Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Date: 2021-08-16
Case No.: 2018-05

Between:

Canada Border Services Agency, Appellant

and

Alexandre Buisson, Respondent

Indexed as: *Canada Border Services Agency v. Alexandre Buisson*

Matter:	Appeal under subsection 146(1) of the *Canada Labour Code* of a direction issued by an official delegated by the Minister of Labour
Decision:	The direction is confirmed.
Decision rendered by:	Mr. Peter Strahlendorf, Appeals Officer
Language of decision:	English
For the appellant:	Mr. Marc Séguin, Treasury Board Legal Services, Department of Justice
For the respondent:	Ms. Kim Patenaude, Raven, Cameron, Ballantyre and Yazbeck LLP/s.r.l.
Citation:	2021 OHSTC 3

REASONS FOR DECISION

[1] This case concerns an appeal brought by the employer, Canada Border Services Agency (CBSA), under subsection 146(1) of the *Canada Labour Code* (the *Code*) of a direction issued on January 11, 2018, under subsection 145(2) of the *Code*, by Afshin Manglori, an official delegated by the Minister of Labour (ODML or Ministerial Delegate).

[2] The direction was issued based on a finding of "danger" following an investigation by the ODML into a refusal to do dangerous work by Mr. Alexandre Buisson, a Border Services firearms instructor, on January 9, 2018, pursuant to section 128 of the *Code*. The work refusal took place at the Pacific Region Training Centre (PRTC) indoor firing range in Chilliwack, British Columbia. The work refusal was about the use of a certain type of ammunition in the firing range. The range is owned roughly 80% by the Royal Canadian Mounted Police (RCMP) and 20% by CBSA.

[3] While Mr. Buisson is the named respondent, there were nine other firearms instructors, employees of CBSA, who engaged in the same work refusal. Mr. Buisson's case is representative of them all.

Background

[4] ODML Manglori attended at the workplace and investigated on January 10, 2018.

[5] At the time of the ODML's investigation, there were 12 firearms instructors. An instructor oversees four trainees who are CBSA employees. The participants commence firing at the target at 25m and then move closer to the target, firing at 15m, 7m, 5m and 3m distances. The target is immediately in front of the opening of the steel bullet trap, which is an uncommon design feature. The closer the shooter is to the target, the more likely it is that fragments of bullets will be ejected back out of the trap. The manufacturer of the trap cautions that shooting directly at the trap at close range (2.7-6.4m) could cause low energy impacts to the shooter.

[6] Shooters wear ear and eye protection and clothing (including hat), which typically leaves the face, neck and hands exposed.

[7] An instructor oversees four shooters at a time, and advances with them down the range.

[8] On July 13, 2017, a CBSA employee was injured by a piece of metal that ricocheted back from the trap into which bullets entered after passing through the target. The ammunition being used was a copper-jacketed lead bullet. A bullet fragment was embedded in the employee's face. At the hospital, the employee required x-rays and minor surgical intervention to remove the fragment.

[9] Because of the July 13, 2017, event, the employer switched to a different type of ammunition. The new type of ammunition was a "frangible" bullet that disintegrated into powder on impact so it did not cause a "splatter" of metal fragments back out of the trap.

[10] Between July 13, 2017, and the date of the work refusal, January 9, 2018, the CBSA employees used the frangible ammunition.

[11] As a result of the July 13, 2017, incident, a Job Hazard Analysis was performed, and its report was made available on November 30, 2017. The analysis concluded that there was no need to switch to frangible ammunition as a final control measure. The analysis recommended more frequent cleaning of the trap as more debris in the trap correlated with more fragments that were expelled back out the opening. It also recommended monitoring the results of any further bounce-back incidents for a period of three months.

[12] The employer considered moving the target closer to the shooters, rather than have the shooters advance towards the target. The ODML determined that this was the process at the Vancouver Police Department firing range. The RCMP did not agree to this proposal on the basis that this would result in fewer bullets entering the trap, and thus, more damage being done to the walls and ceiling of the range.

[13] On January 9, 2018, the employer ran out of the frangible ammunition and thus required its employees to switch back to the original copper-jacketed ammunition. This switch prompted the respondent and all of the other firearms instructors to engage in a work refusal.

[14] The ODML found that the firearms instructors are exposed to fragments every shift. He observed metal fragments on the floor and embedded in the rubber matting on the walls as far back as 10m from the trap.

[15] At the time of the investigation, the employer could find no other hazardous occurrence reports other than the one for the July 13, 2017, incident.

[16] On January 11, 2018, the ODML issued his decision that a danger existed and his direction, which read 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 January 10, 2018, the undersigned official delegated by the Minister of Labour conducted an investigation following a refusal to work made by Alexandre Buisson on behalf of all Canada Border Services Agency (CBSA) Use of Force and Firearms Instructors in the workplace operated by Canada Border Services Agency, being an employer subject to the *Canada Labour Code*, Part II, at 45504 Petawawa Road, Chilliwack, British Columbia, V2R 3M4, the said work place being sometimes known as CBSA - WCLC.
>
> The said official delegated by the Minister of Labour considers that the performance of an activity constitutes a danger to an employee while at work:
>
> The activity of shooting conventional copper jacketed ammunition at less than fifteen (15) meter to the Total Containment Bullet Trap at the indoor

> firing range at Chilliwack, BC, exposes the employees performing this activity, and the CBSA firearms instructors in the immediate vicinity of these employees to an imminent threat of being injured by small metal fragments that ricochet out of the bullet trap with enough mass and velocity to pierce and possibly embed themselves in the employees' exposed skin.
>
> 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 Vancouver, British Columbia, this 11th day of January, 2018.
>
> Afshin Manglori
> Official Delegated by the Minister of Labour
> Senior Investigator, etc.

[17] In his report, the ODML determined that the increase in the cleaning of debris from the trap (from once a week to twice a week), as was recommended by the hazardous occurrence report, did not clear the debris effectively, as debris began accumulating within a couple of hours of firing in the range.

[18] The ODML found that "small metal fragments embed themselves very frequently in exposed skin, clothing and even protective vests" and that "employees suffer small cuts and would seek quick medical aid and return back to work." The ODML was of the opinion that the type of injury sustained by the employee in the July 13, 2017, incident was not a "low energy impact."

[19] During the period when frangible ammunition was used, no bounce back incidents were reported.

[20] The ODML's determination that a danger existed was based on his determination that there was an "imminent threat", as set out in subsection 122(1) of the *Code*.

[21] The ODML was of the view that "imminent threat" was established; in his report he stated:

> There is a high probability the hazard will cause an event or exposure. At close proximity to the bullet trap using conventional bullets, bounce back is a common occurrence... Minor injuries are common occurrences nonetheless severe injury could happen depending on the size and velocity of the fragment striking an employee.

[22] On the question of whether the danger was a "normal condition of employment," and therefore not a proper basis for a work refusal, the ODML noted in his report that the employer had initially removed the hazard and had then reintroduced the hazard without introducing sufficient measures to either reduce or control the hazard. The ODML concluded that "the hazard in question therefore is not intrinsic or essential characteristic of the work for a Firearms Instructor, and does not constitute a normal condition of employment."

[23] Following the ODML's direction, the employer ceased using the PRTC range, switching to an alternate site.

[24] The employer appealed the ODML's decision and direction.

[25] The appeal hearing was held before me on July 23 to July 25, 2019, in Vancouver.

[26] A site visit occurred on the first day of the hearing when, accompanied by the parties, I attended at the PRTC firing range. While the CBSA was no longer using the range, I was able to observe the RCMP's use of the range. I observed fragments similar to those observed by the ODML. One change, however, was that there was a rubber mat between the target and the opening of the trap. Bullets could penetrate the mat and enter the trap but would be less likely to result in fragments exiting onto the range.

Issues

[27] I have to determine the following issues:

1. Whether the ODML's direction was well-founded; more specifically, whether the respondent was exposed to a danger as defined under the *Code* when he exercised his right to refuse to work on January 9, 2018.

2. If a danger existed, whether the danger was a normal condition of employment so as to preclude the respondent from exercising his right to refuse to work under the *Code*.

Submissions of the Parties

Appellant's Submissions

[28] The appellant called the following witnesses:

1. Jeromey Schroeder
2. Ivan Matrtaj, Senior Engineer, RCMP
3. Michael Charbonneau, Supervisor Training and Development Directorate, CBSA

[29] The appellant's first witness, Mr. Jeromey Schroeder, explained how the lead core of a bullet will tear apart the copper jacket of the bullet upon impact, producing many small fragments. The behaviour of the bullet jacket cannot be predicted as the velocity of the bullet is affected by many variables. Nevertheless, as a general rule, the closer a shooter is to the trap, the higher the bullet's velocity on impact, and therefore the more fragments there will be. The fragments will be smaller than when the shooter is further away from the trap.

[30] The appellant's second witness was Mr. Ivan Matrtaj. He was involved with the RCMP's certification of the PRTC firing range and was thus very familiar with the design of the range. He referenced the trap's manufacturer as authority that three yards is a safe operating distance from the trap, and that the hazard of small particles coming back out of the trap is minimal as they

would possess low energy.

[31] Mr. Matrtaj said that the range is not designed for frangible bullets as they leave a micro-sand residue that cannot be ventilated out of the range. While the manufacturer states that frangible bullets can be used, Mr. Matrtaj was of the opinion that proper ventilation would still be necessary.

[32] Mr. Matrtaj said that the RCMP had no reported injuries at the range. A health and safety engineering sub-group within the RCMP had concluded that the fragments did not present a risk given the absence of reported injuries by the RCMP and the performance of the range.

[33] The appellant's third witness, Mr. Michael Charbonneau, testified that the annual firearms qualification process at CBSA consists of a one-week course. There are normally 16 shooters in a course. They each fire 14 rounds at 25m, 8 rounds at 15m, 8 rounds at 7m, 12 rounds at 5m, and 8 rounds at 3m for a total of 50 rounds per participant. This sequence is repeated five times. This amounts to 3,200 rounds shot in a week. There are four instructors for the 16 shooters; a 1:4 ratio. There is also a single range officer a few meters behind the instructors.

[34] Mr. Charbonneau made the following points:

- CBSA had shot close to 125 thousand rounds at the PRTC range up until the July 13, 2017 incident and the only reported injury was the July 13th incident.
- Frangible bullets are 50% more expensive that the regular duty ammunition.
- There was discussion with instructors about minor cuts and abrasions, but no injuries had been reported.
- There was no incident on the day of the work refusal other than the frangible ammunition running out.
- The employer agreed to the use of frangible ammunition solely to get instructors back to work.

[35] It is the appellant's position that there was no danger within the meaning of the *Code* present on the day of the work refusal. The appellant referenced the three-prong test for "danger" set out in *Correctional Service of Canada* v. *Ketcheson*, 2016 OHSTC 19 (*Ketcheson*).

[36] The appellant also referenced the *Ketcheson* decision as to what would constitute an "imminent threat" and a "serious threat."

[37] The appellant cited *Arva Flour Mills Ltd*, 2017 OHSTC 2, for the proposition that a serious threat cannot be a "hypothetical threat."

[38] The appellant states that although much mention has been made of the July 13, 2017, incident, this current work refusal case is not about that incident, but with whether there was a danger on January 9, 2018. According to the appellant, there was no danger because there was no serious threat on the day of the work refusal. For there to be a serious threat, the appellant cited *Ketcheson*, at paragraph 212:

> [212] In order to conclude that the respondent was exposed to a serious threat to his health or life, the evidence has to show that there was a reasonable expectation that the respondent would be faced in the days, weeks or month ahead with a situation that could cause him serious harm...

[39] The appellant states that the work refusal on January 9, 2018, was based on a belief that reverting to conventional ammunition would cause an injury, but that belief was based solely on the injury that occurred on July 13, 2017. The work refusal was not based on any specific situation on January 9, 2018. It was business as usual that day. The appellant states that "hypothetical and speculative risk is not a danger under the *Code*." The work refusal on January 9, 2018, was a "planned work refusal" caused by the end of frangible ammunition.

[40] The appellant pointed out that the July 13, 2017, incident occurred to a course participant, not an instructor. Instructors stand behind participants and so are shielded from "splash back" of the fragments to some degree.

[41] The appellant notes that despite "receiving daily splatter," Mr. Buisson has never observed such splatter cutting through his clothing.

[42] It also notes that there are no reported injuries from either the RCMP or CBSA to an instructor caused by splash back.

[43] The appellant's position is that there was no danger, but even if there were a danger, it would constitute a "normal condition of employment" and, according to paragraph 128(2)(b) of the *Code*, would preclude an employee from exercising their right to refuse work.

[44] The appellant states that the possibility that instructors will encounter splash back is a "normal condition of employment." The PRTC firing range at Chilliwack is an approved range by the RCMP and it meets the CBSA's policies and guidelines. The manufacturer of the trap anticipates that the frequency of low energy impacts may increase at close range. The manufacturer recommends long-sleeved shirts and long pants when shooting at close range, which is what the employer requires. While the face, neck and hands are exposed, there are no reported injuries to instructors despite nearly 125,000 rounds of conventional ammunition being used at the range.

[45] The appellant notes that the Firearms Instructor work description mentions firing ranges and includes a long list of possible hazards of the job generally. According to the appellant, it has taken reasonable steps to manage and mitigate such risks.

[46] In summary, the appellant's position is there was no danger on January 9, 2018. and even if there were, the splash back of fragments from the trap was a normal condition of employment, precluding the respondent from exercising his right to refuse work. The appeal should be allowed and the ruling of danger should be set aside.

Respondent's Submissions

[47] The respondent, Mr. Buisson, appeared as a witness. He provided a number of details about the July 13, 2017, incident. He was not present at the range when the injury occurred, but he was called in. There was a lot of blood, and gauze was used. He accompanied the injured employee to the hospital.

[48] He testified that at the hospital, a piece of metal the size of a small fingernail was removed from the employee's face. Mr. Buisson understood that the fragment had hit the jawbone on the left side of the face, although he agreed that the hazardous occurrence report did not mention the fragment hitting the jawbone. Stitches were required to close the wound.

[49] According to him, there were concerns that there might have been further fragmentation of the piece before it was removed, so the employee remained at the hospital for several hours so as to undergo a series of x-rays. Further fragmentation had not occurred.

[50] Mr. Buisson made a number of further points:

- He has had to remove splatter fragments from his clothing and his face.
- He could recall two other incidents where instructors were struck in the head with fragments. The cuts were cleaned with alcohol, but no band aids were used.
- He said that the doctor attending the injured employee on July 13, 2017, was of the opinion that a fragment could travel to an artery. The doctor was also concerned about lead poisoning.
- The employer said there was no more money for frangible bullets, prompting the return to conventional ammunition.
- He was not aware of any issues of irritation caused by particulates from the frangible bullets.
- After the work refusal, an outdoor range has been used by CBSA. It has a berm as a backstop. There have been no splash back issues at the outdoor range.
- Since the work refusal, the RCMP has installed a rubber curtain at the PRTC range in order to reduce splash back.
- Fragments have never cut through his clothing.

[51] The respondent cites the *Ketcheson* decision regarding what is meant by "threat" and by "imminent threat" and "serious threat" in the definition of "danger" in the *Code*. The respondent also referred to the three-pronged test in *Ketcheson*.

[52] In addition to Mr. Buisson's testimony, the respondent also emphasized Mr. Charbonneau's following observation, made by management during the stage one work refusal investigation:

> CBSA employees working on the indoor firing range at Chilliwack are subjected to splatter and ricochet when shooting at the bullet trap from close range. It is our experience that these ricochets can and do result in minor injuries ranging from minor cuts and abrasions to lacerations.

[53] The respondent examined the applicability of "imminent threat" and "serious threat" separately. The respondent cited the *Ketcheson* descriptions of "imminent" and "imminent threat."

[54] He concluded that shooting copper-jacketed bullets in close proximity to the steel bullet trap is an activity that can reasonably be considered to be an imminent threat. He relied on the following facts:

- instructors are subject to splatter on a daily basis when providing instruction to shooters on the range.
- instructors pluck the splatter from their clothes and faces.
- minor cuts and abrasions and lacerations have been experienced, despite not being officially reported.

[55] The respondent concludes that there is a reasonable expectation that when providing instruction to participants at the 7m, 5m and 3m distances that instructors will be injured by cuts, abrasions and lacerations from splatter. The activity is therefore an imminent threat and is therefore a danger.

[56] The respondent also views the activity as being a "serious threat," in addition to being an "imminent threat." The respondent cited the *Ketcheson* description of "serious threat."

[57] Regarding the seriousness of the threat posed by the splatter, the respondent relies upon the evidence concerning the July 13, 2017, incident as an example of how severe an injury from the splatter can be. Specifically, the attending doctor's comments:

- that the patient was lucky that the fragment did not hit two inches lower as it could have hit the carotid artery;
- that there was a concern that a piece of metal could break off from the fragment that hit the jawbone and travel to an artery; and
- that there could be lead poisoning.

[58] The respondent addressed the appellant's criticism that Mr. Buisson was uncertain about being in the room when the doctor made his comments by noting that Mr. Buisson's evidence was consistent with the hazardous occurrence report, the job hazard analysis and the stage one investigation report by management. The respondent is of the view that any discrepancy about whether the fragment was embedded in the employee's cheek or in his jaw is not significant since there is no dispute that the employee required x-rays and surgery and that the situation could have been worse if the carotid artery had been hit.

[59] The respondent takes issue with the appellant's argument that the refusal was a "planned refusal," that it was business as usual on January 9, 2018, and that the danger on the day of the work refusal was therefore hypothetical or speculative. The work refusal was triggered by a particular event—the return to the use of the copper-jacketed bullets.

[60] The respondent states that the danger was neither hypothetical nor speculative, relying on

the comments in *Martin* v. *Canada (Attorney General)*, 2005 FCA 156, paragraph 37, to the effect that "[t]ribunals are regularly required to infer from past and present circumstances what is expected to transpire in the future."

[61] The respondent cited *Verville* v. *Canada (Correctional Services)*, 2004 FC 767, paragraphs 34 to 36 and 41 to 43, for the principle that the absence of past incidents does not necessarily lead to the conclusion that the risk is so remote as to be hypothetical or speculative.

[62] Thus, although there has not been a serious injury to an instructor, the possibility of serious injury cannot be ruled out given the July 13, 2017 incident and the evidence regarding the unpredictability of the bullet jacket upon impact.

[63] The respondent notes that the evidence makes it clear that instructors would be exposed to the splatter or ricochet before the activity could be altered, in reference to the definition of danger wherein an imminent or serious threat is a threat to a person exposed to it before the hazard or condition can be corrected or the activity altered.

[64] On the issue of whether the danger faced by instructors at the PRTC range is a normal condition of work, the respondent is of the view that it is not, based in part on Mr. Buisson's testimony that the PRTC range is the only range, in his experience, where shooters advance towards the target, and that the splatter at the PRTC range is greater than experienced at other ranges.

[65] The respondent cites the case of *P&O Ports Inc. And Western Stevedoring Co. And International Longshoremen's and Warehousemen's Union, Local 500*, [2007] C.L.C.A.O.D. No. 32 (*P&O Ports*). This decision was upheld by the Federal Court in 2008 FC 846, for the principle that it is only after the employer has implemented various safety measures that the "residual" hazard that remains constitutes what is referred to as a normal condition of employment.

[66] The respondent states that the employer has not done everything reasonably practical to eliminate or control the hazard since:

- the employer has merely referred to the trap manufacturer's protocols for close-range shooting.
- the employer has done no independent study of the PRTC range and the risks associated with close-range shooting.
- the employer has rejected all the proposals put forward by the instructors to reduce the risk of exposure to the splatter.

[67] The respondent notes that the site visit during the course of the hearing revealed the presence of a black rubber sheet installed between the target and the trap entrance. This was a control measure not discussed prior to the work refusal. Hence, he argues that the employer had not taken all reasonable precautions prior to the work refusal, and therefore it cannot be said that the hazard was a normal condition of employment at the time of the work refusal.

[68] The respondent's position is that the appeal be denied and the ODML's direction be confirmed.

Appellant's Reply

[69] The appellant made the following points in its reply submissions:

- there is no medical report to support Mr. Buisson's testimony about the doctor's comments regarding the potential severity of the injury on July 9, 2017.
- the doctor's comments are second-hand information and of little weight.
- there is no medical evidence the injury on July 9, 2017 could have been worse.
- Mr. Buisson's testimony about instructors plucking fragments from their faces is anecdotal evidence.
- Mr. Buisson could not recall whether any of the shooters he supervised were ever injured.
- the splatter at PRTC is normal as per the manufacturer's instructions.
- the amount of splatter does not make a difference from a risk standpoint.
- the appellant has not done an independent study of the PRTC range because there is no evidence to suggest a need for such a study.
- the appellant was not able to entertain the proposals put forward by the instructors, but the instructors also refused to consider the cleaning and monitoring recommendations made subsequent to the job hazard analysis.

Analysis

[70] The respondent engaged in a work refusal pursuant to subsection 128(1) of the *Code*:

> 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.
>
> [Emphasis added]

[71] "Danger" is a key concept in the exercise of the employee's right to refuse to work. If a hazard is of such low risk that it is not a danger then it is not a suitable subject to base a work refusal on. There are other mechanisms in the *Code* to deal with such hazards.

[72] On January 11, 2018, Ministerial Delegate Manglori determined that there was a "danger" and issued a direction under paragraph 145(2)(a) of the *Code*:

> 145(2) If the Minister considers that the use or operation of a machine or

> thing, a condition in a place or the performance of an activity constitutes a danger to an employee while at work,
>
> (a) the Minister shall notify the employer of the danger and issue directions in writing to the employer directing the employer, immediately or within the period that the Minister specifies, to take measures to
> (i) correct the hazard or condition or alter the activity that constitutes the danger, or
> (ii) protect any person from the danger; and…

[73] The appellant then appealed the direction pursuant to subsection 146(1):

> 146(1) An employer, employee or trade union that feels aggrieved by a direction issued by the Minister under this Part may appeal the direction in writing to an appeals officer within 30 days after the date of the direction being issued or confirmed in writing.

[74] Pursuant to subsection 146.1(1) of the *Code*, 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

[75] The appellant requests that I set aside the Ministerial Delegate's ruling of danger. As such, I must determine if a danger existed at the time of the work refusal. If there was no danger, then I must rescind the Ministerial Delegate's direction.

[76] The current definition of "danger" is described in section 122 of the *Code*:

> … 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.

[77] The test for "danger" set out in the *Ketcheson* decision consists of the following questions:

> 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?

[78] In this case, there is no disagreement that the activity that is alleged to be a danger is the act of shooting conventional copper jacket ammunition in close proximity to the steel bullet trap in the indoor PRTC firing range. More specifically, it is alleged that the employees performing this activity and the CBSA firearms instructors in the immediate vicinity of these employees can be injured by small metal fragments that ricochet or splatter out of the bullet trap.

[79] The next question to be asked is whether this activity could reasonably be expected to be an imminent or a serious threat to the life or health of the respondent on January 9, 2018.

[80] ODML Manglori's direction of January 11, 2018 was based on a finding of an "imminent threat", not a finding of "serious threat":

> The activity of shooting conventional copper jacketed ammunition at less than fifteen (15) meter to the Total Containment Bullet Trap at the indoor firing range at Chilliwack, BC, exposes the employees performing this activity, and the CBSA firearms instructors in the immediate vicinity of these employees to an **imminent threat** of being injured by small metal fragments that ricochet out of the bullet trap with enough mass and velocity to pierce and possibly embed themselves in the employees' exposed skin.
>
> [Emphasis added]

[81] However, both the appellant and respondent in this case made arguments about whether the activity of close-range firing of copper-jacketed ammunition was an "imminent threat" or "serious threat." I will start by focusing on whether the activity in question was an "imminent threat."

[82] In *Ketcheson*, I described what an "imminent threat" is as follows:

> [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.

[83] In this case, I must therefore determine whether the respondent and the other firearms instructors were faced with an imminent threat on January 9, 2018 because the course participants were required to use the copper-jacketed ammunition instead of the frangible ammunition they had been using since July 13, 2017. This inquiry entails considering whether there was a reasonable expectation that the hazardous activity of firing ammunition at close range that had a tendency to ricochet fragments of metal back out of the bullet trap would cause injury within minutes or hours.

[84] As noted in *Ketcheson*, the degree of harm can be minor for an "imminent threat" to

exist. However, trivial injuries do not meet the necessary threshold. Still, given the overall purpose set out in section 122.1 of the *Code* (to prevent work-related accidents, injuries, illnesses and harassment), I believe that the mechanisms under Part II are designed to prevent such injuries as cuts, abrasions and lacerations.

[85] Furthermore, given all of the evidence, I am persuaded by the respondent's testimony that there was a reasonable expectation that Mr. Buisson and his colleagues were subject to being struck by fragments of metal on a daily basis. While the firearms instructors may not have been injured every day on the range, there was a reasonable expectation that they could be injured in a non- trivial manner on any given day that the course participants used copper-jacketed ammunition. In other words, there was an imminent threat of being the subject of injury, such as cuts, abrasions and lacerations on January 9, 2018, when the course participants were required to use the copper-jacketed ammunition. Considering my conclusion that there was an imminent threat, it is not necessary to address the respondent's argument that there was a serious threat in this case.

[86] I am also of the view that this threat could materialize before the activity could be altered, thereby satisfying the third element of the test as set out in *Ketcheson*. I note that the appellant did not address this last part of the test in its submissions and the respondent did so very briefly.

[87] The above analysis demonstrates that, in this matter, the conditions necessary to conclude that a danger existed are therefore satisfied within the meaning of section 128 of the *Code*.

[88] Having found that there was a danger, I must now consider whether the danger was a normal condition of employment so as to preclude the respondent from exercising his right to refuse to work under the *Code*. This limitation is set out in paragraph 128(2)(b):

> 128(2) An employee may not, under this section, refuse to use or operate a machine or thing, to work in a place or to perform an activity if
>
> ...
>
> (b) the danger referred to in subsection (1) is a normal condition of employment.

[89] In *P&O Ports*, the Federal Court cited with approval the following analysis by the appeals officer in regard to the question as to whether a danger constituted a normal condition of employment:

> [46] The Appeals Officer held as follows at paragraph 152:
>
> > [152] I believe that before an employer can say that a danger is a normal condition of work, he has to identify each and every hazard, existing or potential, and he must, in accordance with the Code, implement safety measures to eliminate the hazard, condition, or activity; if it cannot be eliminated, he must develop measures to reduce and control the hazard, condition or activity within safe limits; and finally, if the existing or potential hazard still remains, he must make sure that employees are provided with the necessary

> personal protective equipment, clothing, devices and materials against the hazard, condition or activity. This of course, applies, in the present case, to the risk of falling as well as to the risk of tripping and slipping on the hatch covers.
>
> [153] Once all of these steps have been followed and all the safety measures are in place, the "residual" hazard that remains constitutes what is referred to as the normal condition of employment. However, should any change be brought to this normal employment condition, a new analysis of that change must take place in conjunction with the normal working conditions.
>
> [154] For the purposes of this case, I find that the employers failed, to the extent reasonably practicable, to eliminate or control the hazard within safe limits or to ensure that the employees were personally protected from the hazard of falling off the hatch covers.

[90] This analysis derives from section 122.1 of the *Code*, which sets out the purpose of Part II and section 122.2 of the *Code*, which sets out what, in occupational health and safety practice, is called the "hierarchy of controls." Section 122.2 reads as follows:

> 122.2 Preventive measures should consist first of the elimination of hazards, then the reduction of hazards and finally, the provision of personal protective equipment, clothing, devices or materials, all with the goal of ensuring the health and safety of employees.

[91] The issue therefore is whether the employer has taken appropriate measures to guard against the danger identified above, and to reduce it to an acceptable level such that the activity and the residual risk that it presents can be said to be a normal condition of employment as provided in paragraph 128(2)(b) of the *Code*.

[92] As stated in *P&O Ports*, the employer must first attempt to eliminate the hazard. In the current case, the employer eliminated the hazard by substituting copper-jacketed ammunition with frangible ammunition. The employer then decided to reintroduce the hazard to the workplace. That decision would *prima facie* not be within the spirit of section 122.2.

[93] There are further implications of section 122.2. Where the section says that there should be a reduction of risk, that is understood in occupational health and safety practice to mean that engineering controls should be applied before administrative controls (e.g. training and behaviour). It also means that personal protective equipment is a "last resort" as a control.

[94] This is a case that revolves around safety engineering. The appellant called Mr. Matrtaj as a witness. He is a senior engineer with the RCMP. At no point did he state or suggest that it was impossible from an engineering point of view to reduce the risk from the fragments. My impression was that he had not been asked to fully turn his mind to the problem.

[95] It is not the role of the ODML, or an appeals officer, to offer specific suggestions as to how to eliminate or reduce risk. I would note that the firearms instructors had some suggestions prior to the work refusal. I would also note that I observed a black rubber mat placed between the target and the entrance to the trap during our site visit. That was an engineering control that was

not present on January 9, 2018. Its effectiveness as a control was not fully explored at the hearing. I also note the evidence of the respondent that in his experience, the PRTC range was unusual in that other ranges have the target advanced towards the shooters rather than have shooters approach the opening of the trap.

[96] It would seem that the appellant relied on the manufacturer of the trap in its decision to merely require the control of last resort, personal protective equipment (hat, glasses, long-sleeved shirts and pants). With all due respect, the manufacturer is not an authority on the implications and requirements of section 122.2 of the *Code*.

[97] In conclusion, it cannot be said that the employer has done everything reasonably practicable to eliminate or reduce the risk from the ricocheting fragments, and so it cannot be said that the danger the respondent faced on January 9, 2018 was a normal condition of employment. The respondent was entitled to engage in the work refusal on January 9, 2018.

[98] Having decided that there was a danger, and that this did not constitute a normal condition of employment, I conclude that the ODML's direction was well-founded. I therefore confirm the direction issued under paragraph 145(2)(a).

Decision

[99] For these reasons, I confirm the direction issued by Mr. Afshin Manglori, Ministerial Delegate, on January 11, 2018.

Peter Strahlendorf
Appeals Officer