Occupational Health and Safety Tribunal Canada

Date: 2015-03-03
Case No.: 2014-33

Between:

VIA Rail Canada Inc., Appellant

and

Ashika Patel, Respondent

Indexed as: *VIA Rail Canada Inc.* v. *Patel*

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Decision:	The direction is rescinded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. Maxime Blais, Counsel, Beauvais Truchon, LLP
For the Respondent:	Mr. Danny Andru, Regional Representative, Unifor - Council 4000
Citation:	2015 OHSTC 4

REASONS

[1] This decision concerns an appeal filed by VIA Rail Canada Inc. ("VIA Rail" or "the employer") on July 18, 2014, pursuant to subsection 146(1) of the *Canada Labour Code* ("the Code"), against a direction issued on July 3, 2014, by Health and Safety Officer (HSO) Francesco Misuraca, with the Labour Program of Employment and Social Development Canada (ESDC).

[2] The grounds in support of the appeal are set out in the appeal form filed with the Occupational Health and Safety Tribunal Canada (Tribunal) by Ms. Marie-Claude Laporte, on behalf of VIA Rail Canada Inc., read as follows:

> The instruction given to the employer and issued on July 3rd by the Health and Safety Officer Francesco Misuraca against Via Rail inc. and related to Mrs. Ashika Patel's situation is unfounded in facts and in law.
>
> In fact, the instruction does not identify in any way that the work schedule of 9 am to 5 pm Monday to Friday and 8h30 am to 4h30 pm on Saturdays this poses a danger to Mrs. Patel's health and to her fetus.
>
> Moreover, the argument raised by Mrs. Patel to support her refusal to work is not based on the existence of a health and security risk for her and her fetus under the Canada Labour Code.

[3] The direction under appeal reads as follows:

> IN THE MATTER OF THE *CANADA LABOUR CODE*
> PART II – OCCUPATIONAL HEALTH AND SAFETY
>
> DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145(2)(*a*)
>
> On Monday June 30, 2014, the undersigned health and safety officer conducted an investigation following a refusal to work made by **Ashika Patel** in the work place operated by Via Rail Canada Inc., being an employer subject to the *Canada Labour Code,* Part II, at 50 Drummond Street, Building "C", Toronto, Ontario, M8V 4B5, the said work place being sometimes known as Via Rail Canada (Maintenance Centre).
>
> The said health and safety officer considers that the performance of an activity constitutes a danger to an employee while at work:
>
> On the advice of a qualified medical practitioner, a work schedule of 9 am to 5 pm Monday to Friday and 8:30 am to 4:30 pm on Saturdays, poses a risk to Ashika Patel's health and to her foetus.
>
> Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(*a*) of the *Canada Labour Code*, Part II, to take measures to correct the hazard or condition that constitutes the danger immediately.

> Issued at Toronto, this 3rd day of July, 2014.
>
> [signed]
> Francesco Misuraca
> Health and Safety Officer
> […]

[4] The direction was issued further to HSO Misuraca's investigation into Ms. Patel's refusal to work on June 27, 2014. The basis on which Ms. Patel invoked her right to refuse is set out in the Work Refusal Form dated June 27, 2014, in the following terms:

> Requesting to start shift earlier, since I get tired as the day goes on – she does not want to – said she can accommodate only two days - I am refusing work under section 132 under the Canada Labour Code, Part II and section 128 of the Canada Labour Code, Part II – because of the accumulative of this schedule – it's a danger to myself and my unborn child.
>
> […]

Background

[5] The material facts relevant to the present appeal are found in HSO Misuraca's report as well as in an affidavit authored by Ms. Michelle Gardner filed by the appellant's counsel along with his written submissions, in the context of the process that I determined to be appropriate to deal with this appeal, and which I will describe in more detail later in these reasons. For the most part, those facts are not disputed. What is at issue is the conclusions to be drawn from those facts in regards to whether Ms. Patel was exposed to a danger within the meaning of the Code when she refused to carry out her duties.

[6] Ms. Patel was hired by VIA Rail as an onboard train service employee on October 6, 2008.

[7] On May 26, 2014, Ms. Patel presented to her supervisor a note from her midwife stating that being 7 weeks pregnant, she needed to be off alternate work that requires any heavy lifting, bending or any strenuous duties, pushing or pulling. The employer accommodated Ms. Patel's condition by appointing her to administrative functions, under the supervision of Ms. Gardner, Manager of Customer Experience for the employer. Ms. Patel was accordingly assigned to modified duties: filing, sorting and organization of files and blueprints for the Real Estate Department of VIA Rail. Ms. Patel also did administrative work for the On-Train Services Department such as filing documents and data entry. As stated by Ms. Gardner in her affidavit, those tasks presented very low and limited risks, if any risk at all, since they consisted in slow pace clerical work without stress or pressure.

[8] It should be stressed that the nature of Ms. Patel's modified duties and functions is not at issue in the present appeal. Rather, the nub of the dispute relates to Ms. Patel's hours of work. Her schedule was made weekly and included two rest days (Sunday and Wednesday) as well as

five days of work consisting of three days from 9 am to 5 pm and two days from 8:30 am to 4:30 pm (or 8 am to 4 pm exceptionally).

[9] In the middle of June 2014, Ms. Patel asked Ms. Gardner if her starting and ending times could be modified to 8 am to 4 pm for all five days. Ms. Gardner states in her affidavit that Ms. Patel indicated that she wanted such a change in order to have the same working hours as one of her work colleagues, who was also accommodated by reason of her pregnancy. Ms. Patel's request was denied, on the basis that there were already a sufficient number of employees working the hours that she was requesting, considering an appropriate distribution of the workload. According to Ms. Gardner, Ms. Patel did not mention anything about being tired or health problems relating to her condition of pregnancy at that time.

[10] In an email dated June 19, 2014, Ms. Patel again asked her supervisor to modify her work schedule in order to start earlier than 9 am, due to the fact that "grabbing the bus pass 5 pm is very difficult in this area". Her request was again declined. That email was filed as an exhibit along with the appellant's submissions and was also referred to by HSO Misuraca in his report.

[11] On June 27, 2014, Ms. Patel presented Ms. Gardner a note dated June 25, 2014 from her midwife with the Midwife Alliance, recommending that she starts work earlier "as she becomes extremely exhausted in the afternoon". Ms. Gardner informed Ms. Patel on that day that the request was denied and that VIA Rail was requiring additional medical information to support the schedule change and to elaborate on the risks associated with the current schedule. Ms. Patel exercised her right to refuse to work on that same day.

[12] In response to the employer' request, Ms. Patel provided a medical note dated June 28, 2014 signed by Dr. S. Kashani from the Lakeshore Village walk-in medical clinic. The handwritten note reads as follows:

> Above patient is pregnant. She feels tired in afternoon. It is in her interest to start work one hour earlier and finish one hour earlier as she wishes.

[13] After conducting his investigation into the work refusal on June 30, 2014, HSO Misuraca concluded that Ms. Patel's work schedule exposed her and her unborn child to a danger and issued the direction under appeal. HSO Misuraca states in his report that on July 2, 2014, he spoke to Dr. Kashani to clarify her note. Dr. Kashani stated that in her opinion, if Ms. Patel was to continue in her current job functions and schedule, she poses a risk to her health and to that of the foetus. She further stated that Ms. Patel feels very stressed in light of the situation and because she is in her first trimester of pregnancy, the feelings of exhaustion are more prevalent.

[14] HSO Misuraca thus concluded as follows, as he stated at page 7 of his investigation report:

> In the case at hand, the employee exercised her right to refuse to perform activities as an officer (*sic*) worker with a shift schedule of five days of work per week with three days of 9am – 5pm and two days of 8:30am – 4:30pm or 8am – 4pm because she believes that the exhaustion she feels by working past 4pm, constitutes a danger to her health and to the health of the foetus. While the midwife is not considered a qualified medical

> practitioner for his purpose, the M.D. at the medical clinic is. It was this doctor's medical opinion that confirmed that this condition in the workplace, specifically the shift times and the employee's level of stress, poses a risk to Ms. Patel's health and that of the foetus.
>
> In consideration of the circumstances prevailing at the time of the investigation, including the advice of a qualified medical practitioner, a work schedule of five days of work per week with three days of 9am – 5pm and two days of 8:30am – 4:30pm or 8am – 4pm, poses a risk to Ashika Patel's health and to her foetus and is therefore a danger.

[15] Along with its submissions, the employer filed with the Tribunal a report prepared by Dr. Marcel Pigeon, described as the Chief Medical Officer for VIA Rail Canada since 1992. Dr. Pigeon has 38 years of experience in occupational medicine and states that he has developed a degree of expertise concerning the risks that may apply in the work place involving a pregnant woman and her unborn child. The respondent does not dispute Dr. Pigeon's qualifications. In his report he expresses an opinion on the question of whether in the circumstances related above, and on the basis of the medical information available, whether it is reasonable to conclude that there are risks to Ms. Patel's health and that of her foetus if she is to continue working on the work schedule existing at the time of her refusal. In formulating his opinion, Dr. Pigeon considered the note from the midwife and the medical note from Dr. Kashani, as well as Ms. Patel's medical record provided by Dr. Kashani's clinic, which counsel for the employer filed with his submissions.

[16] Dr. Pigeon states that the risk factors to a pregnant woman may be categorized under different categories such as: biological, chemical, physical or ergonomic. Among other risk factors, he states that it is accepted that pregnant patients should be exempted from working on rotating shifts, as rotating shifts can disturb the sleep cycle and contribute to an inordinate state of fatigue. He then states as follows:

> In the present case, I understand that Mr. Misuraca concluded that the fact the day shift work schedule, could vary from 30 minutes to an hour every day, would be for him a schedule variation that could constitute a risk for the health of Ms. Patel or that of her foetus.
>
> I must say that I was unable to find any study showing that such a minimal range of variation in a work schedule, which in this case is always on a daytime shift anyway, could cause any repercussions on the state of health of a pregnant woman or that of her unborn child.
>
> […]
>
> I must further add that Doctor Kashani's note does not enable us to determine whether Ms. Patel might present some unusual specific medical condition such that, in her special situation, even a minimal variation in her daytime work schedule could cause the slightest verifiable medical repercussion.
>
> To conclude, I consider that, absent any other specific medical information, I do not see how Ms. Patel could not carry out a daytime work schedule according to the minimally varying shift assignments indicated in the case-file, taking as a given that she will never exceed 8

> working hours a day, and can therefore benefit every day from clearly sufficient periods to allow her adequate rest.
>
> [Underlining added]

[17] Before setting out the issue and the parties' main arguments in support of their respective positions, I find it appropriate to set out some of the facts that transpired in the processing of the appeal by the undersigned.

[18] Given the time-sensitive nature of the issue, a first pre-hearing teleconference was held on August 19, 2014, at which Ms. Barbara Court was representing the interest of the respondent. Since the employee had invoked health issues related to her pregnant condition as the basis for her refusal to work, the employer's counsel sought the production of Ms. Patel's medical record related to her pregnancy, in the possession of the Midwife Alliance, well ahead of any hearing to be scheduled in order to obtain a separate medical opinion in time for the hearing. The hearing was eventually scheduled on October 21 and 22. This arrangement did not cause any concern to Ms. Court and an agreement was reached at the teleconference that Ms. Patel would sign off the necessary authorizations to have the Midwife Alliance release that information to the employer's counsel, in a diligent and timely manner. Counsel for the appellant forwarded the said authorizations to Ms. Court the next day, August 20, 2014.

[19] On October 2, 2014, the Tribunal was informed by the appellant that it had not yet obtained a properly dated and signed authorization allowing the employer to have access to the midwife's medical record, which raised a concern with the rapidly approaching hearing dates. The employee had apparently post-dated her authorization to October 8, 2014, which caused the Midwife Alliance to refuse to release the documentation in September, when it was first approached to do so. In spite of several attempts by counsel for the employer to sort things out with the respondent's representative, he was unsuccessful in doing so.

[20] As the undersigned was out of the country between September 20 and October 11, 2014, a second pre-hearing teleconference could not be convened earlier than on October 16, 2014, at which Mr. Danny Andru, Regional Representative, Unifor Council 4000, represented the respondent. Based on the information above, I felt compelled to issue an Order dated that same day, pursuant to paragraph 146.2(*d*) of the Code, enjoining Ms. Patel to obtain from the Midwife Alliance a copy of her medical record and communicate that record to the employer's counsel, with a compliance date of October 22, 2014. In the meantime, the October 21-22 hearing dates were cancelled and the Tribunal proceeded to consider dates in November 2014 for the hearing.

[21] On October 24, 2014, Mr. Andru informed the Tribunal by email that Ms. Patel had not complied with the Order, that she was no longer under the care of the midwife and that she had an appointment with her physician in "late October". She thus felt that providing the midwife's record was no longer relevant. In light of this information, a third pre-hearing teleconference was held, on November 3, 2014, at which Mr. Andru confirmed that he had reminded Ms. Patel of her obligation to comply with the Order, but that she indicated she would not comply, and that she was off work since September 29, 2014, her absence apparently related to work-related stress. Mr. Andru added that Ms. Patel may not be capable to participate in the present appeal proceedings as a result.

[22] I asked Mr. Andru to inform the Tribunal before November 5, 2014, as to whether and when Ms. Patel would provide her medical record in the possession of the Midwife Alliance, either directly herself or via her attending physician. And before considering a new hearing date, I also sought from Mr. Andru a prognosis as to Ms. Patel's capacity to attend a hearing in the present matter, and if not, alternate means of presenting her evidence such as filing an affidavit or giving her testimony by way of teleconference.

[23] On November 4, 2014, Mr. Andru informed the Tribunal by email "that Ms. Patel's intentions are that she will not be able to disclose the medical information requested by November 5th and she is not intending to disclose this information anytime soon, if at all. Ms. Patel also informed me that she would not be attending any oral hearing."

[24] In the circumstances, I decided that the appeal would be dealt with by way of written submissions, on the basis of the record before the Tribunal and of any additional supporting documentation, including relevant documentary evidence or sworn witness statement that the parties may wish to file with the Tribunal in support of their position regarding the appeal.

Issue

[25] The issue raised by the present appeal is whether Ms. Patel – or her foetus - were exposed to a danger as defined in the Code resulting from her work schedule, and whether the direction under appeal that was issued after such a finding of danger, is well founded in fact and law in the circumstances of this case.

Submissions of the parties

A) Appellant's submissions

[26] In summary, counsel for the appellant submits that HSO Misuraca erred when he found that Ms. Patel's work schedule on the day of her refusal presented a danger to her or her unborn child. After reviewing the relevant provisions of the Code, namely sections 128 and 132, counsel for the employer stresses that a conclusion of danger cannot be based on speculation or hypothesis and must conclude that there is a reasonable probability that the risks to the health of the employee or her foetus will materialize in the circumstances (*Martin* v. *Canada (Attorney General)* 2005 FCA 156; *Canada Post Corporation* v. *Pollard,* 2008 FCA 305; *Verville* v. *Canada (Service correctionnel),* 2004 FC 767).

[27] Counsel for the employer submits that the conclusion of danger reached in the present case was reached in the absence of factual evidence or medical grounds. The medical evidence presented by Ms. Patel is unspecific and fails to explain in what way her work schedule presents a danger to her and her unborn child, and why such a slight variation in her hours of work would remove the risk to her health. Counsel further argues that whether the matter is looked at under section 128 or section 132 of the Code, the evidence fails to establish that the job functions or the activity poses a risk to the health of the employee or to the foetus. In fact, counsel for the appellant argues that the medical evidence submitted by Ms. Patel is complaisant and must be considered in the context of her previous requests to change her work schedule for other purposes than her medical condition. Counsel concluded that the opinion provided by Dr. Marcel

Pigeon is conclusive that, all things considered, no reasonable risk of health problem to the employee or her foetus has been established, and should be preferred.

[28] Counsel for the employer also noted the lack of cooperation of Ms. Patel in the appeal process and referred to sections 142, 143, 146.1 and 146.2 of the Code. In his view, the respondent should be forfeited from any additional evidence or pleadings given her attitude and conduct in regard to the appeal process.

B) Respondent's Submissions

[29] The respondent's representative submits that the direction is well-founded. He first suggests that Ms. Gardner may have misinterpreted the reasons for Ms. Patel's request of schedule change and, after commenting on Ms. Gardner's management approaches, warned that her affidavit evidence is not entirely credible and should be taken with caution.

[30] The respondent's representative further argues that the note from Ms. Patel's midwife confirmed that she became extremely exhausted in the afternoon, and it is reasonable to conclude that she would be more exhausted at 5 pm than at 4 pm. He stresses that although the employer did not accept the midwife's conclusions, as she is not a medical practitioner, the use of midwives has become increasingly popular and their expertise largely accepted, as reflected in a publication of the World Health Organization, which he quoted in his submissions. Therefore, VIA Rail was unreasonable in requiring that a physician provide a medical justification, in light of the fact that she had been under the care of a mid-wife since the beginning of her pregnancy, and that a physician would obviously not have the prior history of that patient. In his view, VIA Rail must take some of the blame for not recognizing Ms. Patel's midwife as a medical practitioner and forcing her to find alternate medical expertise.

[31] The respondent's representative points out that Dr. Pigeon never interviewed or examined Ms. Patel, nor did he have communication with her medical practitioner or midwife. HSO Misuraca was therefore correct to consider the medical evidence submitted as the basis for his conclusions and his finding of danger and resulting direction should remain undisturbed.

C) Reply

[32] The appellant's counsel urges the appeals officer to disregard the respondent's comments in his submissions regarding Ms. Gardner's management approaches or credibility, as they are not founded on any testimony or written statement.

[33] Counsel for the appellant points out that it is the Code that defines who should provide medical justification under section 132, and dismisses the claim that it is VIA Rail's unilateral determination of who they will accept as the medical practitioner that caused the problem. In any event, the issue is not whether a midwife should be considered a "medical practitioner" for the purpose of section 132, but whether Ms. Patel's schedule was posing a risk (or danger) for herself or her unborn child. However one looks at them, the midwife's medical note and Dr. Kashani's are lacking in particularity, are unspecific, unscientific, inconclusive and

complaisant, especially considering Ms. Patel's refusal to provide her full medical record, to attend any hearing and or submit herself to cross-examination.

Analysis

[34] After considering the evidence on record and the parties' submissions, I am of the view that the direction must be rescinded, for the reasons that follow.

[35] The direction was issued after HSO Misuraca's investigation further to Ms. Patel's work refusal on June 27, 2014. Section 128 of the Code authorizes employees to exercise the right to refuse in the following terms:

> **128.** (1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that
>
> (*a*) the use or operation of the machine or thing constitutes a danger to the employee or to another employee;
>
> (*b*) a condition exists in the place that constitutes a danger to the employee; or
>
> (*c*) the performance of the activity constitutes a danger to the employee or to another employee

[36] "Danger" is defined in section 122 of the Code as follows, as it read at the time of the work refusal:

> **122.** (1) "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;

[37] The nature of the analysis required before a finding of danger can be made was the subject of a number of Court cases, which have provided guidance on the application of the definition of danger in relation to a condition in the work place or, as HSO Misuraca enunciates in his direction, the performance of an activity.

[38] Regarding the notions of a situation that may reasonably be expected to cause injury or illness, the Federal Court of Appeal expressed the following comment in *Martin* v. *Canada (Attorney General)* 2005 FCA 156:

> [37] I agree that a finding of danger cannot be based on speculation or hypothesis. However, when attempting to ascertain whether a potential hazard or future activity could reasonably be expected to cause injury before the hazard could be corrected or the activity altered, one is necessarily dealing with the future. Tribunals are regularly required to

> infer from past and present circumstances what is expected to transpire in the future. The task of the tribunal in such cases is to weigh the evidence to determine whether it is more likely than not that what an applicant is asserting will take place in the future.
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> [Underlining added]

[39] Along the same lines, the Federal Court of Appeal wrote the following in *Canada Post Corporation* v. *Pollard*, 2008 FCA 305:

> [16] The Appeals Officer**,** at paragraphs 71 to 78, reviewed the case law on the concept of "danger". Relying more particularly on the decision of this Court in *Martin v. Canada (Attorney General)*, 2005 FCA 156 and that of Madam Justice Gauthier in *Verville v. Canada (Correctional Service)*, 2004 FC 767, he stated that the hazard or condition can be existing or potential and the activity, current or future; that in this case the hazards were potential in nature; that for a finding of danger, one must ascertain in what circumstances the potential hazard could reasonably be expected to cause injury and to determine that such circumstances will occur in the future as a reasonable possibility (as opposed to a mere possibility); that for a finding of danger, the determination to be made is whether it is more likely than not that what the complainant is asserting will take place in the future; that the hazard must be reasonably expected to cause injury before the hazard can be corrected; and that it is not necessary to establish the precise time when the hazard will occur, or that it occurs every time.
>
> [17] This statement of the law is beyond reproach or is, at the least, reasonable in the *Dunsmuir* sense.
>
> [Underlining added]

[40] In *Verville* v. *Canada (Service correctionnel)*, 2004 FC 767, the Federal Court stated as follows:

> [36] In that respect, I do not believe either that it is necessary to establish precisely the time when the potential condition or hazard or the future activity will occur. I do not construe Tremblay-Lamer's reasons in Martin above, particularly paragraph 57, to require evidence of a precise time frame within which the condition, hazard or activity will occur. Rather, looking at her decision as a whole, she appears to agree that the definition only requires that one ascertains in what circumstances it could be expected to cause injury and that it be established that such circumstances will occur in the future, not as a mere possibility but as a reasonable one.
>
> [Underlining added]

[41] The danger can thus be prospective to the extent that the activity is capable of coming into being or action over time and is reasonably expected to cause injury or illness to a person exposed to it before the activity can be altered. The guidance found in those excerpts from relevant judgements regarding the application of section 128 and the definition of "danger" is

premised on the duty of the appeals officer to conduct a careful appreciation of the facts in each case. Whether a danger is immediate or prospective, a conclusion that a situation could reasonably be expected to cause injury or illness must be based on cogent and convincing evidence.

[42] In this case, the evidence in question is essentially medical in nature, in light of the grounds invoked by Ms. Patel to refuse to work, which relate to her state of pregnancy. The appeal process has been described as a *de novo* process where the appeals officer is not bound by the conclusions of the health and safety officer nor by his factual findings set in his or her investigation report (*Canada Post Corporation*, 2010 OHSTC 002; *Correctional Service Canada Millhaven Institution* (August 10, 2006), Decision No. 06-026). It is the responsibility of the parties to present evidence so as to allow the appeals officer to reach an informed conclusion on the existence of a danger based on the factual circumstances of the case.

[43] After reviewing the medical evidence on the record, I am of the view that it was not established in any conclusive way that Ms. Patel's work schedule in effect at the time of her refusal posed risks to her health or that of her unborn child, that could be said to constitute a danger within the meaning of the Code.

[44] Dr. Kashani's note is at best cryptic and does not assert in any way, in my opinion, that Ms. Patel's work schedule is likely to cause injury or illness to her or her foetus. Dr. Kashani is not Ms. Patel's attending physician. Her note is based solely on Ms. Patel's statement that she feels tired in the afternoon and does not refer to any kind of medical examination that may have revealed a particular health issue or pregnancy-related pathology. In fact, the note uses words such as "it is in her interest" to start work earlier and "as she wishes". Such a statement hardly establishes that Ms. Patel will be exposed to a danger, i.e. a reasonable likelihood of illness or injury, if she continues to work on the existing schedule.

[45] Turning to Ms. Patel's midwife's note dated June 25, 2014, the note refers to Ms. Patel's "pregnancy induced tiredness", and recommends that her shifts start earlier, as she "becomes extremely exhausted in the afternoon", as Ms. Patel related to her. I agree with the appellant that a midwife is not a "medical practitioner" as contemplated by section 132 and defined in section 166 of the Code, and as such could not satisfy the requirement of section 132 to justify the preventive reassignment from her duties. Since the direction was not issued on the basis of section 132, I consider this question to be immaterial to the determination of the appeal. However, I am prepared to consider the midwife's advice set out in her note to be relevant evidence for the purpose of determining whether a danger existed or not. The weight to give to such evidence then becomes the issue. As it was the case for Dr. Kashani's note, I am equally of the view that the note falls short of establishing that Ms. Patel was facing a danger if she continued to work on her assigned schedule. I am simply unable to infer from the short statement on that note that, as a reasonable probability, Ms. Patel or her foetus would be exposed to a danger to their health if the schedule is not modified by moving the starting and ending times one hour earlier, in the three days out of five that it is 9 am to 5 pm.

[46] None of these notes evoke a particular or abnormal condition related to Ms. Patel's pregnancy that would explain why such a slight change in Ms. Patel's hours of work would cure the potential threat to her health or that of her foetus that I am asked to infer, and why not doing

so would present a danger to her. In the absence of more specific evidence from those individuals on the nature of the illness or injury and the causal link with the work schedule, I am left to wonder how such a conclusion can be explained. I therefore accept the opinion expressed by Dr. Pigeon in his evaluation of the circumstances, that Dr. Kashani's note or evaluation notes for June 28, 2014 do not enable us to determine whether Ms. Patel might present some unusual specific medical condition such that, in her special situation, even such a minimal variation in her daytime work schedule could cause the slightest verifiable medical repercussion.

[47] While performing physically demanding tasks, being exposed to certain chemical agents or as Dr. Pigeon points out, working on rotating shifts, may not require extensive medical justification to support a conclusion that those activities may present unacceptable risks to a pregnant employee, the same conclusion can hardly be reached in the absence of more elaborate medical justification regarding the kind of schedule change that Ms. Patel was seeking. I stress that neither Dr. Kashani nor Ms. Patel's midwife were called to testify or to provide affidavit evidence, which could have served to establish more persuasively that Ms. Patel's schedule posed a danger to her and her foetus, rather than inconvenience or discomfort. Indeed, I venture to say that what is described in those notes is the tiredness and resulting discomfort frequently experienced by many pregnant women in the early stages of pregnancy. In order to come to a finding of danger in such a context, I am of the view that a much more detailed medical evaluation related to the patient and the unborn child's state of health, the symptoms experienced by the employee, the medical history of the patient, the work environment and an explanation of the risks of possible complications as a result, is required.

[48] Thus, in the absence of persuasive medical evidence clearly linking Ms. Patel's schedule to a potential threat to her health and the health of her foetus, I am simply unable to reach a conclusion of danger.

[49] Furthermore, this is where Ms. Patel's conduct in the context of the present proceedings also becomes relevant to my determination that her work schedule did not expose her or her foetus to a danger within the meaning of the Code. Ms. Patel could have testified as to the symptoms she experienced or any previous medical situation that may be relevant to the issue, if only to dispel the suggestion that her claim of danger was an afterthought after her requests to change her schedule, apparently for practical and non-health related reasons, were turned down. She unfortunately took a cavalier attitude vis-à-vis the appeal process and through her representative, informed the Tribunal that she would not communicate her medical record held by her midwife, in spite of my Order to do so, and would not participate in any way in the appeal proceedings, without further explanation or justification.

[50] Against that background, I am compelled to draw an adverse inference against Ms. Patel's contention that she was exposed to a danger on June 28, 2014 when she refused to work. I also cannot ignore the uncontradicted evidence that she had asked on two occasions, shortly before her work refusal, to change her scheduled hours to start earlier in the day, without mention of any health issue. Without her testimony to elucidate some of those facts, and more specific and persuasive medical evidence related to her particular condition, I am not inclined to give much weight to Ms. Patel's statements that, as I pointed out earlier, largely formed the basis of the medical evidence she provided the employer in support of her claim.

[51] It is regrettable that Ms. Patel, by her attitude in the present proceedings, has adversely affected her case. Her initial failure, followed by her outright refusal, to comply with the appeals officer's production Order are unacceptable and contemptuous of the appeal process. Those actions constitute an offence under the Code, for which Ms. Patel could be facing penal prosecution. The appeals officer's powers regarding the enforcement of its orders are limited and to that extent, the appeal system is largely premised, in the final analysis, on the parties' goodwill and willingness to cooperate. A party's decision not to cooperate, let alone not to participate in the process, such as Ms. Patel's, does not serve the sound administration of the Code and can only be detrimental to that party's interest.

[52] On a final note, I am conscious of the fact that by the time these reasons are issued, the matter at issue will no longer have practical relevance, as Ms. Patel will have given birth to her child. The mootness of the matter was not raised by the parties. I cannot refrain from expressing the concern that Ms. Patel's lack of cooperation, which resulted in delays in the management of the appeal case, turned out to be self-serving given the time-sensitive nature of the issue and the statutory obligation for the employer to comply with the direction pending the appeal. Nevertheless, I am hopeful that these reasons will provide guidance to the parties for situations of the same kind that may arise in the future.

[53] For all the above reasons, I conclude that the medical evidence before me does not establish in any conclusive way that Ms. Patel's work schedule exposed her to a situation that could reasonably be expected to cause her or her foetus, illness or injury when she refused to work on June 27, 2014. As a result, that HSO Misuraca's direction is not well-founded in fact and law. Accordingly, the appeal is upheld and the direction is hereby rescinded.

Decision

[54] For these reasons, I rescind the direction issued on July 3, 2014 by HSO Misuraca.

Pierre Hamel
Appeals Officer