Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Date: 2020-06-17
Case No.: 2017-23

Between:

Canada Border Services Agency

and

Public Service Alliance of Canada

Indexed as: *Canada Border Services Agency v. Public Service Alliance of Canada*

Matter:	Appeal filed under subsection 146(1) of the *Canada Labour Code* against a direction issued by an official delegated by the Minister of Labour.
Decision:	The direction is rescinded.
Decision rendered by:	Mr. Olivier Bellavigna-Ladoux, Appeals Officer
Language of decision:	French
For the appellant:	Mr. Sean Kelly, Senior Counsel, Labour and Employment Law Group, Department of Justice Canada
For the Respondent:	Ms. Kim Patenaude, Counsel, Raven, Cameron, Ballantyne & Yazbeck LLP / s.r.l.
Citation:	2020 OHSTC 5

REASONS FOR DECISION

[1] The present reasons concern an appeal brought pursuant subsection 146(1) of the *Canada Labour Code* (the *Code*) against a direction issued under subsection 145(2)(a) of the *Code* on June 1, 2017, by Mr. Régis Tremblay, an official delegated by the Minister of Labour ("ministerial delegate").

Background

[2] The Canada Border Services Agency (CBSA) has three offices to process and examine international mail, in Toronto, Vancouver and Montréal. The Border Services Officers (BSOs) who work there apply the *Customs Act*, which allows them to examine, open and take samples from packages that they suspect on reasonable grounds contain goods that are prohibited, controlled or regulated under another Act of Parliament.

[3] Since 2013, fentanyl has been found in many packages imported illegally to Canada from China. On June 27, 2016, the first case of imported carfentanil (an opioid 100 times more toxic than fentanyl) was found in Vancouver. Towards the end of 2016, unprocessed packages presumed to contain fentanyl and its derivatives were redirected to the Léo-Blanchette International Mail Processing Centre (IMPC) in Montréal to reduce congestion at the Vancouver office. BSOs at the Léo-Blanchette IMPC began processing these packages towards the end of March 2017. In preparation for the processing of these packages, the employer instructed employees on how to handle fentanyl and carfentanil and delivered training on how to administer naloxone, the antidote to fentanyl.

[4] In the course of normal operations, one of the tasks of BSOs is to look for suspicious packages that may contain narcotics. When a BSO intercepts a sealed suspicious package, it is put aside and tests (NIK test, ion detector) are performed to identify the unknown substance. Suspicious packages are examined by a BSO using a narcotics identification kit (NIK) and nitrile gloves. To do so, the BSO must make a small incision in the package and take a tiny sample of the unknown substance. This sample is then placed in test tubes to produce a chemical reaction. Depending on the results, the package will either be released or sent to a laboratory for further testing.

[5] On April 26, 2017, Ms. Geneviève Leclair, a BSO, was found unconscious by a co-worker in the break room of the Léo-Blanchette IMPC (the Leclair incident). Co-workers began CPR while waiting for first responders to arrive. When the paramedics arrived, a co-worker told them that Ms. Leclair was working on an export package that she had identified as containing methamphetamine. The operations manager, Mr. Éric Paradis, also reportedly told the paramedics that the CBSA had concerns about potential fentanyl exposure in its operations. The paramedics decided to give her the antidote naloxone and transported her to the hospital. Meanwhile, the packages Ms. Leclair was working on before the incident were secured and then dropped off at Health Canada's laboratory by two co-workers.

[6] Following this incident, the CBSA suspended all testing, including NIK testing, of suspicious packages. The CBSA also issued reminders and clarifications regarding the procedures for examining suspicious packages, and had certain rooms at the Léo-Blanchette IMPC decontaminated. Samples were taken, revealing a small amount of fentanyl in the work place. No trace of carfentanil was found.

[7] On April 28, 2017, the incident was reported to the Labour Program. Mr. Régis Tremblay was assigned to the case and decided to initiate a hazardous occurrence investigation under subsection 141(1) of the *Code* given that the victim had suffered serious injury.

[8] On May 29, 2017, he issued an initial direction under paragraphs 145(1)(a) and (b) of the *Code* since he believed that the employer had contravened section 19.4 of the *Canada Health and Safety Regulations* for not having identified and assessed the occupational hazards of potential BSO exposure to fentanyl and related drugs. The direction also identified a contravention of paragraph 125(1)(z.04) since he also considered that the employer had not developed and implemented a hazard prevention program. This direction was not appealed by the employer.

[9] On June 1, 2017, the official delegated by the Minister of Labour issued a second direction under paragraph 145(2)(a) of the *Code*, which reads as follows:

IN THE MATTER OF THE *CANADA LABOUR CODE*

PART II — OCCUPATIONAL HEALTH AND SAFETY

DIRECTION TO EMPLOYER PURSUANT TO PARAGRAPH 145(2)a)

On May 25, 2017, the undersigned official delegated by the Minister of Labour conducted an investigation in the work place operated by the Canada Border Services Agency, being an employer subject to the *Canada Labour Code*, Part II, at 555 McArthur, Ville Saint-Laurent, Quebec, H4T 1T4, the said work place being sometimes known as Canada Border Services Agency.

The said official delegated by the Minister of Labour is of the opinion that the current situation in the work place poses a danger for an employee at work, more specifically:

The fact that employees can be exposed to a lethal or incapacitating dose of fentanyl or a related drug while performing their regular duties, without being able to detect it and without measures in place to protect them.

On April 26, BSO Geneviève Leclair was examining packages for export in the seizure room of the Léo-Blanchette IMPC. She came into contact with carfentanil, an extremely powerful and toxic synthetic opioid (100 times more toxic than fentanyl). She was found unconscious in the break room by a co-worker and had a very weak pulse. First aid administered along with the antidote naloxone in three consecutive doses saved her life.

> The CBSA's last operational bulletin OPS-2016-19 (dated July 22, 2016) on the handling of fentanyl applies only to imports and states that employees must wear personal protective equipment and follow OHS guidelines at all times when the presence of fentanyl is suspected. However, the victim could not suspect the presence of fentanyl since the packages in question were intended for export. The victim identified these packages as containing other drugs, such as methamphetamine, which led her to further examine their contents. Moreover, the Ionscan detector available at the work place cannot detect fentanyl.
>
> Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(a) of the *Canada Labour Code*, Part II, to immediately implement measures to remedy the situation or modify the task.
>
> Pursuant to subsection 145(3), a notice bearing number H0837 was posted and cannot be removed without the officer's authorization.
>
> Issued at Montreal this 1st day of June 2017.

[10] The ministerial delegate also, pursuant to his powers under subsection 145(3) of the *Code*, posted a notice of danger in the work place, requiring the employer to stop opening any packages at the Léo-Blanchette IMPC.

[11] After receiving the direction, Mr. Paradis, the CBSA operations manager, contacted the ministerial delegate to inform him of the preventive measures that were in place on the day of the incident, as well as the steps and additional procedures taken by the CBSA since the incident. On receipt of this letter, the ministerial delegate informed Mr. Paradis that the response provided was not sufficient since he needed a commitment from the CBSA regarding the preventive measures that will be taken to remedy the situation that he identified in his direction as constituting a danger.

[12] On June 23, 2017, Mr. Paradis issued a further response to his letter of June 12, providing a detailed list of the measures taken and that will be implemented by the CBSA. In response to this letter, the ministerial delegate withdrew the notice of danger, thus allowing packages to be examined and opened by BSOs.

[13] On June 29, 2017, the CBSA filed an appeal of the direction of June 1, 2017, with the Occupational Health and Safety Tribunal Canada (the Tribunal). A hearing was held on May 13, 14 and 15, 2019.

Issue

[14] The issue before me is whether the danger direction issued by the ministerial delegate under paragraph 145(2)(a) of the *Code* is well-founded, more specifically, whether employees at the Léo-Blanchette IMPC were exposed to a danger as defined under the *Code*.

Ministerial delegate's testimony

[15] The ministerial delegate explained his investigation procedure, which led to the issuance of the danger direction on June 1, 2017. He presented a summary of the grounds on which he

based his danger decision. He stated that during his investigation, he did not have access to Ms. Leclair's medical file and was unable to obtain official confirmation that she was intoxicated by fentanyl or one of its derivatives during the work incident involving the drug.

Submissions of the parties

Submissions of the appellant

[16] The appellant called two witnesses. The first was Mr. Brian J. Beech, an industrial hygiene expert from Health Canada. A certified industrial hygienist, Mr. Beech has experience that is especially relevant to this case, more specifically, he performed an opioid risk analysis for officers and employees of the Royal Canadian Mounted Police in connection with seizure warrants and operations in illegal narcotics laboratories and warehouses. The second witness was Ms. Maria Nohos, Superintendent, Mail Operations and Casual Refund Centre, at the Léo-Blanchette IMPC. She explained the CBSA's work procedures at the Léo-Blanchette IMPC.

[17] The appellant challenges the merits of the danger direction issued by the ministerial delegate on June 1, 2017. According to the appellant, the evidence does not establish the existence of a threat or "danger" within the meaning of the *Code* at the time the direction was issued. In addition, the appellant argues that any danger or risk associated with the examination of packages was reduced at the time the danger direction was issued by the preventive measures put in place by the CBSA.

[18] The appellant refers to the decision in *Correctional Service of Canada* v. *Ketcheson*, 2016 OHSTC 19 (*Ketcheson*), in which the following criteria were established to determine whether a danger exists within the meaning of the *Code*:

> 1. What is the alleged hazard, condition or activity?
> 2. a) Could this hazard, condition or activity reasonably be expected to be an imminent threat to the life or health of a person exposed to it?
>
> Or
>
> b) Could this hazard, condition or activity reasonably be expected to be an imminent threat to the life or health of a person exposed to it?
>
> 3. Will the threat to life or health exist before the hazard or condition can be corrected or the activity altered?

[19] The appellant maintains that these criteria must be applied based on evidence concerning the circumstances at the time the direction was issued and not the circumstances at the time of the incident. Moreover, the appeals officer must evaluate these criteria considering evidence that was not made available to the ministerial delegate (*Swissport Canada Handling Inc*., 2018 OHSTC 3, paras 32 and 43, *Canadian National Railway Company* v. *Teamsters Canada Rail Conference*, 2016 OHSTC 20, para 14, and *Securitas Transport Aviation Ltd.* v. *Doyle*, 2018 OHSTC 10, paras 63 and 70).

[20] Following the Leclair incident, the CBSA suspended all tests, including the one with the NIK, and at the same time issued reminders and clarifications regarding the following procedures:

- Officers must wear nitrile gloves, which can be changed if necessary, at all times during their daily duties;
- Officers have additional personal protective equipment at their disposal, such as an N-95 respirator and goggles;
- Officers must clean their workstation and tools before and after their work;
- Officers are prohibited from bringing personal effects and food to their workstations; and
- Officers should always work in teams of two.

[21] The appellant submits that the concept of danger requires a reasonable possibility that the alleged threat will materialize. The evidence must show that the situation will cause injury or illness in a matter of minutes or hours, in the case of an imminent threat, or that it will cause severe injury or illness in the coming days, weeks, months or years, in the case of a serious threat (*Securitas Transport Aviation Security Ltd*. v. *Doyle*, 2018 OHSTC 10, paras 70 and 77, *Teamsters Local Union No. 419* v. *GardaWorld Cash Services Canada Corporation*, 2018 OHSTC 2, paras 199 to 201, and *Robitaille* v. *Air Canada*, 2019 OHSTC 1, paras 39 to 45).

[22] According to the appellant, in order to assess the threat linked to a harmful substance such as fentanyl, it is not enough to observe its presence in the work place but rather to determine whether an employee was exposed to an unacceptable level of the substance causing an imminent or serious threat to their health.

[23] The appellant argues that the evidence submitted demonstrates that employees at the Léo-Blanchette IMPC were not exposed to an unacceptable level of fentanyl resulting in an imminent or serious threat to the life or health of employees.

[24] The appellant is of the opinion that the reasons stated by the ministerial delegate for issuing the danger direction are not supported by the evidence. By the time the danger direction was issued, the alleged threat, that is, the testing of packages that may contain fentanyl, had already been discontinued. The appellant therefore contends that there was no longer any danger or threat of danger at the time of the June 1, 2017 direction.

[25] The appellant states that a finding of no imminent or serious threat to the life or health of employees is reinforced by the fact that the ministerial delegate himself reversed his decision that a danger exists for employees four weeks later despite the fact that no new preventive measure had been implemented since the start of his investigation.

[26] The appellant claims that such a finding is further supported by the preventive measures already in place in mid-April 2017. The appellant is of the opinion that it had eliminated any threat related to the search by implementing the following preventive measures:

- Suspicious packages that may contain fentanyl were essentially always sealed and secured in the work place unless the NIK test was performed;
- Officers collected trace amounts of the unknown substance for the NIK test to reduce exposure;
- Officers wore nitrile gloves at all times during their daily duties to avoid accidental contact;
- Officers were well trained on how to use the NIK (S3061-N), how to use the x-ray machine to identify suspicious substances (S7145-P), how to use their masks (H3044 -P) and how to administer first aid (EPSH1001);
- Tests, including the one with the NIK, were performed in controlled settings to reduce the risk of an accident;
- The Agency collected and communicated information about potential conspiracies (e.g. modus operandi) to inform officers of threats and to identify suspicious packages; and
- The Agency had first aid kits and naloxone on site.

[27] The appellant contends that there is no evidence to show that any officer was exposed to an unacceptable level of fentanyl or that there was an unacceptable level of fentanyl in the air or on work surfaces at the Léo-Blanchette IMPC.

[28] The appellant also argues that the Leclair incident is not relevant and that the appeals officer should draw an unfavourable conclusion from the fact that Ms. Leclair did not testify at the hearing and refused to disclose her medical file following a request from the ministerial delegate. For these reasons, the appellant argues that there is no basis to support the claim that Ms. Leclair was accidentally intoxicated by fentanyl at work.

[29] The appellant contends that there is no evidence as to the cause or even the nature of the injuries suffered by Ms. Leclair. The following evidence presented at the hearing contradicts the allegation that the incident was caused by accidental fentanyl intoxication:

- The testimony of its expert witness, Mr. Beech, who was of the opinion that based on the evidence on file, it was impossible to become accidentally intoxicated by fentanyl when examining any package;
- A discussion that the ministerial delegate had with Dr. Pierre-André Dubé, a pharmacologist-toxicologist, regarding the incident. According to the ministerial delegate's investigation report, Dr. Dubé expressed doubts about the possibility of accidental intoxication, given the excessively long time and the diagnosis of chemical pneumonia;
- Ms. Leclair told the ministerial delegate that she believed she was intoxicated by carfentanil and not fentanyl but there is no evidence to support the presence of carfentanil in the work place;

- The fact that a co-worker of Ms. Leclair heard paramedics say that Ms. Leclair's sugar level was low at the time of the incident.

[30] Lastly, according to the appellant, the evidence clearly establishes the absence of any threat, whether real or potential, and hence there was no valid basis for the conclusion of danger and the direction issued by the ministerial delegate.

Submissions by the respondent

[31] The respondent called Ms. Josée Paleovrahas and Ms. Chantale Veillette, both BSOs working at the Léo-Blanchette IMPC. Ms. Paleovrahas explained the procedures for her work as a BSO. Ms. Veillette described the events she witnessed on April 26, 2017, the day her co-worker felt unwell.

[32] First, the respondent states that it agrees with the appellant's position that the danger analysis must relate to the prevailing circumstances at the time of the danger direction rather than at the time of the incident.

[33] The respondent submits that a finding of danger can be made on the basis of an imminent or a serious threat. As noted in *Keith Hall & Sons Transport Limited* v. *Robin Wilkins*, 2017 OHSTC 1, a serious threat, just like an imminent threat, can result in a finding of danger, so long as the threat is likely to cause serious injury or illness. In the case at hand, employees were exposed to a serious threat that was not imminent since exposure to fentanyl can have serious consequences if controls are not established and strengthened to protect employees.

[34] Contrary to what the appellant claims, the respondent submits that an unfavourable conclusion should not be drawn from the fact that Ms. Leclair did not testify because she had no recollection of the events surrounding the incident. Likewise, an unfavourable conclusion cannot be drawn from the fact that she refused to disclose her medical file, which she was well within her right to do.

[35] The respondent challenges the appellant's position that there is no evidence of accidental intoxication. The respondent further disagrees with the appellant’s contention that Mr. Beech’s testimony contradicts this allegation. According to the respondent, Mr. Beech stated in his report that a quantitative analysis was necessary to be able to conclude with certainty that there was no accidental intoxication, an analysis that was not carried out.

[36] According to the respondent, no weight can be given to the discussion that took place between the ministerial delegate and Dr. Dubé and on which the appellant relies to support the conclusion that there was no accidental intoxication since the ministerial delegate was not questioned about this discussion during his testimony.

[37] The respondent submits that it is impossible to know exactly what happened before Ms. Leclair was found in the break room since she does not recall the events and worked alone. However, the evidence shows that Ms. Leclair’s condition improved after naloxone was administered, that she suffered serious sequelae as a result of the incident, that she claimed benefits from the Commission des normes, de l’équité, de la santé et de la sécurité au travail (the CNESST)—which were granted—and that she did not return to work following the incident.

[38] Lastly, the respondent submits that the preventive measures put in place by the CBSA are not sufficient to correct the situation that constitutes a danger. In particular, the respondent emphasizes the temporary aspect of some of the measures put in place, the lack of training on opioids and fentanyl, the communication difficulties between employees in the evening, and the BSOs' inability to detect fentanyl. Although certain measures were put in place before the danger direction, the respondent is of the opinion that the threat had not been corrected when the direction was issued on June 1, 2017.

[39] For all these reasons, the respondent claims that the danger direction issued on June 1, 2017, should be confirmed.

Reply

[40] In reply, the appellant contests the respondent's allegation that the naloxone dose partially stabilized Ms. Leclair's condition. Moreover, the appellant objects to the respondent's allegation that Ms. Leclair has no recollection of the events of April 26, 2017. Since no expert witness was called to testify to this fact, this allegation is unfounded.

[41] The appellant also states that contrary to the respondent's claim, the NIK tests did not resume in December 2017 and the CBSA has since been using an ion mobility spectrometry device to identify unknown substances.

[42] Lastly, the appellant submits that although not all the preventive measures were in place when the danger direction was issued, there was no danger or threat given that employees of the Léo-Blanchette IMPC were no longer conducting tests.

Analysis

[43] Subsection 146.1(1) of the *Code* describes the power of an appeals officer when an appeal is filed against a danger direction. An appeals officer may vary, rescind or confirm the direction:

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

[44] To determine whether the direction issued by the ministerial delegate under subsection 145(2) of the *Code* is well founded, I must determine whether there was a danger as defined by the *Code* for the BSOs working at the Léo-Blanchette IMPC.

[45] Section 122 of the *Code* defines "danger" as follows:

> Any hazard, condition or activity that could reasonably be expected to be an imminent or serious threat to the life or health of a person exposed to it before the hazard or condition can be corrected or the activity altered.

[46] As mentioned in the parties' submissions, the factors to be analyzed to determine the presence of danger were discussed at length in *Ketcheson* and may be described as follows:

> 1. What is the alleged hazard, condition or activity?
> 2. a) Could this hazard, condition or activity reasonably be expected to be an imminent threat to the life or health of a person exposed to it?
>
> Or
>
> b) Could this hazard, condition or activity reasonably be expected to be a serious threat to the life or health of a person exposed to it?
>
> 3. Will the threat to life or health exist before the hazard or condition can be corrected or the activity altered?

[47] The first part of the test involves identifying the hazard, condition or activity that is alleged to be a threat to the life or health of employees. It is important to point out that the danger direction was not issued concerning a situation that was deemed dangerous following an employee's refusal to work but rather after an investigation by the ministerial delegate on the circumstances surrounding the Leclair incident. In his direction, the ministerial delegate describes as follows the work place situation that, in his view, constitutes a danger:

> The fact that employees can be exposed to a lethal or incapacitating dose of fentanyl or a related drug while performing their regular duties without being able to detect it and without measures in place to protect them.

[48] The ministerial delegate also mentions the Leclair incident and states that the employee could not suspect the presence of fentanyl in the package she was examining since it was intended for export and therefore did not take the necessary steps to protect herself against exposure to fentanyl.

[49] Thus, the situation alleged to constitute a threat to the life or health of BSOs involves their potential exposure to fentanyl or a related drug when examining international mail.

[50] The next step in the analysis involves determining whether this situation is likely to pose an imminent or serious threat to employees exposed to it.

[51] In *Ketcheson*, the appeals officer explained what constitutes an imminent threat as follows:

> [129] The New Shorter Oxford English Dictionary (1993) defines "imminent" in the following way: "of an event esp. danger or disaster: impending, soon to happen". Thus, in my view, to say that something is "imminent" is to say two things. That something can happen or exist soon and that something has a high probability of happening or existing. One would not ordinarily say that something is "imminent" if it could happen

> soon but the probability of it happening is a mere possibility. But there is no connotation of the severity of harm. An imminent threat can be something that results in either a severe harm or a minor (but not trivial) harm. An employee should not have to do work where there is an imminent threat of either dying or cutting a finger. In the work place, an employee would view something as "imminent" if it can reasonably be expected to happen or exist in a matter of minutes or hours.
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> […]
>
> [205] An imminent threat is established when there is a reasonable expectation that the hazard, condition or activity will cause injury or illness soon (within minutes or hours). The degree of harm can range from minor (but not trivial) to severe. A reasonable expectation includes a consideration of: the probability the hazard condition or activity will be in the presence of a person; the probability the hazard will cause an event or exposure; and the probability the event or exposure will cause harm to a person.

[52] In my view, there is no evidence to allow me to conclude that when the direction was issued, the threat to the health or life of BSOs would have materialized in the ensuing hours. Moreover, the respondent does not allege that the employees were exposed to an imminent threat and is of the view that the issue in this case is whether the situation was likely to pose a serious threat to the life or health of employees.

[53] In *Ketcheson*, the appeals officer addressed the concept of serious threat as follows:

> [130] A "serious threat" is one that is not necessarily imminent. The New Shorter Oxford English Dictionary defines the term "serious" to mean: "important, grave, having (potentially) important esp. undesired consequences; giving cause for concern; of significant degree or amount worthy of consideration". In the ordinary usage of words, an employee would understand that a "serious threat" refers to the severity of harm. There is no time frame as to when the harm might occur. Death, a major injury or an illness requiring medical attention could be reasonably expected to occur. An employee should not have to work with high levels of a potent human carcinogen even though, with a latency period, the exposure might be reasonably expected to result in cancer years down the road.
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> […]
>
> [210] A serious threat is a reasonable expectation that the hazard, condition or activity will cause serious injury or illness at some time in the future (days, weeks, months, in some cases years). Something that is not likely within the next few minutes may be very likely if a longer time span is considered. The degree of harm is not minor; it is severe. A reasonable expectation includes a consideration of: the probability the hazard condition or activity will be in the presence of a person; the probability the hazard will cause an event or exposure; and the probability the event or exposure will cause harm to a person.

[54] For the following reasons, I am not convinced that in the circumstances described in the evidence, the employees working at the Léo-Blanchette IMPC were exposed to a serious threat to their health or life.

[55] First, there is no doubt that fentanyl is a very powerful synthetic opioid that poses a significant risk to the health of any individual exposed to it. The evidence shows that overexposure to an opioid can lead to slowed breathing. Fentanyl can enter the body through different exposure routes. For example, an employee could be exposed to it through skin contact, inhalation or accidental ingestion due to poor hygiene practices.

[56] According to the appellant's expert witness, Mr. Beech, in order to assess the risk associated with exposure to a hazardous substance, in this case fentanyl or carfentanil, one must take into account the route of entry into the body, the dose and the quantity or concentration. During his testimony at the hearing, he presented the various toxic concentrations of fentanyl in the event of skin contact, inhalation or involuntary ingestion. In his view, since fentanyl is not a volatile substance, it is very unlikely that a BSO handling packages could accidentally inhale a toxic amount. As well, in his opinion, it is unlikely that skin exposure would have harmful effects on the health of employees. Indeed, absorption through the skin presents the lowest risk since it takes place slowly. In the event of skin exposure, simply washing one’s hands or the affected surface at the end of the shift is sufficient to avoid any health risk.

[57] The only route of exposure that Mr. Beech identified as potentially problematic for BSOs working at the Léo-Blanchette IMPC is involuntary ingestion of fentanyl, which could have adverse health effects. This could happen when, for example, an employee touches a contaminated object and then accidentally ingests the substance by touching their mouth. However, Mr. Beech opined that wearing protective gloves and a mask completely eliminates this risk.

[58] In his view, the ministerial delegate relied on qualitative information to support his conclusions about the potential risk to employee health associated with exposure to fentanyl and similar drugs when what was required was a quantitative analysis that considers the actual amount of substance that could be found in the work place. In fact, the ministerial delegate could not explain how a BSO could have been exposed to a toxic amount of fentanyl or one of its derivatives.

[59] It should be noted that during his testimony, the ministerial delegate stated that he only contacted Mr. Beech for the first time on July 4, 2017, or one month after the direction was issued, to obtain additional information about the potential toxicity of fentanyl and its derivatives. He also stated that opioids, including fentanyl and its derivatives, are a new topic of analysis in workplaces, where he believes the extent of real danger is not always clear.

[60] Nevertheless, the ministerial delegate concluded, following a qualitative analysis of the factors that caused the Leclair incident, that the employee was acutely intoxicated with fentanyl or one of its derivatives. With respect, I have trouble understanding how he could reach such a conclusion given that he admitted never having had access to the employee's medical file and never obtaining official confirmation that the employee was intoxicated by fentanyl and/or its equivalents. He stated the following in his investigation report:

> The causes of Geneviève Leclair's intoxication are difficult to establish. Different hypotheses were developed and analyzed. The most logical hypothesis is accidental ingestion through cross-contamination from a package or contaminated work surfaces. Accidental inhalation is also a possible hypothesis. However, neither of these hypotheses can be confirmed. We must therefore consider each one.
>
> According to the victim, fentanyl and carfentanil were found in body fluid samples taken at the hospital. The employer also provided this information verbally during the investigation. We could not validate this information as Ms. Leclair refused to give consent for the disclosure of her analysis results. Knowing which substances were absorbed by the victim would have been useful for the investigation.
>
> [Emphasis added]

[61] It is well established in the Tribunal's jurisprudence that a conclusion of danger within the meaning of the *Code* cannot be based on conjecture or hypothesis. A serious threat is established when the evidence shows a reasonable expectation of serious injury or illness at some point in the future. In this regard, the appeals officer in *Keith Hall & Sons Transport Limited* v. *Robin Wilkins*, 2017 OHSTC 1, states the following:

> [40] It also warrants noting that the concept of reasonable expectation remains included in the amended definition. While the former definition required consideration of the circumstances under which the hazard, condition, or activity could be reasonably expected to cause injury or illness, the new definition requires consideration of whether the hazard, condition, or activity could reasonably be expected to be an imminent or serious threat to the life or health of the person exposed to it. In my view, to conclude that a danger exists, there must therefore be more than a hypothetical threat. A threat is not hypothetical where it can reasonably be expected to result in harm, that is, in the context of Part II of the *Code*, to cause injury or illness to employees.
>
> [41] For a danger to exist, there must therefore be a reasonable possibility that the alleged threat could materialize, i.e., that the hazard, condition or activity will cause injury or illness soon (in a matter of minutes or hours) in the case of an imminent threat; or that it will cause severe injury or illness at some point in the future (in the coming days, weeks, months or perhaps even years) in the case of a serious threat. It warrants emphasizing that, in the case of a serious threat, one must assess not only the probability that the threat will cause harm, but also the seriousness of the possible harmful consequences from the threat. Only those threats that can reasonably be expected to cause severe or substantial injury or illness may constitute serious threats to the life or health of employees.
>
> [Emphasis added]

[62] In *Nolan et al.* v. *Western Stevedoring*, 2017 OHSTC 11, the appeals officer also addressed the reasonable possibility criterion and concluded as follows:

> [61] Given that the *Code*'s definition of danger is based on the concept of reasonable expectations, the mere possibility that such an event or

> incident causing serious harm is not sufficient to conclude to the existence of a serious threat. There must be sufficient evidence to establish a reasonable possibility that the employees could be subject to such serious harm as a result of their exposure to the alleged hazard, condition or activity.
>
> [62] The determination of whether the materialization of the threat is a reasonable possibility as opposed to a remote or hypothetical one, is not always an easy task. It is a matter of fact in each case and will depend on the nature of the activity and the context within which it is examined. It involves a question of appreciation of facts and passing judgment on the likelihood of occurrence of a future event. In my view, an acceptable way to make this determination is to ask the following question: would a reasonable person, properly informed and viewing the circumstances objectively and practically, conclude that an event or incident causing serious harm to an employee is likely to occur?
>
> [Emphasis added]

[63] More recently, the Federal Court indicated in *Canada (Attorney General)* v. *Laycock*, 2019 FC 750, that despite the changes made to the definition of danger, the decision in *Verville* v. *Canada (Correctional Services),* 2004 FC 767 (*Verville*), continues to offer useful guidance in determining whether a situation could be reasonably expected to pose a serious threat. In *Verville*, the Federal Court had stated the following:

> [36] (…) 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.
>
> [Emphasis added]

[64] After considering all the evidence presented at the hearing, I believe that the ministerial delegate's conclusion of danger was based on a hypothetical threat. In my opinion, the ministerial delegate could not rely solely on an incident, the causes of which he himself admits he did not know, to conclude that there was danger within the meaning of the *Code*.

[65] Ms. Nohos testified that around the time the direction was issued, several analyses were conducted on the work surfaces and on the packages present when the Leclair incident occurred, to detect the presence of fentanyl and/or carfentanil. The samples taken did not reveal the presence of fentanyl or carfentanil on work surfaces or in the air. Only a tiny amount of fentanyl was found on the surface of the packaging inside a package.

[66] The minute concentrations of fentanyl found in the work place during the investigation and analyses were, in the opinion of the appellant's expert witness, well below what could be considered a toxic dose. In his professional opinion, the risk factors for BSOs are fairly low if

employees follow the work procedures put in place by the employer and wear personal protective equipment. These can include nitrile gloves, long-sleeved clothing, a mask (N95) and safety goggles. However, Mr. Beech stated that in his opinion wearing nitrile gloves and hand washing before breaks and at the end of the work shift are sufficient to effectively prevent the risks posed by exposure to fentanyl and its equivalents.

[67] It is therefore my opinion that all of the evidence produced does not support the ministerial delegate's conclusion that an employee could have been exposed to a "lethal or incapacitating dose" of fentanyl. Similarly, the ministerial delegate's allegation that Ms. Leclair was intoxicated following her exposure to fentanyl or a related drug is simply not supported by any evidence.

[68] The appellant's expert witness testified that based on the evidence on the record, he was unable to make a connection between the employee's discomfort that day and her exposure to fentanyl or one of its derivatives in the course of her normal work activities. It should be noted that Mr. Beech's testimony was not contradicted by any evidence. The respondent did not call Ms. Leclair to testify and did not submit her medical file into evidence.

[69] In its written submissions, the respondent asserts that Ms. Leclair has no recollection of the events surrounding the incident of April 26, 2017, and claims it can be deduced from the following facts that she suffered accidental intoxication: 1) her condition improved after she was given three doses of naloxone, 2) she suffered serious sequelae and has not yet returned to work, and 3) her claim for CNESST benefits was granted.

[70] I cannot accept the respondent's arguments. As the appellant argued, no expertise was provided to confirm the employee's medical condition and, in my view, it is simply not possible to conclude that she was the victim of accidental intoxication without direct proof of the cause and nature of the injuries she suffered that day.

[71] In its written submission, the appellant listed a number of preventive measures it had implemented before and after the Leclair incident. These measures were described in the summary of the appellant's submissions and I do not consider it necessary to repeat them here in detail.

[72] In my opinion, in light of the opinion of the appellant's expert witness to the effect that the concentration levels of fentanyl found in the work place are not likely to cause adverse health effects in BSOs provided they wear nitrile gloves and adopt good hygiene practices by washing their hands, the measures in place when the direction was issued were sufficient to mitigate the risk associated with BSO exposure to fentanyl or similar drugs when handling packages.

[73] In light of the foregoing, I have come to the conclusion that the evidence gathered at the hearing does not demonstrate a reasonable possibility that BSOs working at the Léo-Blanchette IMPC could be exposed to a lethal or incapacitating dose of fentanyl or similar drugs.

[74] I also note that the appellant implemented additional measures after the direction was issued. However, these measures are not relevant to the assessment of whether a danger existed for employees when the direction was issued. In addition, the employer was required to take the necessary measures to comply with the direction unless it was stayed by an appeals officer.

[75] For all these reasons, I conclude that the employees working at the Léo-Blanchette IMPC were not exposed to a danger within the meaning of the *Code* and the direction issued by the ministerial delegate to this effect is not well founded.

Decision

[76] For these reasons, the appeal is allowed and the direction issued by the ministerial delegate on June 1, 2017, is rescinded.

Olivier Bellavigna-Ladoux
Appeals Officer