Tribunal de santé et sécurité au travail Canada

Occupational Health and Safety Tribunal Canada

Ottawa, Canada K1A 0J2

Citation: City of Ottawa (Para Transpo) v. Andrew Sigouin, 2014 OHSTC 4

Date: 2014-05-14
Case No.: 2013-27
Rendered at: Ottawa

Between:

City of Ottawa, Para Transpo, Appellant

and

Andrew Sigouin, Respondent

and

Amalgamated Transit Union, Local 279, Intervenor

Matter:	Appeal under subsection 146(1) of the *Canada Labour Code* of a directions issued by a health and safety officer.
Decision:	The direction is rescinded
Decision rendered by:	Mr. Michael McDermott, Appeals Officer
Language of decision:	English
For the Appellant:	Mr. David Patacairk, Legal Counsel, City of Ottawa
For the Respondent:	Himself
For the Intervenor:	Mr. John McLuckie, Jewitt, McLuckie and Associates

REASONS

[1] This decision concerns an appeal brought under subsection 146(1) of the *Canada Labour Code* (the Code) of a direction issued by Health and Safety Officer (HSO) Michael J. O'Donnell on April 18, 2013, pursuant to paragraph 145(2)(*a*) of the Code. The appellant is the City of Ottawa in respect of Para Transpo. The respondent is Mr. Andrew Sigouin a transit operator employed by the appellant.

[2] A hearing was held in Ottawa, Ontario, on February 3 and 4, 2014. The Amalgamated Transit Union (ATU), Local 279, participated as the intervenor having been granted such status in my letter decision of October 31, 2013.

[3] The subject direction was issued by the HSO following his investigation of a refusal to work exercised by the respondent, pursuant to section 128 of the Code, on June 8, 2012. The HSO's investigation report, dated April 18, 2013, records Mr. Sigouin's statement of his reason for the refusal as, "Failure to provide adequate time for a rest and meal break resulting in undue stress related illness". The employee's description of events is stated by the HSO in the same report as, "The employee believes the 10-12 (Break Request) Bulletin is insufficient for the assignment of meals and breaks and threatens his health."

[4] Following the respondent's initial exercise of the refusal to work provision, the next steps contemplated in the Code for addressing such matters were not taken. On December 12, 2012, HSO Marc Beland conducted an investigation that led to his finding a contravention of subsection 128(10) of the Code noting that the employer has failed to investigate the refusal to work made by Mr. Sigouin. On March 21, 2013, HSO Beland issued a direction pursuant to section 145(1) of the Code ordering the employer to terminate the contravention no later than April 5, 2013, and to take steps to ensure that it would not continue or reoccur.

[5] April 12, 2013, HSO O'Donnell received a call from Mr. Sigouin who evidently had continuing concerns about the break request system and was not satisfied that his work refusal had been addressed in the prescribed manner. The HSO immediately began his investigation and on April 18, 2013, issued the direction under appeal indicating that performance of the following activity constitutes a danger to an employee while at work and requiring it to be altered immediately:

> Para Transpo bus operators are at times required to drive their vehicles during their shifts without meal and rest breaks. This can lead to fatigue including micro-sleep events and cognitive ergonomics problems like cognitive overload, physical & mental stress, and perception errors. These factors can contribute to hazardous occurrences, such as collsions**.**

Background

[6] Para Transpo is an alternative transportation service for persons with disabilities who are unable to use conventional transit services. It is funded by the City of Ottawa and administered by OC Transpo which also provides dispatch services to support the system. A city wide service is offered mostly using a five ton vehicle modified to accommodate up to eight passengers plus the driver operator. Service hours are from 6:30 a.m. until midnight seven days a week. While some passengers may be ambulatory, some need to use mobility devices such as wheelchairs or scooters. In addition to driving, Para Transpo operators are required to escort passengers to and from the vehicle and to ensure that they and, as the case may be, their mobility devices are properly secured before commencing a journey. Uncontested testimony indicates that some 16,000 customers are registered for Para Transpo services and that up to 3000 trips occur every day. Trips are classified either as regular or casual with the former being scheduled customer pick-ups and the latter being assigned on a one-off or call-in basis.

[7] Providing the service apparently calls for 81 vehicles to be on the road and requires 81 driver/ operators plus some five spares to be on duty out of a total complement of approximately 170. Driver start times are staggered and some operators work split shifts. Shifts vary in length with 8.25 and 12 hours being mentioned although the respondent referred to at times being on duty as a spare for 13 hours. Evidence indicates that operators were averaging in the order of 34 to 35 hours of work per week in June 2012 and that they would not normally exceed 40 standard hours per week when averaged as provided for in the Code, Part III. The collective agreement provides that overtime will only be paid "for each hour in excess of 80 hours of work […] per bi-weekly pay period", suggesting a two week averaging period. Spares have scheduled start or reporting for work times but are assigned to actual duties during their shifts on an as the need arises basis. They are guaranteed a minimum nine hours' pay.

[8] In addition to paid annual vacation time off that increases in stages from two weeks for an employee with between one and five years of service, up to four weeks for those with ten or more years, the collective agreement entitles employees who complete at least one year of continuous service to a maximum of seven floater days per calendar year. Floater days are available on the basis of not more than three days off work with pay prior to June 1st and four such days during the balance of the year. The agreement requires an employee to notify the employer of an intention to use a floater day at least two hours before commencement of his or her normal shift in case of sudden illness or emergency and with as much notice as reasonably possible in other cases. Provision is made for unused floater days to be banked for use in the subsequent year.

[9] Para Transpo's operational targets indicate customers can expect to be picked up within one half hour after their agreed time and dropped at their destination within one hour of their scheduled arrival. Assignment clerks compile trip schedules in response to customer requests. Operators are provided with a written schedule of booked trips at the start their shift but can

anticipate changes resulting from cancellations. I was informed there may be in the order of 600 cancellations each day. As cancellations occur, vacant slots are filled with new or rescheduled bookings. Two-way radio communication systems are installed in the vehicles but it appears that the principal means of notifying operators of trip schedule changes is the mobile data terminal (MDT). Responses to customer trip requests must first be approved by an assignment clerk before being entered into the automated system and shown on the MDT. Operators can confirm arrival at and departures from pick-up points by activating "canned" message buttons on the MDT that can also serve to inform dispatch of no-shows or cancellations. However, operators are required to confirm these signals by radio.

[10] The MDT and the Trapeze software that feeds schedule information to it enhance Para Transpo's ability to respond to the significant number of customer requests. An arbitral award concerning meal break policy, issued in September 2004 and germane to the subject of this appeal, describes how Trapeze was incorporated into the dispatch system in 1999 and notes that "the scheduling became tighter, with fewer breaks, because the schedulers were able to fill vacancies in the schedule." Previously, it appears there were sufficient gaps in between customer trips obviating a need for specific meal breaks to be scheduled. It seems that efficiencies emanating from Trapeze created employee concerns over meal and rest breaks times. A policy grievance was pursued to arbitration resulting in the aforementioned award. The then existing article in the collective agreement cited in the grievance reads as follows:

> 8.4 The parties recognize that cancellations of scheduled pick ups occur in the daily scheduled duties. The parties agree that the employee shall not have his/her wages reduced for the day due to cancellations. The parties further agree that the scheduling of rest and meal breaks shall occur at times or a time without interruption in service and normally taken when a cancellation occurs. Employees shall be scheduled on such breaks in accordance with Company procedures and must first contact and receive the approval from dispatch before going out of service.

The article, negotiated during a previous collective bargaining relationship, remains in the collective agreement with the only change being that "City" replaces "Company" in the last sentence.

[11] The substance of the grievance alleged that article 8.4 was being violated by the employer's refusal of employee requests to schedule meal breaks. In considering the grievance, the arbitrator referred to a previous decision by an interest arbitrator that upheld article 8.4 but also awarded employees who work more than five consecutive hours in a day a meal allowance of $7.00 for each day. That award remains in effect by virtue of article 8.18 in the current collective agreement. With respect to the 2004 grievance, the arbitrator found that article 8.4 requires the employer "to develop a flexible procedure for considering driver requests for meal breaks on an individual basis" and indicated that:

> the policy should recognize that on most days, a driver is entitled to a meal break, that there will be other days however when no such break can be scheduled, and there are other days in which the vehicle may have to be taken out of service in order to provide a meal break at a reasonable time in the shift. Ultimately, any such procedure not agreed to by the Union can be challenged in accordance with the arbitral jurisprudence.

He further observed that operators "must also understand that it is their responsibility to bring requests for meal breaks to the attention of the Employer, and if they believe that such requests are not being considered in accordance with the Employer's procedure they can file a grievance."

[12] The arbitrator concluded his award by urging the parties "to keep track of the number of requests, and the disposition thereof," so that "a certain understanding can be achieved as to the administration of clause 8.4 for the balance of this collective agreement", before summarizing the award as follows:

> In summary, and to the extent that the policy grievance requests that the Employer schedule meal breaks at pre-determined times, or that the Employer be required to automatically schedule a meal break upon request when there is a cancellation of a scheduled pick up, the grievance is denied. To the extent however that the policy grievance alleges that the employer is violating article 8.4 by not having in place an appropriate and flexible policy for considering the requests of individual drivers for a meal break the grievance is allowed and the Employer is directed to develop such a policy.

The arbitrator indicated he would remain seized should there be any issues of interpretation or implementation of the award.

[13] The two types of break that operators may request are identified by their radio code numbers. 10-7 signifies a natural break during which an operator may leave the vehicle for a short period of approximately five minutes provided that no passengers are on board. 10-12 is the request an operator should make to the shift controller for a 15 minute rest or meal break when none is specified in his or her schedule. The latter break request is referred to in paragraph three above. The written procedure for 10-12 break requests, to be followed by operators, shift controllers and assignment clerks, was entered in evidence. An operator initiates the process by contacting the shift controller on his or her radio to request a break. Normally, the shift controller will instruct the operator to carry on while a substantive reply is considered. The shift controller records the time the request was received and then contacts the assignment clerk. On receipt of the request from the shift controller, the assignment clerk checks the record to ascertain if the operator has already had a 10-12 break during the shift. If such a break has already been taken, the request is denied. If the operator has not had a 10-12 break within a reasonable amount of time since booking on shift, the assignment clerk will insert one in the operator's schedule. Both the operator and the shift controller are informed of the disposition of the request and the latter records the information in the 10-12 log sheet. In the event the assignment clerk determines that

the requested break time cannot work, the policy indicates “every effort will be made to reassign a trip either to another Driver/Operator, by using the floater and when absolutely necessary to a taxi.” Should an operator disagree with the response to the request, the policy advises, “carry on to the end of the shift, and grieve the decision later.”

Issue

[14] The issue in this appeal is whether or not HSO O’Donnell erred in his finding that the performance of an activity, namely driving at times without meals or rest breaks, constitutes a danger to an employee while at work, and in issuing a direction, pursuant to paragraph 145(2)(a) of the Code, to alter the activity.

Submissions of the parties

A) Appellant’s submissions

[15] The appellant submits that the direction issued by HSO O’Donnell on April 18, 2013, should be rescinded because, among other reasons, it was based on his erroneous finding of the existence of a danger within the meaning of the Code. In support of this submission the appellant cites in some detail testimony given and evidence entered with respect to the respondent’s choice of shift and his failure to follow required procedures when he exercised the refusal on June 8, 2012. For example, the appellant notes that, at the time of the HSO’s investigation, hours worked by Para Transpo driver/operators ranged on average between 31 and 35 per week. Further, the shifts worked by Para Transpo driver/operators are booked in accordance with the seniority provisions of the collective agreement between the employer and ATU Local 279, provisions that offer the respondent, a longstanding Para Transpo employee, shift choices such as the “spare” shift option he had voluntarily chosen at the time of his refusal and that he has since maintained. Operators on “spare” shifts, the appellant explains, fulfill duties left vacant when a scheduled employee is absent or another vehicle has service problems and that, until an assignment is made, they do not drive and are able wait in the drivers’ room.

[16] With respect to events on June 8, 2012, the appellant submits that the HSO was not aware of how many hours the respondent had worked before exercising his refusal nor was he aware of the specific shift type he worked. It is argued that the respondent did not receive a denial of his request for a 10-12 break but that a response was delayed while the shift controller dealt with an emergency situation involving another vehicle. The appellant notes that, while claiming he could not continue driving, the respondent drove the vehicle back to the garage and subsequently drove his own car home without responding to the shift controller’s request for the refusal to be documented. Refuting the respondent’s claims concerning damage caused to his health, the appellant refers to testimony indicating that: he waited one week before visiting his doctor; the absence of documentary evidence of that visit; reporting to his next shift; and, not missing further shifts for health reasons.

[17] Referring again to evidence and testimony, the appellant takes issue with the scope of the HSO's investigation arguing that he did not seek and was not provided with medical documentation in support of the respondent's claim that the employer's failure to provide adequate time for a rest and meal break had caused him undue stress related illness. While acknowledging that the HSO had identified five dates on which the respondent had either not received a 10-12 break or had received one late in his shift, the appellant questions whether he had ascertained if the respondent had requested a break on those occasions or whether natural breaks in the schedule had provided rest periods during those shifts. Pursuing the latter point, it is submitted that the HSO, although he testified he was aware that natural breaks occurred in the operators' schedules, "he did not examine the practice and instead focussed exclusively on formal 10-12 breaks." It is further argued that the HSO "was not aware of the rate at which 10-12 breaks were granted upon request" and reference is made to the appellant's statistics entered in evidence indicating a high level of positive responses since recording of requests began in 2010.

[18] The HSO's report includes substantial documentation on national and international standards, recommendations and studies relating to the regulation of hours of work and driving time in the motor vehicle transportation sector. The appellant argues that much of the documentation relates to trucking and other long haul vehicular transportation where lengthy periods of continuous driving and rotating shift patterns are more the norm. Further, it is noted that many of the standards and recommendations cited provide for exemptions from application to urban public transit operations. Where referenced standards have application to Para Transpo's operations, the appellant submits that they are respected.

[19] With reference to the direction indicating that fatigue resulting from a lack of meal and rest breaks "can contribute to hazardous occurrences, such as collisions", the appellant argues that the HSO did not review any information concerning Para Transpo's collision record, "except to note that he was unaware of any accident relating to fatigue having ever occurred."

[20] The appellant briefly refers to evidence given by one of its witnesses to the effect that additional customer journeys requiring trip schedule changes are not entered into the system automatically by the computer but are placed there by the assignment clerk. With respect to testimony given by the two witnesses called by the respondent, the appellant argues that one testified that he has never requested a 10-12 break and that he has been able take breaks as needed throughout his shifts. In further comment on evidence given, the appellant notes that "the most appropriate means of providing breaks has been a long-standing concern between the employer, the union and the employees" and refers to the arbitration proceedings identified and quoted from above.

[21] Turning to the law concerning the finding of a danger, the appellant first quotes in full the definition of danger in subsection 122(1) of the Code and follows with references to jurisprudence on the definition's application and found in *Unger* v. *Canada (Correctional Service)* 2011 OHSTC 8 that, in turn, cites relevant passages of the Federal Court decision in

Verville v. *Canada (Service correctionnel)*, 2004 FC 767 and the Federal Court and Federal Court of Appeal decisions in *Martin* v. *Canada (Attorney General)*, 2003 FC 1158 and 2005 FCA 156. In brief, the jurisprudence refers to the need, before a danger can be found, for there to be a reasonable expectation that a hazard, condition or activity will cause injury or illness to an employee before it can be altered, and for that expectation not to be based on hypothesis or conjecture.

[22] In the light of the jurisprudence cited, the appellant first submits that the activity in question, as described in the direction under appeal, is "the possibility of driving a vehicle during a shift without meal and rest breaks." It is argued that, in determining this activity could constitute a danger, the HSO "focused his attentions exclusively on formal 10-12 breaks and their procedure, ignoring all other means by which employees obtain rest and meal breaks including natural breaks in their schedule." "To that extent," the appellant submits, "the direction under appeal is too vague with respect to actual 'activity' which is alleged to be a danger." Further submitting that "to the extent that a direction is vague and ambiguous with respect to the nature of the activity itself", and citing jurisprudence from the Occupational Health and Safety Tribunal Canada (Tribunal) *1260269 Ontario Inc. (Sky Harbour Aircraft Refinishing)* and *Chambers* (Decision No. 06-032), the direction under appeal must be rescinded.

[23] In the alternative, the appellant submits that, even if the direction "does relate to a sufficiently clear activity which is alleged to be a danger, the evidence suggests that any such danger is speculative at best." Two principal arguments are advanced in respect of this submission: there is insufficient evidence that the operators do not receive breaks; and, there is insufficient evidence that the break practices lead to hazards. With respect to the first argument, the appellant revisits evidence summarized earlier in its submissions noting, for example, that the operators receive rest and meal breaks in ways that are not captured under the 10-12 break designation but occur naturally in an employee's schedule. This practice is corroborated, it is argued, by testimony given by Mr. Robert Barss, a Para-Transpo operator and one of the two witnesses for the respondent, who stated that he does not request or receive 10-12 breaks but that he is able to create his own breaks when needed. Additionally, the appellant claims that senior employees can choose to book "spare" and that such shifts may entail "frequent periods where they are not required to drive as they wait for work to materialise", or book split shifts that would guarantee an extended break in the day. Lastly on this argument, the appellant maintains the respondent's witness confirmed that an employee who felt unable to continue driving due to fatigue, "could pull over and they would be told by the employer not to continue driving and that someone would be dispatched to get them."

[24] The second argument maintains there is insufficient evidence to support the HSO's conclusion that the break practices at issue lead to hazardous occurrences such as collisions. The appellant first submits that the HSO testified that he was not aware of a single collision related to fatigue and, further, that the direction he issued was based on his assumption, contrary to

evidence entered at the hearing, "that the break policies at Para Transpo create an ever greater danger as shifts are extended over a longer period of time." The appellant maintains that those policies have been in place for a decade without incident. Turning to the related issue of the respondent's claim that failure to provide adequate time for a rest and meal break results in undue stress that threatens his health, effectively accepted by the HSO, the appellant submits that the HSO did not seek or receive any medical information to support of the claim. Further, the appellant notes that the respondent delayed visiting his doctor for a week following the refusal and argues that the visit did not lead to any findings to prevent him from resuming his duties which he did at his next shift and which he continued to do thereafter. In sum, the appellant submits that, in the absence of objective evidence to establish that an employee's fatigue constitutes a danger, only speculation remains and a danger finding should not have been made. The Tribunal's decision *Bondy* v. *Canadian National Railway (CNR),* (Decision No. 04-017), is cited in support of this submission.

[25] Additionally, arguing that the right to refuse "is an emergency measure designed to protect employees, not to seek assistance in interpreting operating rules or collective agreements", the appellant submits that the respondent has for some time pursued his concerns with the break policies in grievances and other fora, and that the union, the intervenor, has previously raised the issue in collective bargaining and at grievance arbitration. *Bondy* (cited previously) is again cited in support, this time with respect to the inappropriateness of using the work refusal provision to address ongoing labour and operational issues.

[26] The appellant concludes its submissions, re-stating the main points made with respect to testimony heard and evidence entered and re-affirming arguments with respect to the law on the finding of a danger within the meaning of the Code. It submits that, "a danger must be reasonably expected to cause illness or injury, and cannot be based on hypothesis or conjecture." It argues that the HSO "appears to conflate the question of whether breaks are adequately documented with the question of whether breaks are actually provided". The appellant questions the value of much of the HSO's research that it argues does not relate to an industry similar to that of Para Transpo and that his findings are based on faulty information. It is submitted that the direction under appeal must be rescinded in its entirety.

B) Respondent's submissions

[27] The respondent's submits that the direction under appeal should be upheld indicating that he has had the opportunity to review the intervenor's submissions that he agrees with and adopts in their entirety.

C) Intervenor's submissions

[28] In framing its submissions, the intervenor argues that the Appeals Officer must decide two questions with respect to this appeal. It is submitted the first question is whether, based on

the testimony and documentary evidence put before me, "that on a balance of probabilities it has been shown that a dangerous condition existed at Para Transpo due to the inability of Andrew Sigouin (and other employees) to obtain regular breaks over the course of their shifts as Para Transpo bus operators." The second question posed by the intervenor is whether the direction issued by the HSO to the employer, "namely that it schedule regular breaks in the daily runs issued to each operator, was an appropriate response to that danger." Initially reviewing what it finds to be supportive testimony, the intervenor argues that both questions must be answered in the affirmative.

[29] Information provided by the intervenor on the general nature of Para Transpo's service is in line with that given in the background section above. Some emphasis is placed on the operators' duties involving more than driving skills since they are also responsible for the safe pick-up, placement in the vehicle and drop-off of their passengers. Attention is also drawn to the length of shifts with some spare shifts scheduled to last up to 13 hours as well as to the variety of road type and conditions that operators may encounter. Note is made of journeys extending into parts of Gatineau that give rise to Para Transpo being subject to federal labour legislation.

[30] Specific to the scheduling of Para Transpo operations, the intervenor first notes that, at the start of a shift, an operator receives a paper copy of the initial runs that he or she is scheduled to make during the shift but that frequent changes to the schedule can be expected as cancellations occur and replacement requests are slotted in. The intervenor submits that testimony given by the appellant's witnesses portrays an aim to maximize the number of passenger requests met on any given day against a background of more demand for service than the current funding level is capable of providing. While acknowledging that a human controller has the final authority to add new or replacement pick-ups to the schedule, it is argued that the Trapeze software system facilitates the process and that in any event the human controller is required to respect the need to maximize service efficiency. Reference is made to testimony by Para Transpo's Program Manager indicating that the percentage of passenger requests now refused has dropped to approximately 6% from 9% in previous years and indicating further, the intervenor maintains, that the system takes away time for breaks that used to be available to operators. The intervenor submits that "this testimony clearly demonstrates that the goal of the Para Transpo dispatching system is to maximize the 'efficiency' of the system by minimizing the amount of time operators such as Mr. Sigouin are free from duties over the course of their shifts", and further, that "this constant pressure to provide the highest amount of service possible within the existing budget produces a stressful, and ultimately, a dangerous workplace".

[31] On the scheduling of operators' breaks, the intervenor submits that testimony given by both of the appellant's witnesses confirms that the purpose of breaks is to allow operators to refresh themselves and regain the attentiveness needed to perform their duties. It is argued that, prior to the HSO issuing his direction, the provision of breaks was uneven and in some cases operators completed shifts without a break being formally assigned. On the current break policy,

the intervenor points to testimony from both parties to illustrate "a system with many rules and many exceptions." These include: a bar on requesting a 10-12 break during the first two hours and in the final hour of a shift; the dispatcher relying on computer records that lack information on circumstances that may have eliminated a gap in the schedule and thus removed time for a break; and, the potential for uneven spacing of the single 10-12 break that might still leave many hours in a shift when another such break would not be available to an operator. The intervenor argues that the system leaves operators feeling "stressed", "fatigued", "rushed" and "pushed too hard", while being expected to perform duties requiring their full attention without opportunities for needed breaks.

[32] Arguing that a lack of defined breaks in the schedule creates a danger, the intervenor cites testimony given by the respondent and by his operator colleague, Mr. Tom Cole, regarding the need for a high degree of concentration when driving a Para Transpo bus that, if lost, could result in a serious accident and injury. Reference is made to the respondent's testimony on the adverse effect he maintains that the lack of break opportunities is having on his health including high blood pressure, stress and sleep and appetite issues. Mr. Cole's account of experiencing stress and fatigue after working a full shift without a break is also mentioned. The intervenor argues that testimony given by the appellant's two witnesses supports the need for high levels of concentration when operating the buses and submits "this testimony is evidence of the danger present at Para Transpo in the absence of regular and defined breaks" that in its view meets the definition of danger under the Code.

[33] The intervenor details evidence offered relating to the events surrounding the refusal noting that the respondent testified to having been on duty for more than six hours with no break when he made a 10-12 request. Given the response he received from dispatch, the respondent concluded that he would likely not receive a 15 minute break until he had spent more than ten hours on duty. He felt he could not continue safely with his duties and initiated a work refusal. The intervenor rejects the appellant's suggestion that the validity of the refusal is questionable since the respondent drove himself home after returning the bus to the depot, arguing that driving one's own smaller vehicle without passengers to attend to is of a different order. Similarly, the intervenor challenges the suggestion that choosing a less extended shift was an option open to the respondent, arguing that the Code does not require an employee to choose less lucrative or less preferable work in order to be free from danger in the work place. With respect to the appellant's argument that the respondent did not follow correct procedures under the Code to initiate a refusal, the intervenor argues that he had previously raised his safety and health issues with the appellant and "that the City would have been clearly aware of the reason the Respondent ceased work that day". Noting that the appellant also did not follow the required procedure when faced with a work refusal, the intervenor submits that, "where compliance with the formalities of the Code was lacking on both parties, it would be inequitable to permit the City to rely on the Respondent's minor non-compliance."

[34] The intervenor is dismissive of the appellant's statistics showing that accidents and collisions involving Para Transpo's vehicles occur more frequently in the earlier part of an operator's shift and its related argument that the lack of collisions late in the shifts demonstrates there is no increased risk due to fatigue. The intervenor maintains that these statistics are "simply raw numbers" that "make no effort to correlate collisions to traffic patterns or any other variable", and submits that they do not "prove that fatigue or its resulting inattentiveness and loss of concentration are not factors in these collisions." Issue is also taken with statistics entered by the appellant claiming a high rate of its positive responses to 10-12 meal and rest break requests. For one, it is argued, the statistics do not detail when during a shift an operator is allowed the break, noting that a break in the third hour of a shift lasting over twelve hours would be regarded as a statistical success. More fundamentally, the intervenor argues that the statistics do not cover the workforce as a whole. Taking as an example the figures for March 2013, the intervenor notes that only 438 requests were made through the dispatch centre and calculates that over the 31 days in the month there were more than 2500 operator shifts. It is submitted, given evidence and testimony with respect to the appellant's bias against breaks, it should not be surprising "that not every employee came forward and sought out a break."

[35] Turning to the law and jurisprudence on danger and work refusals, the intervenor first quotes the definition of danger found in subsection 122(1) of the Code and the purpose clause in section 122.1. It is argued with jurisprudential support that, as remedial legislation, the Code "must be given a broad and purposeful interpretation that upholds this central objective of minimizing dangers within the workplace." Specific reference is made to paragraph 26 in the Tribunal's decision *Canadian Freightways Ltd.* and *Teamsters Local 31*, (Decision No. 01-025) that reads:

> Since the Code is preventative in nature, the broadest interpretation must be assigned to a term that is consistent with the facts of the case and the purpose clause of Part II specified in section 122.1 of the Code.

[36] Elaborating its submission the intervenor canvases jurisprudence developed subsequent to amendments to the Code adopted in 2000 and in particular to the definition of danger. Citing two Appeals Officer decisions, *Welbourne* and *Canadian Pacific Railway* (Decision No. 01-008 at paragraph138) and *Parks Canada Agency* and *Douglas Martin*, (Decision No. 02-009, at paragraph 144) the intervenor submits that the definition of danger allows for potential hazards or conditions or future activities to be taken into account and that, in order to meet the definition in the Code, a specific danger need not currently be in existence but that a situation at hand could present a danger in the future.

[37] Further consideration will be given to relevant jurisprudence in the analysis section below. At this point I simply note that, while acknowledging that the risk of harm in an activity must be more than speculative, the intervenor argues the respondent need not show that a failure to provide a break would have resulted in an accident or incident every time, "he only needs to

show that it could have occurred any time a break was not provided." It is further submitted that, "the acknowledgement from both witnesses put forward by the City that breaks were necessary to maintain alertness and that any failure of an operator to remain alert could lead to an accident causing injury is sufficient to meet this evidentiary burden."

[38] The intervenor concludes by referring to the two questions posed at the beginning of its written submissions. First, that not providing breaks to operators working as long as 13 hours in a single shift is a real and pressing danger that the HSO identified correctly as a violation of the Code. Second, that the HSO's direction requiring "the City to provide defined breaks in the shifts of each employee was a proper and proportional response to the danger presented." The intervenor asks that the direction under appeal be upheld.

D) Appellant's reply submissions

[39] The appellant initially notes the respondent's and intervenor's claim that it "seeks to derive efficient service from limited resources." It does not refute this claim arguing that, "like every industry, it is seeking to provide the best possible service to the most customers with the limited resources it possesses." It submits that no evidence was presented to show that attempting to achieve such efficient service "involves a dereliction of attention towards matters of safety" and refutes the implication that "it directly seeks to harm its staff in the pursuit of efficiency."

[40] With respect to whether or not its break practices create a danger, while acknowledging that a job that includes driving involves hazards, the appellant argues that the respondent and intervenor submissions and evidence given do not establish that "those potential hazards rise to a level of statutory danger." The appellant submits that many of the intervenor's claims relate not to denial of breaks but to the breaks not being regular or defined and, further, that testimony and legislation indicate that the transit industry does not lend itself easily to the concept of regular or defined breaks. It reiterates argument that no accidents at Para Transpo have been attributed to the failure to provide regular or defined breaks and that evidence entered indicates no increase in collisions as shift length increases.

[41] On the law and jurisprudence, the appellant submits that, "while relying, at least in part, on precedent such as *Verville* (cited previously) in defining 'danger' under the Code, the intervenor has not appropriately applied the facts of this proceeding to that jurisprudence." It is argued that, although respondent and intervenor submissions recognize that in order to meet the definition under the Code a danger must be more than speculative in nature, they "nonetheless rely entirely on the speculative testimony of two witnesses, neither of whom could in fact point to any actual unsafe examples of work." The appellant concludes by requesting that the direction issued by the HSO be rescinded.

Analysis

[42] As a preliminary observation, I note that the activity constituting a danger identified in the direction issued by HSO O'Donnell is couched in somewhat conditional terms. It refers to operators **at times** having to drive without meal and rest breaks and that this **can lead** to fatigue and stress that, in turn, **can contribute** to hazardous occurrences, such as collisions. (My emphasis) This suggests a need to look closely at how the definition of danger and related jurisprudence may apply to possibilities and eventualities. Indeed, the parties' submissions recognize such considerations.

[43] The parties' submissions cite relevant jurisprudence and, as noted above, in doing so the intervenor traces the evolution of the definition of danger following amendments to the Code in 2000. The definition found in section 122 of the Code currently reads 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.

As the intervenor points out, previously the concept of danger involved immediacy and danger had to be evident at the time of an HSO's investigation. Referring to the Appeals Officer decision in *Parks Canada Agency* (cited previously) as indicating that the new definition allowed for potential hazards or conditions or future activities to be taken into account, the intervenor quotes as follows from paragraph 144 of that decision:

> The Code allows for a future activity to be taken into consideration in order to declare that a "danger" as defined in the Code exists. However, this is not an open ended expression. In order to declare that danger existed at the time of his investigation, the health and safety officer must form the opinion, on the basis of facts gathered during his investigation, that:
>
> - the future activity in question will take place;
> - 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.

[44] Quoting directly paragraphs 34 to 36 in *Verville* (cited previously), the intervenor submits that the final two aspects of the criteria set down in the above quotation from *Parks Canada Agency* (cited previously) were subsequently refined. I agree and select the following passages from the quoted paragraphs in Madam Justice Gauthier's decision to illustrate the nature of that refinement.

> [34] […] the injury or illness may not happen immediately upon exposure, rather it needs to happen before the condition or activity is altered.
>
> [35] Also, I do not believe that the definition requires that it could reasonably be expected that every time the condition or activity occurs, it will cause injury. The French version « susceptible de causer » indicates that it must be capable of causing injury at any time but not necessarily every time.
>
> [36] In that respect, I do not believe either that it is necessary to establish precisely the time when the potential hazard or the future activity will occur. […] Rather, looking at her decision as a whole, she appears to agree that the definition only requires that one ascertains in what circumstances it could be expected to cause injury and that it be established that such circumstances will occur in the future, not as a mere possibility but as a reasonable one.

"She", in the last point, refers to Madam Justice Tremblay-Lamer who in *Martin* (Federal Court decision cited previously), at paragraph 58, held that the definition of danger "still encompasses the concept of reasonable expectation which excludes speculative situations."

[45] The parties acknowledge that driving may be hazardous. However, whereas the respondent and the intervenor submit that not providing regular breaks to Para Transpo operators during lengthy shifts represents a real and pressing danger, the appellant maintains that its break policies are appropriate to the transit industry and do not give rise to a level of statutory danger. In order to find that an activity constitutes a danger within the meaning of the Code, as the HSO has done, it is not sufficient that it involves hazardous circumstances. It must also meet the definition and be consistent with the jurisprudence outlined above. In deciding whether it does so or not, I find it useful to review the testimony and evidence presented regarding total working time for Para Transpo operators, their break opportunities and the potential for injury and illness faced by operators.

Total Working Time

[46] The appellant's claim that it respects hours or work and hours of service regulations was not challenged. Evidence indicates that in June 2012, the month during which the respondent initiated his work refusal, Para Transpo operators worked on average 34 to 35 hours per week and the intervenor confirmed that hours worked by individual operators do not normally exceed 40. Although daily hours of work for some operators, including the respondent, may exceed the limit of eight standard hours set down in Part III of the Code, the averaging provisions in the statute allow for this providing the limits it establishes are respected over the averaging period. The respondent recalled one occasion when he worked a total of 96 hours over a two week period indicating he worked overtime hours also within the statutory limits.

[47] The effect of averaging lengthy daily hours at Para Transpo permits some operators to choose a compressed work week. Mr. Cole expressed a preference for such an arrangement that would allow him more time to spend with his family. In the case of an operator choosing a 13 hour spare shift schedule, as the respondent has done, averaged working hours could reach just short of the 80 standard hour limit for the two week averaging cycle when six shifts are completed, shifts that testimony indicates may not be fully occupied with driving the vehicle and transporting passengers. I realise that total length of working time was not the root issue in the respondent's refusal but I find it appropriate to draw attention to it here and to underline that the longer daily hours of a compressed work week at Para Transpo result in longer periods of continuous time off duty over the two week averaging cycle. In short, I was given no indication that statutory working hour limits were exceeded as a result of shift schedules at Para Transpo, in addition to which the record shows that annual vacation and floater days provided for in the collective agreement meet or exceed regulated standards. However, I should note that the parties acknowledge that meal and short rest break times are not generally addressed by statute or regulation and that I find that their collective agreement is less than precise on the matter.

Break Opportunities

[48] I look first at the appellant's submissions and arguments described in some detail above. The appellant argues that in reaching his decision the HSO concentrated on formal 10-12 breaks and did not take account of other breaks often referred to as natural breaks. Further that he was unaware of how long the respondent had worked before requesting a 10-12 break on the day of his refusal or of whether or not he had taken any other break that day. The appellant raises similar concerns with respect to the five recorded occasions identified by the HSO as the respondent either not having a 10-12 break or having such a break delayed until late in the shift. The appellant points to the testimony of Mr. Robert Barss, one of the respondent's witnesses, to the effect that he does not request breaks but makes his own break opportunities. In support of its argument that 10-12 break requests are responded to positively, the appellant makes reference to its 10-12 break monthly reference log entered in evidence that shows an increasing number of operator requests made monthly over the period from April 2010 until December 2013 and a decreasing number of request denials in response, down according to the record to zero denials in the last four months of 2013. It appears that, for the appellant, this record, plus opportunities in an operator's schedule for natural breaks, offers rest and meal break practices consistent with transit industry norms that do not give rise to a danger within the meaning of the Code.

[49] As indicated above, the respondent and the intervenor submit that Para Transpo's efficiency aim is to maximize service to its passengers within the limited resources at its disposal, citing a level of refused passenger trip requests down now to 6% from 9% previously. The result they argue is less time for breaks, 10-12 or natural. The 10-12 break procedure for them is hobbled by rules and exceptions and permits situations like that faced by the respondent on June 8, 2012, when after being at work for more than six hours he felt he would not be

granted a 10-12 break until he had worked more than ten hours. They question the validity of the appellant's 10-12 break monthly statistics arguing in effect that the relatively small number of 10-12 break requests in relation to the number of operator shifts indicates an operator's expectation that a request will be refused.

[50] The views of the respondent and the intervenor on the adequacy of break times are clearly at odds with those held by the appellant. Looking at their positions on balance, I first find merit in the appellant's argument that its efficiency measures are reasonable practice for the service it provides to a public that needs it and that such efficiency does not automatically lead to unsafe working conditions. On the opportunities for breaks, I also accept that the nature of this sector of the urban transit industry does not lend itself readily to regular scheduled breaks although, as the HSO pointed out, the Trapeze software could offer some assistance in this respect.

[51] An underlying issue for me is the lack of firm data on the distribution of break time, particularly 10-7 and other natural break time. Data recorded by the HSO indicates that over a ten month period from April 2012 until February 2013, there were three occasions recorded when the respondent had 10-12 breaks late in his shift and two shifts when no such breaks were recorded. However, there is no record kept of any natural breaks he might have had. Mr. Barss' comment that he makes his own breaks indicates to me that time can be found, although it would have been helpful if, as the employee health and safety representative, he could have given more specific details. Mr. Cole was more forthcoming with respect to instances when working a full shift with no formal break had caused him significant stress but it was not made clear to me whether or not he alerted dispatch to his concerns at such times so that he could be relieved. In this latter respect Mr. Barss agreed in cross-examination that, if he felt unsafe while on a run, he had no reason to believe he could not pull over and somebody would be sent to get him.

[52] The hardest data provided are the 10-12 break monthly statistics. I accept that they have weaknesses, notably they do not record the time in a shift when a break is taken. However, I accept that they do record when an operator's 10-12 request is denied and consequently when such a request is granted. In that respect, I take issue with the respondent's and intervenor's inference that a relatively small number of 10-12 break requests in a given month means that the work force as a whole does not have an opportunity to make such requests. To argue that only 438 requests were made in March 2013 when up to 2500 shifts may have been worked indicates a "pervasive cultural bias against breaks at Para Transpo" for me misses the point. First, of those 438 requests (from how many individual operators is not clear) only ten were denied. As for the remaining more than 2000 possible 10-12 break requests, are they indicative of a cultural bias against breaks or of an ability on the part of operators to find sufficient opportunities for other breaks? On balance, I find the latter explanation the more credible and accept the appellant's submissions in this respect.

Potential for Injury and Illness

[53] Testimony on the prospect of operators incurring injuries as a result of hazardous conditions such as collisions due to driver fatigue and consequent lack of attentiveness centred largely on the validity or otherwise of the appellant's vehicle accident statistics for the period 2010 -2012. The appellant submits that the HSO did not review its collision record and was not able to attribute an accident to operator fatigue. For the appellant the principal message of its statistics is the longer an operator's shift lasts the less the likelihood of a vehicle accident and, by inference, lengthy operator hours do not result in fatigue related vehicle accidents. The respondent and the intervenor refute such arguments maintaining that the appellant's statistics make no effort to correlate collisions with other variables such as peak traffic hours arguing further that they do not rule out fatigue and resulting lack of concentration being factors in vehicle accidents.

[54] I agree with the respondent and the intervenor with respect to the shortcomings of the appellant's statistics but they are the only statistics made available to me that relate to Para Transpo's vehicle accident record. In my view they neither rule in nor rule out fatigue as a factor in collisions but I note that lack of concentration can occur regardless of how well rested a driver might be and that inattentiveness when driving can result from distractions that have nothing to do with fatigue. What the statistics do show for the period 2010- 2012 is a yearly average of preventable 48 accidents of about 29 of which are termed minor. Close to one half of the operator complement over the three year period covered recorded no accidents with two thirds of the remainder recording only one accident. Given that Para Transpo operates from early morning to late at night seven days a week and through the City's traffic peaks, I do not find the statistics alarming. One thing they do not show is whether or not the accidents recorded involved injury to the employees concerned but in that respect I was given no evidence that such injuries had been incurred.

[55] The essence of the HSO's direction is that failure to provide time for rest and meal breaks result in undue stress related illness echoing the reasons for his work refusal given by the respondent. Tribunal jurisprudence with respect to workplace stress mainly relates to situations involving allegations of harassment or inter-personal conflicts at work causing mental and psychological stress which is not the case here. However, that jurisprudence is well canvassed in the Appeals Officer decision in *Nina Tryggvason* v. *Transport Canada,* 2012 OHSTC 10 and I find the following citation in that decision from paragraph 35 in *Alexander* v. *Treasury Board,* 2007 PSLRB 110, to be relevant to the current appeal:

> [35] Furthermore, where an employee refuses to perform work on medical grounds, which is the case here, it is incumbent upon that employee to satisfy his or her employer with documentary evidence from a physician that the work is a health hazard (see United Automobile Workers Local 636 v. F.M.C of Canada Ltd., Link-Belt Speeder Division (1971), 23 L.A.C. 234) In other words, the employee has the onus of producing

> medical evidence that supports his or her claim that there is indeed a danger.

[56] The above cited jurisprudence would call for the respondent to provide the appellant with documented medical confirmation of the health concerns he believes amount to a danger and justify his refusal to work. The respondent recalled providing a medical certificate after he visited his doctor in the week following his refusal but the appellant denies having received that certificate. While I do not doubt that the respondent believes he provided a medical certificate, on balance I accept that the employer would have a reliable record keeping system in such cases and I find its version of events to be the more credible. I do have testimony from the respondent as to stress leading to his loss of appetite and sleep issues, as well as to an indication from his doctor of higher than normal blood pressure, all of which he attributes to the appellant's insufficient assignment of meal and rest breaks. However, the conditions he refers to could have several causes. The evidence is that the respondent has not produced documented medical confirmation of the existence or cause of his health concerns throughout the process, either to the appellant, the HSO or me. As such and in the light of the jurisprudence, their evidentiary value in this appeal is significantly diminished.

[57] Drawing together the above elements, I note first total working hours that are well within statutory limits allowing time for rest, for recreation and for seeing to life's personal chores. On breaks, although they are not regularly scheduled there is provision for requesting 10-12 breaks that when exercised is responded to positively. Firm data on the availability of 10-7 or other natural breaks is lacking. However, I find that evidence before me including that of Mr.Barss who admits to never requesting breaks but finds times for them anyway, as well as the 10-12 monthly reference log that shows request denials diminishing as requests increase, are supportive of the appellant's position. I was given no evidence of injury to operators resulting from the vehicle accidents recorded or of fatigue having been a factor in those accidents. Indeed, applying an observation from *Martin* (Federal Court of Appeal decision cited previously), at paragraph 33, that "Tribunals are regularly required to infer from past and present circumstances what is expected to transpire in the future", suggests that the likelihood of such injuries is less than certain. Lastly, the lack of documented medical confirmation of the respondent's health claims is contrary to jurisprudence and not helpful to his case.

[58] As inferred at the outset of this analysis, in my opinion a decision in this appeal is dependent on the nature of the possibility of a danger in the meaning of the Code being established as a result of the activity identified by the HSO. Reasonable or mere are the qualifiers of possibility set down in the established jurisprudence referred to above. As I have noted at other times, reasonable and mere are adjectives of degree or value and the weight of available evidence must be assessed in order to determine where the demarcation between them lies. I have addressed the evidence and testimony put before me in some detail. I have attempted to distill them in the previous paragraph to the essentials that I regard as most pertinent to my decision.

[59] Keeping in mind that the specific activity in question is operating Para Transpo vehicles at times without opportunities for meal and rest breaks during a shift, I must now assess on the basis of the evidence whether or not this activity can reasonably be expected to cause injury or illness to the respondent when he is exposed to it before it can be altered. No evidence was given in support of fatigue having been the cause of vehicle accidents. Further, there was no evidence presented of injury to the operators, including the respondent, having resulted from a vehicle accident while on shift. Although this is not determinative of future accidents not causing injury, when taken with the favourable accident record of Para Transpo's professional drivers I consider it instructive as to the degree of such a possibility and conclude on balance that it is mere rather than reasonable.

[60] On breaks and illness, while breaks are not regularly scheduled the evidence demonstrates that opportunities for natural breaks are available in addition to requested 10-12 breaks. To the extent that operators do not request 10-12 breaks, I cannot accept that this equates to them not being available. The more recent and post refusal monthly break statistics indicate that more operators are requesting and being granted such breaks. When I add these considerations to the respondent having failed to provide documented confirmation of his medical concerns, I find also on balance that their being caused by the appellant's break policy is a mere rather than reasonable possibility. I conclude that the respondent was not exposed to danger as defined in the Code at the time he exercised his work refusal and therefore that HSO O'Donnell was not justified in issuing the direction to the employer.

[61] In reaching my decision I have not needed to consider the appellant's claim that work refusals should not be used to address general labour relations or policy issues. It is evident that the break policy and its implementation have been at issue in the past. The 2004 arbitral award referred to above traces the issue from the days when the operators under a contract employer enjoyed a half-hour scheduled lunch break that by agreement in 1990-91 was discontinued in return it appears for an extra half-hour pay. That arrangement was recognized in 1996 in the collective agreement between the then employer and the then bargaining agent that included Article 8.4. Trapeze was introduced in 1999 and the issue of sufficient break time became serious enough to be among those disputed in the strike that took place in 2001. The subsequent interest arbitration maintained Article 8.4 but also provided for the $7:00 meal allowance that remains in the collective agreement between the appellant and the intervenor. The 2004 rights arbitration award indicates that the arbitrator would remain seized should there be issues with the interpretation or implementation of the award. It would appear that the grievance avenues mentioned in the award regarding administration of the break policy have never been pursued to finality. It would also seem that the arbitrator's advice to improve data collection on breaks has been restricted to the 10-12 break policy. These matters are of course beyond my purview but, to the extent that an issue remains, a labour-management relations forum is perhaps the appropriate place to seek a resolution.

Decision

[62] For the reasons given above, I find that the respondent was not exposed to a danger as defined in the Code when he exercised his work refusal and I hereby rescind, pursuant to paragraph 146.1(1)(*a*) of the Code, the direction issued to the City of Ottawa by HSO O'Donnell on April 18, 2013.

Michael McDermott
Appeals Officer