Occupational Health
and Safety Tribunal Canada

Tribunal de santé et
sécurité au travail Canada

Ottawa, Canada K1A 0J2

Date: 2014-08-19
Case No.: 2012-45

Between:

Transport Canada Marine Safety, Appellant

and

Public Service Alliance of Canada, Respondent

Indexed as: *Transport Canada Marine Safety* v. *Public Service Alliance of Canada*

Matter:	Appeal under subsection 146(1) of the *Canada Labour Code* of a direction issued by a health and safety officer
Decision:	The direction is rescinded
Decision rendered by:	Mr. Pierre Hamel, Appeals Officer
Language of decision:	English
For the Appellant:	Mr. Richard Fader, Counsel, Department of Justice, Labour and Employment Law Group
For the Respondent:	Mr. Jean-Rodrigue Yoboua, Representation Officer, Public Service Alliance of Canada
Citation:	2014 OHSTC 13

REASONS

[1] This decision concerns an appeal filed by Transport Canada Marine Safety (TCMS or "the employer") against a direction issued on June 5, 2012, by Health and Safety Officer (HSO) Francis Healey pursuant to subsection 145(1) of the *Canada Labour Code* ("the Code").

[2] The direction reads as follows:

> IN THE MATTER OF THE *CANADA LABOUR CODE*
> PART II – OCCUPATIONAL HEALTH AND SAFTY
>
> DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)
>
> On May 14th, 2012, I commenced a continued refusal to work investigation involving a marine inspection employee of TRANSPORT CANADA MARINE SAFETY (TCMS), being an employer subject to the *Canada Labour Code*, Part II, at 8th Floor, John Cabot Building, 10 Barter Hill, St. John's, Newfoundland and Labrador, A1C 6H8, the said work place being sometimes known as Transport Canada Marine Safety.
>
> The said health and safety officer is of the opinion that the following provisions of the Canada Labour Code, Part II, have been contravened:
>
> **Paragraph 125.1(f) – Canada Labour Code, Part II and Section 10.4 - Canada Occupational Health and Safety Regulations.**
>
> There is a likelihood that the health or safety of marine inspectors with Transport Canada Marine Safety (TCMS), St. John's, NL, may be endangered by exposure to asbestos and other hazardous substances in the exercise of their duties on marine vessels. The employer has not appointed a qualified person to carry out an investigation in that regard.
>
> Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(*a*) of the *Canada Labour Code*, Part II, to terminate the contravention no later than June 5th, 2012.
>
> Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(*b*) of the *Canada Labour Code,* Part II, within the time specified by the health and safety officer, to take steps to ensure that the contravention does not continue or reoccur.
>
> Issued at St. John's, this 5th day of June, 2012.
>
> (signed)
> Frank Healey
> Health and Safety Officer
> […]
>
> To: TRANSPORT CANADA MARINE SAFETY
> 8th Floor, John Cabot Building
> 10 Barters Hills
> St. John's, Newfoundland and Labrador
> A1C 6H8

[3] The appeal was heard in St. John's, NL on January 18 to 20, 2014.

Background

[4] The facts that are relevant to the present appeal are generally not contested. On April 15, 2012, TCMS marine safety inspectors Captain Glenn Mackey and Mr. Dan Earles travelled to Harbour Grace, NL to carry out an inspection onboard the Canadian Coast Guard *Shamook* ("*CCG Shamook*"). The employees split their inspection duties with Captain Mackey completing deck side inspection and Mr. Earles completing inspection below deck. Towards the completion of their inspection, Mr. Earles was advised by the Chief Engineer of the vessel that a contractor was attending the vessel to encapsulate insulation in the engine casing. Mr. Earles questioned the Chief Engineer as to whether or not loose and disturbed insulation as well as white substance on ledges and deck was asbestos, however the Chief Engineer could not confirm. Mr. Earles then advised Captain Mackey of this matter and both inspectors went to the bridge and requested a copy of the Asbestos Management Plan (AMP) for the vessel. They reviewed the plan in the presence of the Captain and the Chief Engineer and questioned them about the presence and location of asbestos on the vessel but their questions could not be answered. The inspectors also asked about the status of the recommendations referenced in the AMP and these questions could not be answered. The Captain and Chief Engineer could not confirm whether the recommendations quoted in the AMP were addressed. Mr. Earles then prepared a Marine Safety Notice, also known as an SI-7, directing the Captain of the *CCG Shamook* to take air sampling in the engine room for the presence of asbestos containing material (ACM), to conduct a re-assessment of the vessel for the presence and condition of asbestos and to confirm that the general recommendations from previous assessment had been properly carried out. Captain Mackey and Mr. Earles did not continue with their inspection at that time and departed the site. It is common ground that there was no assessment of hazardous substances or hazardous conditions on the *CCG Shamook* and no Job Hazard Analysis (JHA) completed by either the employees or the employer prior to the inspection.

[5] Mr. Earles sent an email to Peter Johnson, who was at the time the acting Manager, Inspection Services with TCMS, highlighting his concerns and explaining the situation. Based on that information, Mr. Johnson advised all staff not to attend the *CCG Shamook* until the matter was resolved and contacted Coast Guard officials to advise them of the situation and inform them that inspection services were withdrawn. Captain Mackey also informed Mr. Johnson that he was refusing to work in the circumstances. He filled in a Refusal to Work Registration form on April 16, 2012, stating as follows:

> Possibility of exposed asbestos on CCGS Shamook, April 15, 2012. Asbestos Management Plan unclear on location of asbestos. It appears Coast Guard are not following recommendations in Plan. Crew not familiar, nor have training. I request training on Asbestos Management Plan.

[6] On April 17, 2012, Mr. Johnson received an email from Ms. Shauna Akerman, Operational Requirements Officer, CCG, informing him of the steps taken to comply with the SI-7 direction issued on April 15 by Mr. Earles. Ms. Akerman provided answers to the questions raised by the

inspectors during their inspection and also attached the reports from the two air sampling surveys completed on April 16 and 17, 2012, as mandated by the SI-7. The bulk sampling surveys and analysis was conducted by Pinchin LeBlanc Environmental (“Pinchin LeBlanc”), a firm specialized to deal with this type of analysis. The results indicated that no airborne asbestos was detected as a result of the testing. The results indicated that the samplings contained cellulose, synthetic fibers, mineral wool and non-fibrous material. Although the vessel did contain asbestos-containing material, there is no dispute that this material was properly encapsulated and presented no danger of exposure to the employees. There is no dispute that Pinchin LeBlanc’s staff have the appropriate expertise and qualifications to carry out the types of analysis involved in this matter. There is also no dispute as to the accuracy of the results of Pinchin LeBlanc’s bulk sampling and its conclusions as to the absence of air-borne asbestos on the vessel.

[7] Based on this information, Mr. Johnson lifted the restrictions for TCMS inspectors to attend the *CCG Shamook* for inspection purposes. Mr. Johnson informed Captain Mackey of these developments and provided him with the two reports referenced above.

[8] Captain Mackey maintained his position on his refusal to work, on the basis that he had not received adequate training on the review of AMP, which placed him in a situation of danger when inspecting vessels with asbestos containing materials. Scott Kennedy, Regional Director, TCMS, informed the Labour Program of Human Resources and Social Development Canada (HRSDC) as it was then, of the continued work refusal. HSO Frank Healey was assigned to conduct an investigation into the work refusal and commenced his investigation on May 14, 2012. While he did not visit the work place regarding which the refusal was made, i.e. the *CCG Shamook*, he interviewed all TCMS managers and employees who had been involved in the events. HSO Healey concluded that the situation did not present a danger within the meaning of the Code and so informed Captain Mackey and his employer on June 5, 2012.

[9] HSO Healey points out in his report (at page 8) that the Health and Safety Committee was involved in the investigation of the refusal, as it was notified of the refusal on April 16, 2012. The Committee agreed that the vessel was inspected for the presence of asbestos and tests reports indicated that there was no airborne asbestos present and that any asbestos present was encapsulated and appropriately contained, signage was erected and the location of the known asbestos was clearly marked, and that the air quality testing revealed the substance not to contain asbestos, and that the *CCG Shamook* is deemed safe. He adds that the committee made two recommendations: first, that the employer develop and implement a process to identify all known hazards on any ship work site, in collaboration with a vessel owner, prior to an employee visiting a worksite and second, that the employer, in collaboration with a group of employees, re-evaluate the TCMS Asbestos Awareness Training Program.

[10] On the same date as his decision on the work refusal, HSO Healey issued the direction under appeal, citing a contravention of section 10.4 of the *Canada Occupational Health and Safety Regulations* (COHSR). In his view, his investigation established that there was a likelihood that the health and safety of the two marine inspectors who conducted the inspection on April 15, 2012, may be endangered by exposure to asbestos and other hazardous substances, which required the employer to appoint a qualified person to carry out an investigation in that regard. Although his direction is framed in general terms, HSO Healey was clear in his testimony

that it only concerned section 10.4 of the COHSR and not the adequacy of TCMS' Hazard Identification and Prevention Program (HIPP) and JHAs developed under it, or its application, which his colleague HSO O'Neill was looking into at that time. He also stressed that the cited contravention of that section is based solely on the circumstances that prevailed on April 15, 2012, relating to the two employees' presence on the *CCG Shamook*. He explained that in his opinion, the information obtained from Pinchin LeBlanc should have been provided to the employees prior to their inspection of the vessel, in order to comply with section 10.4 of the COHSR. He further testified that had a Task Hazard Assessment (THA) been completed prior to the employees boarding the vessel, he would have been of the view that section 10.4 had been complied with.

[11] It is worth noting that the events of April 15 and 16, 2012 occurred in a context where concerns relating the proper identification of hazards and the lack of implementation of the employer's Hazard Identification and Prevention Program had been an ongoing issue for some time, and had led to several discussions between TCMS management, Captain Mackey and other employees, and HSO O'Neill, with the Labour Program of HRSDC. The Assignment Narrative Report entered in evidence reflects that situation and refers to previous incidents whereby Captain Mackey had exercised his right to refuse in 2009 when learning that the vessel he was inspecting (*Sir Robert Bond*) was undergoing asbestos abatement and that no AMP was in place. In 2011, he left that ship again when the person responsible for the ship could not answer a question relating to the presence and condition of asbestos. The same situation occurred on the *Anticosti* later that same year. Those situations and resulting discussions eventually led to the signing by Mr. Kennedy, on behalf of TCMS, of an Assurance of Voluntary Compliance (AVC) by which the employer undertook to further develop its HIPP and prepare THAs in collaboration with ship owners, for every vessel to be inspected, to obtain basic information on the conditions of the ship, including the presence of asbestos and other hazardous substances, prior to marine safety inspectors boarding the vessel for inspection. It is useful to quote "Findings No.1" from the AVC, signed on May 4, 2012, which Mr. Kennedy forwarded to HSO O'Neill on May 9, 2012:

> The Labour Program, Occupational Health and Safety (OHS) Division, has been involved in discussion and meetings with Transport Canada Marine Safety (TCMS) personnel (employer, employees, JOHS Committee) relating to work refusals involving Marine Inspectors, inspection activities, onboard Marine Vessels. Throughout this process it was identified that TCMS has developed and implemented, in part, a guideline document for Occupational Health and Safety for TCMS employees in the discharge of their duties. The Labour Program, OHS Division, has reviewed the aforementioned guideline document and has identified that some portions of the guideline document (i.e. Job Hazard Analysis, hazard identification and assessment, hazard inventory and recording, etc…) have not been fully implemented to date which highlights a contravention of section 125(1)(s) of the Canada Labour Code, Part II. As such the employer will ensure that each employee is made aware of every known or foreseeable health or safety hazard in the area where the employee works as per section 125(1)(s) of the Canada Labour Code, Part II.

[12] The AVC sets May 15, 2012 as the compliance date for this undertaking. Mr. Kennedy's May 9th, 2012 email also states as follows:

> In regard to item 1 above, TC will continue with the implementation of the TC Hazard Identification and Prevention Program – Action Plan dated (revised) September 2011 as previously agreed to by HRSDC. I am attaching a copy of the plan for your perusal. Please note that in the plan commencing May 2012, Task assessments are to be carried out to identify high risks tasks. Transport Canada Marine Safety will complete the Task Hazard Assessments, further develop the Task Hazard Analyses for the high risk tasks, and implement a system for recording and keeping an inventory of the hazard analyses as they are completed. These THA's (or JHA's) will form part of the information supplied to employees for where the employee works.

[13] HSO O'Neill acknowledged receiving Mr. Kennedy's email with its attachments, and stated as follows in an email dated May 30, 2012:

> […]
> I have reviewed these attachments and I am of the position that the action plan proposed meets the spirit and intent of the AVC items. As a result, I will attach these documents to the AVC file and mark the issues as "in-compliance".
>
> For your information, HSO Frank Healey is preparing the Work Refusal investigation report and he should be in a position to deliver said report next week.
> […]
>
> [Underlining added]

[14] The documents in question included the portions of the OHS Guideline dealing with the Hazard Identification and Prevention Program, which sets out a comprehensive set of rules, building on the previous 2008 document, purporting to identify all potential hazards in the work place and deal with those hazards prior to inspection. In a nutshell, the key elements of the program include: the identification of health and safety risks, which are recorded in a Health and Safety Risk Identification Form (HSRI) designed for that purpose and completed in collaboration with ship owners/operators, prior to inspection; a Task Hazard Analysis for tasks performed by marine safety inspectors; the establishment of the Safety Program Administrator position, whose responsibility is to implement and monitor the program, including recording and tracking of information; a decision chart to follow in cases where a likelihood of exposure to hazardous substances is identified; a checklist for verifying asbestos plans in place.

[15] The document also provides examples of generic pre-completed THA forms relating to the conditions most likely to be encountered. As the system is populated with site-specific information, it is expected that site-specific THA forms will be available for the majority of work sites to be inspected. Mr. Kennedy explained that a working group of TCMS employees and managers was set up to develop those THAs, initially focusing on higher risk tasks, as undertaken in the AVC and accepted by HSO O'Neill. The information gathered by that process is eventually entered in a data base, described as RDIMS, and employees are required to consult

the relevant THA (site-specific or generic) prior to entering a vessel to become familiar with conditions that they will find there. In situations where no THA is available, marine safety inspectors are required to take a blank HSRI form and ask the person in charge of the site/vessel to complete the form with the required information and return it to the inspector.

[16] Mr. Kennedy explained that the TCMS, as the regulator in the marine sector, does not have control of the work sites where its marine safety inspectors are called upon to carry out their inspection duties. When a hazard is identified, TCMS staff cannot simply walk in and effectively carry out the corrective measure itself: inspectors are to use the enforcement powers conferred on them under appropriate legislation, to require the owner or person in charge of the vessel to rectify the situation by taking appropriate corrective measures by a qualified person such as conducting tests, making analyses, modifications to the site and so forth, so as to remove the hazard, and report the results back to TCMS, as was done in the case of the *CCG Shamook* incident.

[17] Under that program, it is stated that if, as a result of a THA, the employee determines that a risk of exposure to a dangerous substance exists, for which they have not been trained, they shall not proceed to the work site and shall inform their manager accordingly. Likewise, if, once at a worksite, an employee determines that conditions have changed from how they were described on the THA form and a risk of exposure exists, they are to remove themselves from the site and inform their manager, so that appropriate corrective measures can be ordered.

[18] This process was rolled out to all regional operations, as reflected in a letter signed by Mr. Kennedy dated May 29, 2012, and an email from Mr. Balaban dated June 14, 2012 to that effect.

The issue

[19] The issue is whether the employer was in contravention of paragraph 125.1(*f*) of the Code and section 10.4 of the COHSR by not appointing a qualified person to carry out an investigation in the circumstances of the present case, i.e. before Captain Mackey and Mr. Earles boarded the *CCG Shamook* to conduct their inspection, on April 15, 2012.

Submissions of the Parties

[20] The final submissions of the parties were completed on March 14, 2014 with the receipt by the Tribunal of the appellant’s reply submissions on that date.

A) Appellant’s submissions

[21] Counsel for the appellant submits that the direction is flawed on its face and should be rescinded. As the evidence established, the direction is work place specific and the work place at issue was the *CCG Shamook*. The direction dealt only with section 10.4 of the COHSR and did not address the requirement for a hazard prevention/identification program, which was the subject of another process led by HSO O’Neill and where, on May 30, 2012, he deemed TCMS to be in full compliance. HSO Healey confirmed that upon review of the Pinchin LeBlanc report

there was no likelihood that an employee may be exposed to asbestos on board the *CCG Shamook*. His rationale for the direction was his understanding that this information was not shared with the employees prior to their inspection. Counsel argues that faced with those facts, the only possible conclusion was that there was no likelihood of exposure to a hazardous substance in this case, and the obligation for the employer to appoint a qualified person to conduct an investigation pursuant to section 10.4 of the COHSR did not arise. HSO Healey's interpretation of that section amounts to require the employer to appoint a qualified person to investigate each and every work place where its inspectors carry out their inspection duties, for the purpose of determining whether a "likelihood of exposure" exists. This is an incorrect interpretation.

[22] Counsel for the appellant submits that HSO Healey misunderstood the nature of a direction by focusing on the events that existed on April 15, 2012 and not those that existed on June 5, 2012, the actual date of his direction. On that date, the information that HSO Healey found was missing on April 15, 2012, was available and should have been considered. In particular, the fact that the employer had further developed its Hazard Identification and Prevention Program and that as of May 29, 2012, any inspection would only occur once the representative of the ship filled out the Health and Safety Risk Identification form. Furthermore, such undertaking had been found to be in compliance by HSO O'Neill. Counsel points out that employees were trained on asbestos awareness, and in particular, Captain Mackey received training provided by Strum Environmental on February 28, 2012. Such training included a pre-inspection checklist for asbestos, a reminder to employees that they need to review relevant material prior to entry onboard a vessel, including any THA; if the THA established that there is a likelihood of exposure, they should not do the inspection. It also spelled out what information must form part of an Asbestos Management Plan. Counsel points out that marine safety inspectors were in fact following this procedure.

[23] Counsel for the employer further submits that HSO Healey fundamentally misinterpreted section 10.4, which only requires the appointment of a qualified person to investigate when there is a likelihood of exposure. He incorrectly asserted on several occasions during his testimony that the employer was responsible to determine if hazards existed and ought to immediately hire a qualified person to make such determination. Such a position is opposite to HRSDC's own documentation which reiterates that only when the likelihood is established does a qualified person need to be engaged to determine what the safe working procedures should be.

[24] In this case, there was a question with respect to some dust and uncertainty among the crew as to the condition of the ship regarding asbestos. As a result, the marine safety inspectors appropriately removed themselves and TCMS required the ship owner to remedy the situation, do some testing, provide complete information and report back to TCMS. Mr. Kennedy confirmed in his testimony that this was the appropriate course of action, and was consistent with the OHS Guidelines. When he issued his direction. HSO Healey had confirmation that there was no airborne asbestos on board the vessel and therefore, no likelihood that employees may be exposed to that substance. It was therefore inappropriate for him to issue a direction stating a contravention of section 10.4 of the COHSR.

[25] Counsel for the appellant also suggests that Captain Mackey is himself at fault, for not following the TCMS Guidelines and simply not taking the pre-inspection steps to ensure that his safety will not be compromised. His claim that he has not been provided with appropriate training to deal with asbestos-related situations is "unfounded and disingenuous". Likewise, Captain Mackey's suggestion that he needed an expert to advise him on the conclusions of the Pinchin LeBlanc inspection report that no asbestos was detected in the bulk sampling ("none detected"), is argumentative and inaccurate. Counsel submits that Captain Mackey shirked his responsibilities by not following the appropriate preventive measures set out in the OHS Guidelines, a mindset that is further illustrated by his refusal to cooperate in the working group set up by the employer to develop its Hazard Identification and Prevention Program.

[26] Counsel for the appellant is of the view that the majority of the evidence presented by the respondent and the testimony of HSO Healey focussed on the issue of hazard identification or the HIPP, which is a different issue from section 10.4 and regarding which the employer was found to be in compliance by HSO O'Neill. Counsel argues that it is not open to the appeals officer acting under section 146 of the Code, to revisit these issues, which are unrelated to the direction, and unduly expand the scope of the matter under appeal (*Burchill* v. *A.G. of Canada* [1981] 1 F.C. 109 (C.A.); *Schneidman* v. *Canada (C.R.A.)* 2007 FCA 192). The Code does not allow for an independent inquiry into possible other violations of the Code and does not give the appeals officer the authority to issue a new direction under subsection 145(1): the appeals officer may only "confirm, rescind or vary" the original direction and only in matters of danger can an appeals officer issue any direction that he/she considers appropriate, pursuant to paragraph 146.1(1)(*b*) of the Code.

[27] In conclusion, counsel for the appellant invites me to rescind the direction.

B) Respondent's submissions

[28] The respondent's representative submits that the direction under appeal is well-founded, as the employer failed to appoint a qualified person to carry out an investigation when there was a likelihood that the health or safety of marine safety inspectors may be endangered by exposure to asbestos.

[29] During the course of his testimony, HSO Healey indicated that his direction was in part based on the fact that the appellant failed to make its marine safety inspectors aware of every hazard about the *CCG Shamook* prior to its inspection. HSO Healey also indicated that for the purpose of section 10.4, the appellant's managers were not considered qualified persons.

[30] In the respondent's representative's view, the evidence demonstrates that the *CCG Shamook* had undergone a refit prior to being inspected by Captain Mackey and Mr. Earles on April 15, 2012. It is also evident that there was asbestos in the ship and that neither the ship's Captain nor the Chief Engineer were able to identify or locate the asbestos aboard the *CCG Shamook*. These individuals were also unable to confirm whether the recommendations under the latest Asbestos Management Plan had been followed. They could also not confirm whether a white substance on the ledges and deck of the vessel was asbestos. Further, the asbestos at the time of the inspection was not labeled according to Captain Mackey and he indicated that he had

inspected the kitchen, which contained unlabeled asbestos behind a panel. Finally no annual inspection with respect to asbestos had been performed by the Canadian Coast Guard since 2010. All of those circumstances meet the requirement that there must be a likelihood that the health and safety of an employee is or may be endangered by exposure. In order to meet this test, one only needs to demonstrate that there was a hazardous substance and that exposure may occur (see: *Air Canada and International Assn. of Machinists and Aerospace Workers, Airline Lodge 714,* Appeals Officer Decision No. 96-016, August 30, 1996). Once an uncertainty arose with respect to the state of the asbestos, the appellant was required to appoint a qualified person to investigate and make recommendations in light of the criteria set out in subsection 10.4(2) of the COSHR, with respect to future steps. None of the appellant's managers had the qualifications to carry out such a task.

[31] The respondent's representative argues further that in relying on conclusions by Pinchin LeBlanc in its reports to the benefit of the Canadian Coast Guard and not for TCMS, the appellant effectively contracted out its obligations under the Code, which it cannot do (Public Works and Government Services Canada and Indian Affairs and Northern Development Canada Decision no.:OHSTC 10-001).

[32] The respondent's representative also submits that it is not attempting to raise new issues regarding the Hazard Identification Program of the employer. It is the appellant who relies on his HIPP to argue that there is no likelihood of exposure because its HIPP identifies hazardous substances and no employee will be required to go onboard vessels until the owner addresses the hazard. The refusals relating to the *Sir Robert Bond* and the *Anticosti* demonstrate that exposure to hazardous substances has been a long-standing issue. The evidence establishes that the appellant did not have the Health and Safety Risk Identification form in use at the time of the April 15-16 refusal. But even after such a form is completed, Captain Mackey, like other marine safety inspectors, are not in a position to determine if the asbestos constitutes a health risk or not, as he lacks the adequate training to do so. Asbestos management is a complex matter and the evidence has clearly demonstrated that point. Further, the representative pointed to several shortcomings of the HIPP, namely the fact that there is not always a site-specific THA available and that alternative approaches such as using a generic THA or having the vessel operator fill in a blank form prior to inspection does not provide marine safety inspectors with all relevant information prior to entering a ship. Finally, the new OHS Guidelines were only finalized much later in 2012 (November) and the training for the guideline took place in April 2013 only, and in the view of many participants, was inadequate. All in all, the deficiencies in the HSRI process clearly demonstrate that there is a potential for exposure and that the issues that existed prior to its implementation still exist.

[33] The respondent's representative disagrees with the appellant's contention that Captain Mackey shirked his responsibility by not cooperating with the working group and by not following the pre-inspection process set out in the HIPP: Captain Mackey provided a satisfactory explanation for the former, and the fact that he considered that it was not his responsibility to do the pre-inspection process, but that of his employer, is motivated by his genuine concern not to be exposed to asbestos when inspecting ships.

[34] As to the fact that HSO O'Neill found the employer to be in compliance with the Code regarding its Hazard Prevention Program (paragraph 125(1)(*s*) of the Code and Part XIX of the COHSR), the respondent's representative refers to *DP World (Canada) Inc.* v. *International Longshore and Wharehouse Union, Local 500,* 2011 OHSTC 17) and argues that this fact is irrelevant, as HSO Healey was entitled to come to his own conclusions based on the totality of the evidence. Finally, the representative submits that HSO Healey was correct in considering the facts as they were on April 15 and 16, 2012, had no obligation to consider the facts as of June 5, 2012, when he issued his direction in the circumstances of this case and points out that subsection 145(1) enables a health and safety officer to issue directions for past contraventions of the Code.

[35] The respondent's representative concludes that the direction ought to be confirmed.

C) Reply

[36] In reply, counsel for the appellant stressed the fact that the respondent's submissions clearly show that it is attempting to broaden the scope of the appeal to include a range of issues that do not directly relate to the direction. While appeals officers' conduct *de novo* proceedings, it could not have been Parliament's intention to broaden the scope of the debate on a wide range of issues on speculation of what might be argued in closing submissions. Counsel therefore reiterated his position that TCMS does not allow its employees to work in an environment where there is a likelihood of exposure to hazardous substances. Once this is determined (in accordance with its HIPP) that there is a likelihood of exposure, it is incumbent on the ship owner to rectify the situation prior to a marine safety inspectors entering the work place.

[37] Counsel for the appellant disagrees with the statement that the employer is contracting out its responsibilities under the Code by relying on a report prepared for the benefit of someone else, in this case the CCG. TCMS is relying on the expert firm Pinchin LeBlanc's report to ensure the health and safety of its own employees. Finally, counsel submits that the suggestion that a marine safety inspector is incapable of interpreting a report such as that of Pinchin LeBlanc is inaccurate, especially where simple terms such as "none detected" or "contains asbestos" are used. TCMS does not require marine safety inspectors to inspect for asbestos and that task is left to the experts. They are trained on asbestos in a way that allows them to make the right choices to do their jobs safely.

Analysis

[38] The present appeal brings into play paragraph 125.1(*f*) of the Code and section 10.4 of the COHSR, as it is the basis on which HSO Healey founded his direction to the employer. Those provisions read as follows:

> 125.1 Without restricting the generality of section 124 or limiting the duties of an employer under section 125 but subject to any exceptions that may be prescribed, 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,

[…]

(f) where employees may be exposed to hazardous substances, investigate and assess the exposure in the manner prescribed, with the assistance of the work place committee or the health and safety representative;

[…]

10.4 (1) If there is a likelihood that the health or safety of an employee in a work place is or may be endangered by exposure to a hazardous substance, the employer shall, without delay,

(a) appoint a qualified person to carry out an investigation in that regard; and

(b) for the purposes of providing for the participation of the work place committee or the health and safety representative in the investigation, notify either of the proposed investigation and of the name of the qualified person appointed to carry out that investigation.

(2) In an investigation referred to in subsection (1), the following criteria shall be taken into consideration:

(a) the chemical, biological and physical properties of the hazardous substance;

(b) the routes of exposure to the hazardous substance;

(c) the acute and chronic effects on health of exposure to the hazardous substance;

(d) the quantity of the hazardous substance to be handled;

(e) the manner in which the hazardous substance is stored, used, handled and disposed of;

(f) the control methods used to eliminate or reduce exposure of employees to the hazardous substance;

(g) the concentration or level of the hazardous substance to which an employee is likely to be exposed;

(h) whether the concentration of an airborne chemical agent or the level of ionizing or non-ionizing radiation is likely to exceed 50 per cent of the values referred to in subsection 10.19(1) or the levels referred to in subsections 10.26(3) and (4); and

(i) whether the level referred to in paragraph (g) is likely to exceed or be less than that prescribed in Part VI.

[Underlining added]

[39] After hearing the evidence presented by the parties and having carefully considered their submissions, the first question that I must address is the scope of the present appeal. Considerable evidence was led regarding the employer's Hazard Identification and Prevention

Program, the process developed under that program to identify known and foreseeable hazards related to the duties of marine safety inspectors and to communicate that information to them prior to their inspection of vessels, as well as the effectiveness of that program. HSO Healey was quite firm in his testimony that the only basis on which he issued his direction was his conclusion that the employer was in breach of section 10.4 of the COHSR on April 15-16, 2012, by not having appointed a qualified person to investigate the conditions of the work place prior to the marine safety inspectors boarding the *CCG Shamook*, as there was in his opinion a likelihood that the health or safety of the two inspectors may be endangered by exposure to a hazardous substance, namely airborne asbestos. He reaffirmed the fact that had the employer shared with Captain Mackey and Mr. Earles the results of the Pinchin LeBlanc report prior to them boarding the vessel in the first place, he would have found the employer in compliance of section 10.4 of the COHSR, since there is no dispute that Pinchin LeBlanc staff have the appropriate expertise to proceed to the analyses which they conducted on April 16 and 17, 2012. This clarification exemplifies in my view that the sole basis on which the validity of the direction should be assessed is whether HSO Healey's application of section 10.4 of the COHSR in the circumstances of the present case is correct.

[40] While a link does exist between the employer's obligation under Part XIX of the COHSR (Hazard Prevention Program) and section 10.4 of the COHSR (Part X – Hazardous Substances), those provisions prescribe obligations of a different nature, the former being concerned with ensuring that employees are made aware of all known or foreseeable hazards associated with their duties, the latter being more specifically related to the handling of hazardous substances present in the work place. One may inform the other, in the sense that having identified a hazard or potential hazard through the operation of the HIPP and the taking of preventive measures, the employer may have to take additional steps to address situations for which the COHSR prescribes specific measures, such as the handling of hazardous substances, enclosed spaces, levels of sound, and so forth. HSO Healey acknowledged that the Hazard Prevention Program issue was looked into by his colleague HSO O'Neill.

[41] But while HSO Healey states that he founded his direction on 10.4 of the COHSR, he in fact found that the shortcoming was related to the employer's failure to inform the employees of actual or potential hazards, in other words the process under the employer's Hazard Identification and Prevention Program. When he issued his direction on June 5, 2012, the HIPP and processes set up under that program had been acknowledged by HSO O'Neill as being in compliance with the Code and HSO Healey was adamant in his testimony that his direction had no relation to the HIPP or to a conclusion that the employer had failed to implement the processes under it.

[42] Consequently, I conclude that the scope of the present appeal is limited to whether or not the employer has contravened section 10.4 of the COHSR when it failed to appoint a qualified person to conduct an investigation prior to the inspection of the *CCG Shamook* on April 15, 2012, as HSO Healey stated to be the rationale for his decision. That section is concerned with the hazard and danger to the health of employees who may be exposed to hazardous substances in their work place. Although no specific evidence was presented at the hearing on that point, it is common ground between the parties that asbestos is a hazardous substance that may cause serious illness if it is not handled, stored or encased in accordance with strict industrial standards.

The issue here is related to the presence of airborne asbestos on the vessel which could present a respiratory/inhalation hazard to employees who may be exposed to it.

[43] The question then is whether there was a likelihood, on April 15, 2012, that the health or safety of Captain Mackey and Mr. Earles may have been endangered by exposure to airborne asbestos when they boarded the vessel, in which case an investigation by a qualified person was mandated by section 10.4 of the COHSR. The underlined words are not defined in section 10.4 and must be given their ordinary meaning. "Likelihood" is defined as *the condition of being likely or probable; probability; something that is probable* (The Free online Dictionary; Oxford's online Dictionary); *the chance that something will happen, probability* (Merriam Webster Dictionary online). "Exposure" is defined as *the condition of being subjected to something, as to infectious agents, extremes of weather, or radiation, which may have a harmful effect* (The Free Dictionary online); *the state of being exposed to contact with something* (Google Dictionary online); *the state of having no protection from something harmful* (Merriam Webster Dictionary online). Exposure implies in my view more than "being in the presence of", for example, encased asbestos. The nature of the investigation and the criteria that the qualified person must consider under subsection 10.4(2) of the COHSR is indicative that what is contemplated by Part X are the risks and hazards associated with being in contact with dangerous substances. While other sections of Part X refer to storage, identification, labeling, etc. of hazardous substances, 10.4 is concerned with actual exposure. Thus the issue, put in different terms, is whether there was a probability on April 15, 2012 that the employees would be exposed to airborne asbestos when they boarded the vessel for inspection. This is a question of fact that is determined of the basis of the circumstances of this case.

[44] In my opinion, before HSO Healey could draw the conclusion that a qualified person should have been appointed, he first had to make a finding that the employees in question would, in all probability, be in contact with airborne asbestos, or for that matter, with any other hazardous substance that may have been present on the vessel on that day.

[45] I am of the view that no facts have been presented that could reasonably support such a finding. If one steps back in time, there was no evidence on April 15, 2012 on the basis of which one can conclude that there was a probability that the employees would be exposed to airborne asbestos or other hazardous substances: at best, the answer to that question is unknown at that point in time.

[46] However, when HSO Healey conducts his investigation on May 14, 2012, and subsequently issues his direction on June 5, 2012, the results from the bulk sampling analysis performed by Pinchin LeBlanc on April 16 and 17 are known to him, and the report concludes that no airborne asbestos fibres were detected. Based on that evidence, the only conclusion open to HSO Healey, and to the undersigned for that matter, is that there was no likelihood of exposure that may cause a danger to the health of the employees on the days in question. This conclusion is also consistent with HSO Healey's decision of "no danger". The fact that the *CCG Shamook* underwent a refit or that the crew members were not able to answer questions as to the presence of asbestos on the ship does not establish, in my opinion, that there was a likelihood of exposure, within the meaning of section 10.4 of the COHSR.

[47] The respondent cites the *Air Canada* case to support its argument that the investigation under section 10.4 of the COHSR should also serve the purpose of determining the possible presence of a hazardous substance in the work place. In my view, the statements of the appeals officer in that case must be read in their factual context. That case was concerned with the de-icing of aircrafts with a substance known as "ethylene glycol". It is quite clear that employees were called upon to use, spray, handle, in other words were significantly exposed to the hazardous substance in carrying out their duties. The question at issue was whether the level of exposure (over or under the threshold limit value-ceiling of the substance) combined with the respiratory protective devices employees were provided with, presented a danger to the employees' health. In my view, those questions strike at the heart of the purpose of section 10.4 of the COHSR, when looking at the criteria set out under 10.4(2) and it is quite understandable that the appeals officer in that case concluded as he did. The evidence in the present case is clear that there was no use, manipulation, or even presence of airborne asbestos and consequently, no exposure or risk of exposure to that substance whatsoever.

[48] I agree with the appellant that HSO Healey's interpretation of section 10.4 of the COHSR amounts to an obligation to appoint a qualified person to determine whether there is a likelihood that employees' health or safety may be endangered by exposure. Such interpretation in circumstances where the employer, such as TCMS in the present case, has no control over the work places where marine safety inspectors carry out their duties as the regulators of marine activities and shipping, would lead to unintended and unreasonable results, in my view. Not knowing what to expect in each of the hundreds or thousands of vessels to be inspected, the employer, under that approach, would be required to appoint a qualified person to determine whether there may be a likelihood of exposure to any hazardous substances that may or may not be present on the vessel. How can the investigation proceed under such conditions, not knowing what the hazardous substance in question may be in the first place? In my view, a determination of likelihood of exposure to a particular hazardous substance must first be made before the obligation to appoint a qualified person arises. That interpretation is more consistent with what section 10.4 of the COHSR is meant to achieve. The purpose of section 10.4 being that a focused and extensive analysis under mandated criteria (sections 10.4(2), 10(5), 10(6)) of the particular hazardous substance to which employees will likely be exposed, is required.

[49] In my view, HSO Healey confused the obligations flowing from Part XIX (Hazard Prevention Program) and the prescriptions of section 10.4 of the COHSR. The purpose of the HIPP is to identify any known or foreseeable hazard in a way that provides information to employees as to what to expect when stepping on board a vessel. Mr. Kennedy acknowledged in his testimony that there were "gaps" in the HIPP and its application, up to and including at the time of the April 15, 2012 refusal. The hazard identification was indeed inadequate on the day of the refusal, as the employees were not provided with information regarding known or foreseeable hazards that may be present on the *CCG Shamook*. The evidence established that measures aimed at correcting the situation were initiated over the months of May and June of 2012 and recorded in an AVC, and those measures were found acceptable by HSO O'Neill. Under those circumstances, a direction enjoining the employer to comply with its obligations under paragraph 125(1)(*s*) of the Code and Part XIX of the COHSR based on the events of April 15, 2012, would serve no useful purpose, in my opinion. It is therefore not necessary to deal with the employer's argument that it is not open to an appeals officer to find a different contravention of the Code and

issue a direction under subsection 145(1) on the basis of evidence presented in the appeal proceedings.

[50] However, in my view, that is a distinct question from the one raised by the direction under appeal, which relates solely to the conditions that trigger the application of section 10.4 of the COHSR. It is quite clear that the employer considers that Captain Mackey did the right thing when he stopped his inspection after he suspected that the white substance on the ledges and deck of the vessel could be asbestos and the ship's officials could not provide clear information on the presence or condition of that substance. Had the bulk sampling analysis produced positive results as to the presence of airborne asbestos, then section 10.4 would have applied in my view and Captain Mackey's employer would have been required to appoint a qualified person to conduct an investigation and report back on his conclusions and recommendations, in light of the criteria set out in subsection 10.4(2) of the COHSR.

[51] How this obligation is implemented in a context where the employer does not own or have control of the work place adds to the complexity of the matter and raises another set of issues. In my view, the approach prevailing at TCMS to use their enforcement powers as administrators of shipping legislation - or deriving from the Code when they act as safety officers in the marine sector - to order the vessel operator to investigate and correct the situation, is a pragmatic and acceptable approach in their particular context. In my view, this does not amount to the employer contracting out its responsibilities under the Code: the outcome of such a process is to have the person responsible for the site ensure that it is safe <u>for TCMS employees</u>. By interrupting inspection services and using their statutory enforcement powers to have vessel operators ensure, through the appointment of subject matter experts to conduct tests, analyses, structural changes or otherwise rectify the problem identified, the employer is endeavouring to make sure that marine safety inspectors carry out their duties in a safe environment.

[52] I stress however that in such circumstances, any investigation that may be ordered and the report resulting from it must comply with the requirements of section 10.4, 10.5 and 10.6 of the COHSR with regard to its content, the process to be followed, the recommendations set out in the report and the appropriate precautionary measures to be undertaken as a result. The issue of whether marine safety inspectors have sufficient knowledge to understand the conclusions and recommendations in the report and fully appreciate the implications of exposure on their health, depending on the nature of the substance involved, is a question of fact to be determined in each case. It may be that in any given case, a special expertise is required to understand the conclusions and the recommendations of the qualified person and ensure their proper application in the context of marine safety inspectors' duties. The employer must therefore be prepared to address those situations, which are also matters of fact to be determined in each case. But as I mentioned earlier in these reasons, this is beyond what I consider to be the scope of the present inquiry.

[53] Having found that, on the basis of the facts of this case, there was no likelihood that health or safety of an employee was or may be endangered by exposure to a hazardous substance, in this case airborne asbestos, it results that the obligation under section 10.4 of the COHSR to appoint a qualified person did not arise. This is a threshold issue that must be established before a finding of contravention of 10.4 of the COHSR can be made and it was not

open to HSO Healey, in the circumstances of this case, to conclude on June 5, 2012, that section 10.4 of the COHSR had been breached. As a consequence, the direction is not well-founded and must be rescinded.

[54] In light of my decision, it is not necessary to address the question of whether TCMS managers are qualified persons for the purpose of section 10.4 of the COHSR. Although that issue was the subject of discussions between the employer and HSO Healey at the time of the events as a result of one manager, Mr. James Kenny, stating that he felt that “they were over their head” regarding questions of asbestos exposure on the *CCG Henry Larsen*, I was not provided with substantive evidence that would enable me to make an informed conclusion on the matter, in a general way, as the respondent is seeking. But I will say this: as part of the steps taken by the employer to comply with HSO Healey’s direction as required by law, Mr. Kennedy informed HSO Healey that he was appointing the Transport Canada Regional Environmental Affairs team to act as a “qualified person” under section 10.4 of the COHSR. The team comprises environmental scientists and engineers who deliver programs and services for Transport Canada pertaining to the environment such as contaminated sites management and environmental protection. The persons employed in that team have a variety of background in education and work experience which allows them to provide advice and expertise to assess hazards. This approach would appear to address the requirement that appropriate expertise may be called for as required, as I have alluded to earlier, to prepare or review the analyses and recommendations in the report contemplated by section 10.4 of the COHSR, once a likelihood of exposure to a dangerous substance that may endanger the health of employees is established through means such as the HIPP and THAs. However, given my disposition of the appeal that there is no contravention of section 10.4 in the present case, I consider that question to be academic insofar as the present proceeding is concerned.

[55] Likewise, the extent and adequacy of the training provided to employees on asbestos awareness and on the implementation of the HIPP and completion of THAs, is only peripherally relevant to the appeal and I make no finding or conclusion in that respect. I have concluded that compliance by TCMS with its HIPP is outside the scope of the present appeal and I refrain from making any further observations in that regard. This matter is best left with health and safety officers of the Labour Program in their compliance continuum with TCMS, as may be required.

Decision

[56] For the reasons set out above, the appeal is upheld and HSO Healey’s direction dated June 5, 2012, is rescinded.

Pierre Hamel
Appeals Officer