusing to work in non-specific working conditions, such as refusing to work every time it rains, is not a reason to justify a danger as intended by the Code. Had the conditions been different in that case, where stormy conditions with thunder, lightning or high winds had been present, the decision most likely may have been different.
- [76] In this case, we are dealing with poor visibility caused by inclement weather conditions that can change drastically in a very short period of time and/or distance travelled. This does not mean that every time there is inclement weather there is a danger to drive on a road. In circumstances where an employee should use an alternate way to travel they should know how to react when encountering sudden inclement weather that makes it impossible to continue to travel and this should be clearly defined in a policy developed in consultation with the policy health and safety committee. In this case I am not certain that the employees reacted in the safest possible way by turning back and returning to Thunder Bay in heavy fog.
- [77] Based on the facts that she had gathered during her investigation, I find that although she did mention it in her analysis, HSO Kosola did not give enough weight to the potential hazard or condition of the future activity of driving through inclement weather.
- [78] Consequently, for the reasons cited above, I am rescinding HSO Kosola's decision of absence of danger and I am issuing a direction to the employer to immediately protect the health and safety of his employees against the potential hazard or condition that can reasonably be expected to be caused by driving through inclement weather conditions. This is to be done immediately by discontinuing travel by vehicle through inclement weather conditions until measures are put in place to ensure that the health and safety of the employees are protected. The

employer is to advise health and safety officer Kosola, or another health and safety officer when he is in compliance with this direction.

- [79] The evidence demonstrated that the employer had at best, a vague health and safety policy with regard to traveling long distances by taxi. Section 124 of the Code⁹, requires that the employer ensure that the health and safety at work of his employees is protected while at work. As well, par. 125.(1)(s)¹⁰ of the Code requires that the employer ensure that each employee is made aware of every known or foreseeable health and safety hazard in the area where the employee works. To that effect, the employer should conduct a risk analysis of the issue at hand and develop a policy and clear guidelines for the employees as well as managers with regard to traveling through inclement weather.
- [80] Finally, I want to point out that a new regulation under *Part II* of the *Canada Labour Code* came into force on November 28, 2005, entitled "*Hazard prevention program*". This new regulation prescribed under par. 125. (10)(z.03)¹¹ of the Code requires the employer to develop, implement and monitor in consultation with the policy committee a program for the prevention of hazard in the work place.
- [81] Therefore, I rely on the health and safety officer to ensure that the above mentioned provisions of the Code are complied with as well as the attached direction to CP Rail.



Richard Lafrance
Appeals Officer

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

¹⁰ 125. (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,

(s) ensure that each employee is made aware of every known or foreseeable health or safety hazard in the area where the employee works;

¹¹ 125. (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,

(z.03) develop, implement and monitor, in consultation with the policy committee or, if there is no policy committee, with the work place committee or the health and safety representative, a prescribed program for the prevention of hazards in the work place appropriate to its size and the nature of the hazards in it that also provides for the education of employees in health and safety matters;

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

Direction to the employer under paragraphs 145(2)(a) and (b)

On August 15, 2005, the undersigned Appeals Officer conducted an inquiry pursuant to section 146.1 of the *Canada Labour Code*, Part II (the Code), into the circumstances of the decision of absence of danger by health and safety officer Kosola on a refusal to work from Ray Davey and Kim Dudley, employees of Canadian Pacific Railway, 40 South Syndicate Avenue, Thunder Bay, Ontario, P7E 1E5, sometimes known as CP Rail Depot, Thunder Bay, being an employer subject to the *Canada Labour Code*, Part II.

The undersigned Appeals Officer is of the opinion that the following situation constitutes a danger to an employee.

CP employees are required to travel by road in inclement weather conditions exposing them to the potential hazard of an accident which can reasonably be expected to cause injury before the conditions are corrected or the activity altered.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(a) of the Code, to immediately take measures to correct the hazard, condition or alter the activity that constitutes a danger.

You are HEREBY FURTHER DIRECTED, pursuant to paragraph 145(2)(b) of the *Canada Labour Code*, Part II, to immediately cease to have employees travel by road during inclement weather conditions, until this direction has been complied with. The employer is to report to health and safety officer Kosola or another health and safety officer when he is in compliance with this direction.

Issued at Ottawa, January 26, 2006.



Richard Lafrance
Appeals Officer
Certificate #. ON 7496

To: Canadian Pacific Railway
440 South Syndicate Avenue
Thunder Bay, Ontario
P7E 1E5