Mariner Life – Legal Desk

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Unsafe Working Conditions: Rights and Responsibilities of Workers and Employers

Since the earliest example of a person trading their labour for reward in an adventure at sea, the question has arisen: "is this work more dangerous than it needs to be?". Either as a worker or an owner/employer, knowing how to respond to the issue of an unsafe work condition is critical to preserving your rights and remedies. A worker that does not follow the rules of responding to an apparent unsafe work condition can be subject to consequences such as loss of pay, termination of employment, or even a lawsuit for negligence by the employer or fellow employees. An owner/employer that does not prevent or mitigate an unsafe work condition, or improperly disciplines a worker for refusal to work in an unsafe condition, can be at risk of regulatory penalties, costly civil lawsuits, and even criminal proceedings.

SOURCES OF LAW:

The law regarding unsafe working conditions comes from three sources: contracts between parties (including collective bargaining agreements), legislation (federal and provincial), and common law (decisions of courts and arbitrators). While many of the principles that flow from these three sources of law are similar, a worker or an employer must determine which particular law applies to the circumstances in order to determine the specific legal requirements. The following questions should be asked in determining what law applies to the worker/employer:

Is there a union involved? If the worker is unionized than the collective bargaining agreement ("CBA") will be the primary document regarding the rights and responsibilities of the worker and the employer. The CBA will describe steps to be taken when an unsafe working condition is said to exist – the requirements must be followed strictly. The terms in the CBA will reflect the minimum steps required under either the Canada *Labour Code* and regulations, or the B.C. *Workers Compensation Act* ("*WCA*") and regulations, but will often provide more detailed requirements. Whether the *Labour Code* or the *WCA* applies depends on whether the work is federally or provincially regulated.

Is the Work Federally or Provincially Regulated? If the marine work is federally regulated the *Labour Code* and its *Marine Occupational Safety and Health Regulations* will apply. If the work is provincially regulated the *Workers Compensation Act* and the *Occupational Health and Safety Regulations* will apply. Unless the employer has established a relationship with either Transport Canada (the responsible authority for marine work under the *Labour Code*) or the Workers Compensation Board under the *WCA*, it can be unclear which legislation applies. For example, on their website, Transport Canada maintains the *Labour Code* applies to "employees when they are on

board a ship", while WCB typically claims jurisdiction over workers on fishing boats and passengers vessels that do not trade outside of a provincial boundary. This conflict between which legislation applies, federal or provincial, is reflective of the two governments' ongoing struggle to determine their individual jurisdictions without overlapping or leaving any seaman/vessels unregulated. Which legislation applies will be determined by a host of factors, including size of vessel, where it trades, what it carries – and each circumstance must be viewed separately in order to determine which is the applicable legislation. The requirements of both pieces of legislation are discussed below.

Are there other contract terms between the worker and employer? If a union is involved the CBA will be the primary contract document between the worker and employer. When no union is involved, there may be a written contract that speaks to unsafe work and what to do about it, though such a contract is uncommon. Where there is no contract it is open to the parties to argue the agreement for labour includes unwritten or implied terms regarding unsafe work, although the rights and responsibilities under the *Labour Code* and the *WCA* described below will address the vast majority of concerns.

WHAT THE LEGISLATION SAYS:

The principles behind both the federal *Labour Code* and the provincial *WCA* provisions regarding unsafe work are the same:

- the employer and the employee must take reasonable steps to ensure there is a reasonably safe work environment (this includes workers and employers reporting hazardous circumstances to each other);

- the worker can refuse unsafe work without loss of pay or fear of reprisal provided they have a reasonable basis for believing the work is unsafe and provided the refusal to work does not otherwise endanger the safety of others or interfere with the safe operation of the vessel.

The *WCA* provides that workers can decline work if they feel it is "unsafe" to themselves or others, while the *Labour Code* the work must constitute a "danger" to the worker or to others to be rightfully refused. While the legislation uses different words, the intent is arguably the same – "unsafe" or "dangerous work" is work that involves an unnecessary risk of harm to the worker or to others.

Under both pieces of legislation, work that is normally unsafe or hazardous cannot be refused. That is, a deckhand cannot refuse to work because the deck is slippery when it is wet and cold, and an engineer cannot refuse to check the oil on the main because the block is hot. The danger must be something that is more than necessarily inherent to the work for it to be refused.

Unlike the *WCA*, the *Labour Code* makes special provision for refusing work on ships and aircraft. It provides that the worker can report an unsafe condition to the supervisor or the employer and the employer can decide whether the employee *may*, "having regard to the safe operation of the ship", discontinue work. If the employer decides the employee may not refuse the work and advises the employee as such, the employee is obliged to continue work. While this sounds severe, the employee retains the ultimate *ability* (but not necessarily the *right*) to refuse the work regardless of the legislation, and any subsequent discipline by the employer would be subject to being set aside on the basis that the employee was acting reasonably, as discussed below.

That being said, it is illegal for an employer or the agent to intimidate, coerce, discipline, or fire a worker for refusing work that involves an unnecessary risk of harm to the worker or to others. A worker that feels they have been disciplined can complain to the Canada Industrial Relations Board (under the *Labour Code)*, or to the WCB (under the *WCA*). A unionized worker would first file a grievance however.

Proper Procedure for Refusing Unsafe/Dangerous work:

The federal *Labour Code* and the provincial *WCA* both have similar steps that must be followed in refusing unsafe work:

1. The worker must report the unsafe or dangerous condition immediately to a supervisor or their employer;

2. The worker must stay on shift while the work is being investigated but need not participate in the work or the investigation;

3. The supervisor must investigate the unsafe work and correct any unnecessary safety risk. If the worker remains of the view the work is unsafe after the repair a joint investigation between the employer, the worker, and a member of the Safety Committee (under the *Labour Code*) or the Health and Safety Committee (under WCB) - if there is such a committee at the work site. The joint committee will mandate a repair - the employer must make the required repair and the worker must return to work.

4. If the workers complaint continues, either the worker, the worker's supervisor, or the employer reports it to the "Safety Supervisor" (under the *Labour Code* this is Transport Canada Marine Safety) or the WCB Inspector;

5. The government inspector gives a written decision on the safety of the work which the employer must comply with. If the repair is complied with the worker must return to work. If the finding of the inspector is challenged the worker or employer may appeal the decision to the WCB Review Board or the Labour Relations Board.

Discipline for Refusing Unsafe Work:

Even though a worker follows the procedure set out above for reporting unsafe work, the worker might still be disciplined by the employer for refusing work. Whether that discipline is lawful will depend on whether:

- The worker honestly believed their safety was in danger;
- The worker communicated their belief to the employer in an adequate manner;
- The belief reasonable in the circumstances; and
- The danger is sufficiently serious to justify refusal.

(Re Steel Co. & USW Local 1005 (1973, 4 LAC (2d)(315):

Importantly, the work need not in fact be unsafe or dangerous, but rather, the worker must have a reasonable basis for believing it was dangerous, whether it was in fact or not.

In *Cates v. Seafarer's International Union of Canada* (1998) the union grieved a two week suspension imposed on a deckhand who refused to board a chemical barge for fear of his safety. The *Labour Code,* and not the *WCA,* applied in this case. The matter went to arbitration and the arbitrator doubted the deckhand had a sincere belief he was in danger. The arbitrator noted the deckhand has been on the chemical barge both before and after the day of the refusal without training and had not made a complaint then. The arbitrator noted that "[the deckhand] agrees if he had received something in writing indicating training was not required he would have boarded [the barge]", and also stated: "a person who truly believes a situation was dangerous would not have a change of heart because of a piece of paper".

IBEW v. Jim Pattison Sign Co. (2004 BCAB), an interesting though non-marine case, involved two welders who refused to work in a shop because of aluminum welding fumes. In this case the WCB regulations applied. Again, the test applied by the arbitrator in determining whether the workers acted properly in refusing work was not whether the work was actually unduly hazardous, but whether the worker had a reasonable basis to believe it was. The arbitrator in that decision quoted from another case, *Re Industrial Health and Safety Regulations, Decision No. 349*, which held:

> *If the investigatory procedures result in a determination that there was no undue hazard, that does not mean that the worker refusing to work had no reasonable cause to believe that such a hazard did exist. That worker may not have the expert knowledge available to his union, employer, or the Board. He may have been misinformed by or misunderstood what he has read, seen, or heard in the past. On the basis of simple common sense or intuition, he may consider that an undue hazard exists when, in fact, it does not. A worker may only be disciplined if there was no undue hazard and he had no reasonable cause to believe there was such a hazard.*

In other words, the worker with reasonable cause to believe an undue hazard exists does not have to be correct. The examination is to determine whether the employee's apprehensions were objectively reasonable. The question is "whether the average employee at the workplace, having regard to his general training and experience, would, exercising normal and honest judgment, have reason to believe that the circumstances presented an unacceptable degree of hazard."

To this extent, the motives of the worker refusing work are closely examined by arbitrators and courts. A recent case involved a tug captain being terminated for refusing to deliver logs booms on the basis that the tug he was assigned suffered from poor maneuverability, stability and lighting. In assessing whether the worker had an honest belief that the work was unsafe the arbitrator stated:

"Based on the evidence, this Board has grave concerns about the true beliefs of [the master] on August 12. It is clear that he did not like to operate the [vessel] but that is a different issue from whether it was unsafe. Of particular concern is that if [the master] honestly felt the vessel was unsafe why had there been no written communication in the logs or in notes to the mechanic related to those concerns. Why did [the master] not formally record his concerns so that other captains and deckhands as well as management and the authorities would have to address those potential problems? The evidence is clear [the master] never said anything to the other pilots or to the Company's mechanic. If [the master] truly believed his assertions concerning safety, he had a moral, and perhaps even a statutory duty, to raise those concerns with others."

Cases such as this make it clear that workers who chose to refuse unsafe work are best served in reporting recurring dangerous circumstances prior to the actual refusal, or for singular events of unsafe work, reporting the condition promptly and recording the details of the event as much as practical.

In the end, employers must take allegations of unsafe work conditions extremely seriously, and workers must act responsibly in choosing why, when and how to report unsafe work conditions. Like the boy who cried wolf, unnecessary and unanswered calls for help may only lead to more harm. Workers will be protected from reprisal for refusing unsafe work only if their belief in potential harm is reasonable, and their motives pure.

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