

Case In Point

Federal Appeals Officer Confirms Work Refusal Must Be Based on More Than “Hypothesis or Conjecture”

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The Occupational Health and Safety Tribunal Canada has found that there was insufficient evidence of radiation contamination on parcels arriving from Japan after the Fukushima nuclear incident in 2011 to warrant a work refusal at a mail sorting facility. For a reasonable expectation of danger to exist, there must be more than hypothesis or conjecture.

The appellant was a Border Services Officer with Canada Border Services and worked at a mail sorting facility. Shortly following the Japanese tsunami, which caused extensive damage to the Fukushima nuclear facility, the appellant and another colleague noticed mail arriving from Japan. Fearing radiation contamination, they initiated a work refusal under section 128 of the *Canada Labour Code* (the “Code”). A Health and Safety Officer found that a “danger did not exist for the refusing employees” as there was no evidence that incoming mail was contaminated. The appellant appealed that finding.

In dismissing the appeal, the Appeals Officer considered the definition of danger in the Code and confirmed that for a danger to exist, there must be a hazard, condition or activity that can reasonably be expected to cause an injury or illness to an employee. He noted that a reasonable expectation of injury cannot be based on hypothesis or conjecture.

The Appeals Officer also noted that the radiation levels in goods travelling to and from Japan were being actively monitored and assessed at the time and that any risk of radiation-affected mail from Japan was miniscule. He confirmed that it was reasonable for the employer to rely on those assessments to evaluate the risk to workers.

As a result, the Appeals Officer concluded that “the level of potential exposure to radiation coming from the mail from Japan ... could not have reasonably been expected to cause injury or illness to the appellant on the day of the refusal, and consequently does not meet the definition of ‘danger’ as per the Code.”

The decision confirms that in order to justify a work refusal under the Code, there must exist an actual danger which can reasonably be expected to cause injury or illness. A reasonable expectation could be based on expert opinions, the opinion of ordinary witnesses having the necessary experience or by inference arising logically or reasonably from known facts, but cannot



be merely a hypothetical risk. The risk of injury or illness must be more than a “mere possibility”.

[Damian Azeez and Canada Border Services Agency, 2013 OHSTC 8](#)