

*CANADA LABOUR CODE*  
PART II  
OCCUPATIONAL SAFETY AND HEALTH

Darren Welbourne  
*applicant*

*and*

Canadian Pacific Railway Company  
*employer*

*and*

Joseph Brown  
*health and safety officer*

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This case was heard by Serge Cadieux, appeals officer, in Sudbury, Ontario on January 18, 2001.

Appearances:

Mr. Philip Scammell, Co-chairperson, Health and Safety Committee, for the employee, Mr. Darren Welbourne.

Mr. Carman Veitch for the Canadian Pacific Railway Company.

[1] This case concerns an appeal made by Mr. Darren Welbourne under subsection 129(7) of the Canada Labour Code<sup>1</sup> Part II (the Code) of a decision of no danger given by health and safety officer Joseph Brown from Transport Canada.

[2] On December 6, 2000, Mr. Darren Welbourne, a train conductor for Canadian Pacific Railway (CP Rail), refused to work. Mr. Welbourne was attending a training session at Inco's Crean Hill Mine. The training was conducted by Mr. Dave Bright from CP Rail on the proper method to carry out the blow pipe load out operation. After receiving the theory portion of the training, Mr. Welbourne was asked to operate the blow pipe. He informed his trainer that he was not comfortable with the use of the blow pipe. Mr. Bright repeated the theory with the employee and

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<sup>1</sup> A reference to the Canada Labour Code, Part II (the Code), is a reference to the Code as amended and proclaimed on September 30, 2000.

asked him again to operate the blow pipe. At that time, Mr. Welbourne felt it was dangerous for him to operate the blow pipe and invoked his right to refuse to work.

[3] Mr. Welbourne stated that he was refusing to work because *“the pipe could fly apart and the metal valve which is attached to the air hose could strike him in the face or body. Also when loading the front chute #3, when moving the blow pipe into position the valve could get caught on the railing causing him to lose his balance and fall off of the loading platform approximately 10 feet.”*

[4] The health and safety officer investigated the continued refusal to work at Inco’s Crean Hill Mine the same day and was given a demonstration of the blow pipe load out operation. He was informed that Inco and CP rail had contractually agreed to have employees from both companies take part in the loading of rail ore cars. Responsibility for training employees in carrying out the blow pipe load out operation would be assumed by each company.

[5] The health and safety officer issued a report in which he describes the circumstances that led up to his decision of no danger. Since the health and safety officer was unable to attend the hearing, I have decided to reproduce extracts from the narrative portion of his report entitled Facts Established by the Health and Safety Officer. Both Mr. Scammell and Mr. Veitch indicated they had no disagreement with or objection to the safety officer’s Investigation Report as it related to the operation of the blow pipe,

[6] The following extracts read:

Facts Established by the Health and Safety Officer:

...Loading is conducted at the Load Out area building which houses 2 tracks and allows 1 car on each track to be spotted for loading. 1 car is loaded at a time from overhead ore bins through bottom chutes. There is a loading platform adjacent to each track attached to the center wall between the 2 tracks.

Inco employees load the ore cars when ore bins are full. When the train crew arrives they do the loading. Loading is conducted at the blow pipe load out area where rail ore cars are spotted under the bins. The chutes are opened on the bottom of the bins which allows the ore to drop into the open topped cars. However, when the chutes get plugged the employee must, while standing on a adjacent loading platform, insert the end of the blow pipe into the chute and, by opening a manual valve, use air pressure to release the plugged chute.

The blow pipe itself consists of a high pressured (90 psi), 1 inch air hose which is secured to the wall and runs parallel approximately 20 feet from the main safety shut off valve at the end of the loading platform to the opposite end of the platform where there is approximately 30 feet of hose coiled up with the end coupled to the manual lever type valve. Attached to the outlet side of the valve is a 2 inch piece of 1 inch pipe and at the end of the pipe is a clamp with internal rubber bushings. The aluminum 1 inch diameter, 10 foot blow pipe is inserted, properly seated into the clamp, and secured by a bolt on each side of the clamp.

The loading platform is approximately 45 feet long by 3 1/2 feet wide by 8 feet high. It is located parallel to the tracks adjacent to the chutes where the rail cars are spotted. There is 3 bar, 4 foot high safety railing around 3 sides and the back side is supported by the center wall of the building. At one end of the platform there are steps, at the other end there is a ladder. There is a safety chain across the end of the platform. Included in a recent inspection on October 30 , 2000 by Ministry of Labour Ontario Mining Health & Safety Inspector, Jim Trottier, was a request for Hand Holds to be installed at the top of the ladders. (Please see attached report) hand holds and all other exceptions completed prior to December 6, 2000.

The proper loading procedure are as per the Job Aid (Attached). If the blow pipe has to be used, the engineer stands at the main air shut off valve and the air is shut off before and after using the blow pipe. The engineer monitors the operation of the blow pipe and is in position to shut off the air pressure. The conductor, when required, uses the blow pipe by holding the pipe and valve (one hand on the valve and the other hand on the pipe) over the safety railing. He then inserts the end of the pipe into the bottom of the chute and requests the engineer to turn on the air at the main valve. The conductor now turns on the air at his valve and the air blows into the chute to release the ore.

When using the blow pipe in the front chute #3 which is located opposite the north end of the platform, the operator has to stretch out his arms over the north end of the platform in order to insert the end of the 10 foot blow pipe into the chute. However, the safety railing is more than adequate to keep the employee from falling and the operator only has to stretch out to arms length to accomplish this task.

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Blow pipes are used in various operations at 25 locations through out the Crean Hill Mine.

An interview was conducted with Inco's Supervisor at the site who indicated that over the past 29 years that there has not been any incidents, accidents, or injuries resulting from the blow pipe parting from the clamp.

An interview was conducted with the Inco employee who operates the blow pipe, who stated that he had operated the blow pipe for the past 4 years. On occasion the blow pipe has come apart at the clamp but the amount of pressure at the clamp when it parts is minimal and the hose is coiled in the direction that if it parts it blows away from your body. He indicated that he has never been injured by the blow pipe parting from the clamp.

An interview was conducted with Ministry of Labour Mining Health & Safety Inspector, Gerry Giasson, Sudbury, Ontario who indicated that there has not been Incidents, Accidents or Injuries relating to Provincial regulated employees (Inco) resulting from the plow pipe operation at any of the mines in the Sudbury area.

[7] Upon completion of his investigation into the matter, the safety officer informed the refusing employee and his employer of his decision in the following manner:

### III. DECISION OF THE HEALTH AND SAFETY OFFICER

On reviewing the evidence developed in this investigation, consideration must be given to the alleged dangerous conditions perceived by Mr. Welbourne. He was concerned with the “future activity” which was perceived to lead to a “potential hazard” which in his mind would constitute a danger.

The evidence offered by Mr. Welbourne was based on his opinion of the possibility of the blow pipe parting at the clamp and the possibility of sustaining injury or the possibility of getting the valve caught on the safety railing when working on chute #3 in an arms length stretched position causing him to lose his balance and fall. The facts established through my investigation show clearly that the present day operation and the history of the use of the blow pipe proves that there is no potential for danger. Also CP Rail has taken steps through their Job Aid, on the job training and P.P.E. to further ensure their employees safety.

Therefore, the evidence tendered by Mr. Welbourne, in support of the refusal, was based primarily on speculation.

By definition, the dangerous conditions must be an “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 exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in chronic illness, in disease or in damage to the reproductive system.”

It was my conclusion that there was “no danger” within the purview of Section 128(1) of the Canada Labour Code Part II to support Mr. Welbourne’s right to refuse dangerous work because the “potential hazard” was based on speculation and there was no evidence to support that this activity “could reasonably be expected to cause injury.”

[8] Mr. Veitch submits that the operation of the blow pipe is safe. A second person is in attendance at the main air shut off valve position to shut off the air before and after using the blow pipe. That person monitors the operation of the blow pipe and is in position to shut off the air pressure should the blow pipe come apart at the clamp position. Furthermore, the hose is coiled in such a manner that if the pipe comes apart, it will move away from the employee and not strike him. Employees are also well protected by the protective equipment they wear such as protective headgear, wire mesh face shield fastened to ear muffs, safety glasses underneath, safety boots, safety gloves etc.

[9] Mr. Veitch explained that a Job Aid has been developed and that employees receive training in the safe operation of the blow pipe. He added that this operation has been going on for many years and there has never been an injury as a result of the blow pipe coming apart at the clamp position. When an attempt was made to make a modification to the blow pipe by the introduction of a slip joint, it loosened and came off. That is when, observed Mr. Veitch, that they deemed this modification unsafe and abandoned it. Mr. Veitch is of the opinion that, with the Job Aid and the training given, there is no opportunity for injury.

[10] Mr. Scammell is adamant. The operation of the blow pipe is dangerous. He himself refused to operate the blow pipe in the past and recommended to his fellow employees not to use the blow pipe if they were not comfortable with it. The blow pipe is known to come apart at the clamp position. The pipe is not straight; it is bent and if it blows apart, it will be projected at an angle. The pipe can be expelled in any direction and strike an employee. The operator has no control over the pipe once it is expelled. This is likely to cause injury to Mr. Welbourne and to other workers. Also, there is another employee in the area operating the main air shut off valve. This increases the possibility that one employee will be injured when the blow pipe comes apart.

[11] Mr. Scammell stated that the safety and health committee was not involved in the development of the Job Aid. It was developed between Inco, the trainers and CP Rail. Basically, said Mr. Scammell, a risk assessment would be necessary to evaluate and control any risk present in this operation. Mr. Scammell added that if it was necessary, the blow pipe should be re-designed to ensure it does not come apart.

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[12] The appeals officer's role following an appeal under subsection 129(7) of a safety officer's decision of no danger in a right to refuse situation is stated at subsection 146.1(1) of the Code. It provides:

*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; and*
- (b) issue any direction that the appeals officer considers appropriate under subsection 145(2) or (2.1).*

[13] The role of the appeals officer in hearing an appeal of a decision of no danger issued by a health and safety officer following a refusal to work is not to carry out a new investigation into the matter under appeal. The inquiry of the appeals officer begins with and builds on the health and safety officer's initial investigation and report. The appeals officer looks at the same circumstances investigated by the health and safety officer, appreciates the facts that were considered or available to the officer, determines and interprets the legislation applicable to the relevant facts, and makes a ruling. In the end, the appeals officer decides, like the health and safety officer before him or her, if the refusing employee was in a situation of danger as contemplated by the Code and, if so, issues the appropriate directions under subsection 145(2) or (2.1).

[14] In this case, the issue to be decided is whether Mr. Welbourne was in a situation of danger, as defined in the Code, as a result of the blow pipe coming apart at the clamp position. Given that the Code was amended very recently i.e. September 30, 2000, there is a need to look closely at the meaning of danger under the "new" Code in order to apply the proper criteria in determining whether danger, as provided by the Code, exists.

[15] "Danger" is defined at subsection 122(1) of the Code as follows:

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

*“danger” Situation, tâche ou risque - existant ou éventuel - susceptible de causer des blessures à une personne qui y est exposée, ou de la rendre malade - même si ses effets sur l’intégrité physique ou la santé ne sont pas immédiats -, avant que, selon le cas, le risque soit écarté, la situation corrigée ou la tâche modifiée. Est notamment visée toute exposition à une substance dangereuse susceptible d’avoir des effets à long terme sur la santé ou le système reproducteur.*

[16] This new definition of danger is similar to the previous definition of danger that existed in the pre-amended Code, which read:

*“danger” means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected.*

[17] The current definition of “danger” sets out to improve the definition of “danger” found in the pre-amended Code, which was believed to be too restrictive to protect the health and safety of employees. According to the jurisprudence developed around the previous concept of danger, the danger had to be immediate and present at the time of the safety officer’s investigation. The new definition broadens the concept of danger to allow for potential hazards or conditions or future activities to be taken into account. This approach better reflects the purpose of the Code stated at subsection 122.1, which provides:

*122.1 The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.*

[18] Under the current definition of danger, the hazard, condition or activity need no longer only exist at the time of the health and safety officer’s investigation but can also be potential or future. The New Shorter Oxford Dictionary, 1993 Edition, defines “*potential*” to mean “possible as opposed to actual; capable of coming into being or action; latent.” Black’s Law Dictionary, Seventh Edition, defines “*potential*” to mean “capable of coming into being; possible.” The expression “*future activity*” is indicative that the activity is not actually taking place [while the health and safety officer is present] but it is something to be done by a person in the future. Therefore, under the Code, the danger can also be prospective to the extent that the hazard, condition or activity is capable of coming into being or action and is reasonably expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected or the activity altered.

[19] The existing or potential hazard or condition or the current or future activity referred to in the definition must be one that can reasonably be expected to cause injury or illness to the person exposed to it before the hazard or condition can be corrected or the activity altered. Therefore, the concept of reasonable expectation excludes hypothetical or speculative situations.

[20] The expression “*before the hazard or condition can be corrected*” has been interpreted to mean that injury or illness is likely to occur right there and then i.e. immediately<sup>2</sup>. However, in the current definition of danger, a reference to hazard, condition or activity must be read in conjunction to the existing or potential hazard or condition or the current or future activity, thus appearing to remove from the previous concept of danger the requisite that injury or illness will likely occur right there and then. In reality however, injury or illness can only occur upon actual exposure to the hazard, condition or activity. Therefore, given the gravity of the situation, there must be a reasonable degree of certainty that an injury or illness is likely to occur right there and then upon exposure to the hazard, condition or activity unless the hazard or condition is corrected or the activity altered. With this knowledge in hand, one cannot wait for an accident to happen, thus the need to act quickly and immediately in such situations.

[21] The expression “*whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity*” added to the new definition of danger is not germane to the circumstances of the present case and will not be addressed in any detail. However, for clarity and precision purposes, I refer the reader to the French version of this portion of the definition, which has the same force in law and reads “*même si ses effets sur l’intégrité physique ou la santé ne sont pas immédiats*”. Literally translated, this expression suggests that an injury or an illness can occur upon exposure even if the effects on the physical integrity or the health of the exposed person are not immediate. Finally, I will not address the changes in the definition of danger that concern exposure to hazardous substances since it is not an issue in the instant case.

[22] In the case at hand, the health and safety officer considered all the pertinent facts related to the blow pipe coming apart at the clamp position and decided that Mr. Welbourne was not in a situation of danger as a result thereof. I agree with the health and safety officer’s finding for the following reasons.

[23] There is no doubt in my mind that operating the blow pipe under the current conditions entails some risks. It was generally acknowledged that the blow pipe can and does come apart. Contrary to Mr. Veith’s proposal that injury is unlikely to occur, Mr. Scammell asserted that if the blow pipe blows apart, it will be projected at an angle and possibly injure an employee. Therefore, Mr. Welbourne is open to being injured as a result of operating the blow pipe. The question to be answered is whether this situation could reasonably be expected to cause injury to him.

[24] In my opinion, there is no reasonable expectation that Mr. Welbourne, or any other person exposed to the same situation, could be injured either immediately or at any time in the future. The evidence, in support of this conclusion, speaks for itself. For example:

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<sup>2</sup> *Brailsford v. Worldways Canada Ltd.* (1992), 87 di 98 (Can. L.R.B.)  
*Bell Canada v. Labour Canada* (1984), 56 di 150 (Can. L.R.B.)

- The health and safety officer attended the work site, analysed and tested the procedure in detail with respect to the concerns expressed by Mr. Welbourne and verified that no potential for injury existed if and when the blow pipe comes apart. His opinion is corroborated by expert officials of the Ontario Ministry of Labour (Mining).
- Extensive theoretical and on the job training is given by qualified trainers to each employee required to carry out the operation. CP Rail trainers were trained by Inco's trainers who have long standing experience in this area.
- A Job Aid describing in detail the safe procedure to be followed is provided along with the training; adherence to the Job Aid is a pre-requisite to carrying out the operation.
- Should the blow pipe come apart at the clamp, it is coiled in a manner that it will move away from the employee and not strike him.
- The air pressure will be shut off immediately by another person in attendance at the main shut off valve should the blow pipe come apart at the valve position.
- Personal protective equipment is provided to each employee to further enhance their protection in any event.
- The blow pipe load out operation is not a new operation. It has been used extensively and safely in this industry in the past and by Inco's employees and, more recently, by CP Rail employees. It is used at 25 locations throughout the Crean Hill Mine.
- The health and safety officer reports that in the last 29 years, Inco has never had any incidents, accidents, or injuries resulting from the blow pipe parting from the clamp.

[25] The investigation of the health and safety officer was, in my opinion, thorough and factual. The health and safety officer satisfied himself that Mr. Welbourne was not in a situation likely to cause injury to him in the foreseeable future. The experience with and history of this procedure weighs heavily against any probability or possibility that injury will occur. The speculative possibility that Mr. Welbourne could be injured in the manner described by him as a result of the blow pipe coming apart at the clamp does not meet the definition of "danger" under the Code.

[26] This is not to say that the procedure cannot be improved. On the contrary, if the blow pipe comes apart at the clamp and there is a possibility, albeit a slim one, that the pipe could be projected with some degree of force, then a risk assessment, as requested by Mr. Scammell, should be performed in order to eliminate any possibility of injury, no matter how remote that possibility is. I recognize that the operation of the blow pipe entails some risks. However, all jobs contain some risks. If the risks have been identified and the proper controls put in place, such as in this case, then the risks can be assumed safely.

[27] The Code currently provides for the involvement of the safety and health committee in addressing and resolving work place problems. I would strongly encourage the committee to address the blow pipe load out operation to ensure that every employee required to use the blow pipe is satisfied that all risks have been considered and, where necessary, eliminated or controlled.

[28] For all the above reasons, I agree with the health and safety officer's decision that there is "no danger" within the meaning of the Code to



Mr. Welbourne. I therefore confirm the decision of the health and safety officer.

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Serge Cadieux  
Appeals Officer

SUMMARY OF APPEALS OFFICER DECISION

Applicant: Darren Welbourne  
Employer: Carman Veitch, Canadian Pacific Railway

**KEY WORDS**

Blow pipe load out operation, air pressure, bow pipe parting at the clamp position, hose coiling, job aid, risk assessment, role of appeals officer, new definition of danger, amended Code, prospective danger, severe, reasonable expectation, reasonable degree of certainty of injury or illness, experience and history of procedure, hypothetical or speculative situations.

**PROVISIONS**

*Code:* 122(1), 122.1, 128(1), 129(7), 146.1(1), 145(2), 145(2.1)

**SUMMARY**

A train conductor with CN Rail refused to carry out a blow pipe load out operation (blow pipe) which consisted of inserting a blow pipe under pressure into an overhead chute of an ore bin. The purpose of the operation was to dislodge ore which is plugged into the chute and cause it to fall into a rail ore car. The employee feared that the blow pipe could come apart at the valve and injure him. Following a thorough investigation, the health and safety officer concluded that the refusing employee was not in a situation of danger for numerous reasons which were outlined in the safety officer's report.

Upon review, the appeals officer agreed with the health and safety officer. In looking at the concept of danger in the recently amended Code, the appeals officer found that there were no reasonable expectation that the employee would be injured at any time in the future as a result of operating the blow pipe. This operation had been going on without incidents or accidents for numerous years and the employer had taken the proper steps to protect the employee in any event. The appeals officer confirmed the decision of the health and safety officer.