IN THE MATTER OF:

An appeal pursuant to Section 3-53 with respect to the decision of an Occupational Health Officer, in a matter involving harassment or discriminatory action, pursuant to *The Saskatchewan Employment Act.*

BETWEEN:

Honey Bee Manufacturing Ltd.

Appellant (Employer)

- and -

Hazen Grant Stewart

Respondent (Worker)

- and -

Director of Occupational Health and Safety
Ministry of Labour Relations and Workplace Safety

Respondent

For the Appellant: Kevin Hoy, Anderson & Company

For the Respondent: Hazen Grant Stewart, self-represented

DECISION

INTRODUCTION

[1] In a September 11, 2015 complaint of discriminatory action. the worker, Hazen Grant Stewart ("Stewart") alleged that on August 12, 2015 his Employer, Honey Bee Manufacturing Ltd. (the "Employer", "Honey Bee") terminated his employment for exercising his right to refuse unsafe work.

[2] In a letter decision dated December 3, 2015, an Officer of the Occupational Health and Safety Division of the Ministry of Labour Relations and Workplace (the "Officer") found that the work refusal process was not followed to completion. The Officer concluded that the termination of the worker prior to exhausting the work refusal process constituted an unlawful discriminatory action pursuant to section 3-35(f) of *The Saskatchewan Employment Act*, SS 2013, c.S-15.1 (the "Act").

[3] The Officer issued a concurrent Notice of Contravention requiring the Employer to cease the discriminatory action against Mr. Stewart; to reinstate him to his former employment; to pay him the wages he would have earned if he had not been wrongfully discriminated against; and, to remove any reprimand or other reference to the matter from the worker's employment records.

[4] The Employer has appealed from the decision of the Officer, and requested a stay of the effect of the decision being appealed pending the hearing of the appeal.

[5] Following my appointment as adjudicator to hear the appeal, both parties provided written submissions on the request for stay, followed by oral submissions via teleconference on February 23, 2016. On my motion, pursuant to section 3-57(3) of the Act, I stayed the effect of the decision pending the appeal to be heard on March 22, 2016. The hearing was subsequently re-scheduled due to inclement weather and poor road conditions on March 22, and was heard on April 15, 2016 in Swift Current, Saskatchewan.

ISSUE(S)

[6] Did the worker exercise his right to refuse pursuant to section 3-31; and

[7] If so, did the Employer take discriminatory action against the worker contrary to section 3-35 of the Act?

RELEVANT LEGISLATION

[8] The relevant provisions of *The Saskatchewan Employment Act, 1993* are as follows:

> **3-1**(1) In this Act:
>
> ...
>
> (i) **"discriminatory action"** means any action or threat of action by an Employer that does or would adversely affect a worker with respect to any terms or conditions of employment or opportunity for promotion, and includes dismissal, layoff, suspension, demotion or transfer of a worker, discontinuation or elimination of a job, change of a job location, reduction in wages, change in hours of work, reprimand, coercion, intimidation or the imposition of any discipline or other penalty but does not include:

(i) the temporary assignment of a worker to alternative work, pursuant to section 3-44, without loss of pay to the worker; or

(ii) the temporary assignment of a worker to alternative work, without loss of pay to the worker, while:

(A) steps are being taken for the purposes of clause 3-31(a) to satisfy the worker that any particular act or series of acts that the worker refused to perform pursuant to that clause is not unusually dangerous to the health or safety of the worker or any other person at the place of employment;

(B) the occupational health committee is conducting an investigation pursuant to clause 3-31(b) in relation to the worker's refusal to perform any particular act or series of acts; or

(C) an occupational health officer is conducting an investigation requested by a worker or an employer pursuant to clause 3-32(a);

Right to refuse dangerous work

3-31 A worker may refuse to perform any particular act or series of acts at a place of employment if the worker has reasonable grounds to believe that the act or series of acts is unusually dangerous to the worker's health or safety or the health or safety of any other person at the place of employment until:

(a) sufficient steps have been taken to satisfy the worker otherwise; or

(b) the occupational health committee has investigated the matter and advised the worker otherwise.

Investigation by occupational health officer

3-32 If there is no occupational health committee at a place of employment or if the worker or the employer is not satisfied with the decision of the occupational health committee pursuant to clause 3-31(b):

(a) the worker or the employer may request an occupational health officer to investigate the matter; and

(b) the worker is entitled to refuse to perform the act or series of acts pursuant to section 3-31 until the occupational health officer has investigated the matter and advised the worker otherwise pursuant to subsection 3-33(2).

3-35 No Employer shall take discriminatory action against a worker because the worker:

...

(f) refuses or has refused to perform an act or series of acts pursuant to section 3-31

3-36(1) A worker who, on reasonable grounds, believes that the Employer has taken discriminatory action against him or her for a reason mentioned in section 27 may refer the matter to an occupational health officer.

(2) Where an occupational health officer decides that an Employer has taken discriminatory action against a worker for a reason mentioned in section 27, the occupational health officer shall issue a notice of contravention requiring the Employer to:

(a) cease the discriminatory action;

(b) reinstate the worker to his or her former employment on the same terms and conditions under which the worker was formerly employed;

(c) pay to the worker any wages that the worker would have earned if the worker had not been wrongfully discriminated against; and

(d) remove any reprimand or other reference to the matter from any employment records maintained by the Employer with respect to that worker.

(3) Where an occupational health officer decides that no discriminatory action has been taken against a worker for any of the reasons set out in section 27, the occupational health officer shall advise the worker of the reasons for that decision in writing.

(4) Where discriminatory action has been taken against a worker who has acted or participated in an activity described in section 27, there is, in any prosecution or other proceeding taken pursuant to this Act, a presumption in favour of the worker that the discriminatory action was taken against the worker because the worker acted or participated in an activity described in section 27, and the onus is on the Employer to establish that the discriminatory action was taken against the worker for good and sufficient other reason.

[9] Provisions of *The Occupational Health and Safety Regulations, 1996* referred to herein are:

Operating controls

135(1) Where reasonably practicable, an employer, contractor or supplier shall ensure that operating controls on machines:

(a) are located within easy reach of the operator; and

(b) cannot be activated by accidental contact.

(2) Where reasonably practicable, an employer, contractor or supplier shall ensure that stopping devices on machines are:

(a) located in the direct view and within easy reach of the operator; and

(b) readily identifiable.

(3) Where a worker is required to feed material into a material-forming press, punch, shear or similar machine, an employer, contractor or supplier shall:

(a) where practicable, install a positive means to prevent the activation of the machine while any part of the worker's body could be injured by moving parts of the machine; or

(b) where it is not practicable to comply with clause (a), install safeguards to prevent the worker from contacting a moving part of the machine.

Unattended and suspended machines

136(1) An employer or contractor shall not require or permit a worker to leave unattended or in a suspended position any machine or any part of a machine unless the machine or part has been:

(a) immobilized and secured against accidental movement; or

(b) enclosed by a safeguard to prevent access by any other worker to the machine or part.

(2) A worker shall not leave unattended or in a suspended position any machine or any part of a machine unless the machine or part has been:

(a) immobilized and secured against accidental movement; or

(b) enclosed by a safeguard to prevent access by any other worker to the machine or part.

Safeguards

137(1) Except where otherwise provided by these regulations, an employer or contractor shall provide an effective safeguard where a worker may contact:

...

(c) an open flame;

(5) Where there is a possibility of machine failure and of injury to a worker resulting from the failure, an employer or contractor shall install safeguards that are strong enough to withstand the impact of debris from the machine failure and to contain any debris resulting from the failure.

CREDIBILITY

[10] Though each party views and argues the facts from their own perspective, the underpinning facts are largely undisputed. For that reason, the issues in this appeal require consideration of the factual background and evidence and the application of the legislation to that evidence. However, to the extent there may be contentious evidentiary issues material to my reasoning and determination, I have been guided by the seminal decision of the British Columbia Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.):

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony

with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

BACKGROUND AND EVIDENCE

[11] In the evidence before me are the parties' respective sets of documentary material, and the testimony presented at the hearing. I have had the opportunity to read the Officer's investigation file prior to the hearing, first in relation to the request for stay. Prior to the hearing the request for stay, disclosure of the contents of the Officer's file was made to both parties. Both parties were advised that any additional documents intended to be relied on at the hearing must be exchanged (with a copy to this Tribunal) prior to the hearing. Each party submitted a "book of documents" prior to the hearing. As a result of the foregoing, there was a great deal of duplication in each "book" of documents. For clarity, the Employer's materials are referred to herein by Tab Numbers. The documents at each Tab are marked, correspondingly, as Exhibit A1 to A21. Mr. Stewart's set of documents consists of a set of individually numbered pages 1 to 90. I have marked Stewart's set of documents in its entirety, as Exhibit R-1. I have also taken the liberty of adding to his set of documents a page (marked page 91) of pictorial evidence previously submitted by Stewart (to OH&S) which informed my understanding of the background facts. References herein to Exhibit R-1, will be by page number(s). I have marked as Exhibit R-2, an additional one-page document submitted by Stewart during the hearing and added it to the Employer's Tab 10 which referenced attached statements but did not include Cadoy's second statement dated August 10, 2015.

[12] I found the majority of Stewart's set of documents to be irrelevant, unnecessary or redundant. My intent here is to explain, not to embarrass. I have made allowances for the fact that Mr. Stewart has represented himself in these proceedings. Documents irrelevant to these proceedings included material pertaining to Stewart's complaint to the Ombudsman, his appeal(s) to Service Canada in re: the denial of Employment Insurance, and informational material related to work refusals pursuant to the Canada Labour Code. It was unnecessary to submit into evidence 19 pages of extracts from *The Saskatchewan Employment Act* and *The Occupational Health and Safety Regulations,* particularly extracts from Part II of the Act (Employment Standards) which is irrelevant to this appeal. Finally, and subject to the exceptions listed below, Stewart's set of documents included documents which were relevant but redundant inasmuch as they had been previously been entered as Exhibits A1-A21 as described above. The following documents from Mr. Stewart's set of documents were of assistance:

a) R-1, Page 10, Informational material about industrial shotblast systems. R-1, Page 11, Rotoblast wheel, expanded assembly drawing;

b) R-1, Page 12, Rotoblast wheel, promotional photograph, information and specifications;

c) R-1, Page 13, Scale drawing of Pangborn Blaster, top view and side view, drawn and annotated by the Respondent;

d) R-1, Page 58, correspondence dated October 16, 2015 from OH&S Officer notifying Employer of Mr. Stewart's complaint of discriminatory action and requesting the employer to provide (good and sufficient) reasons for the discriminatory action by November 2, 2015 R-1, Page 66, photograph of worker in the "blasting position";

e) R-1, Page 67, photograph of the Pangborn machine's control panel and emergency stop button;

f) R-1, Page 73, correspondence dated August 13, 2015 from the Employer to the worker assigned to replace Stewart on the Pangborn following Stewart's refusal.

g) R-2, Page 76. Statement 1 of 2 from Tony Cadoy, dated August 12, 2015 in re: events of August 8, 2015. Referred Tab 10, but not included. However, Statement #1 is a duplicate of Cadoy's incident report at Tab 3.

h) R-1, Page 77, Statement 2 of 2 from Tony Cadoy, dated August 12, 2015 in re: events of August 10, 2015. Referred to in the OHC report at Tab 10 of the Appellant Employer' Book of Documents, but not included;

i) R-1, Pages 83 and 86, a copy and duplicate copy of Stewart's statement to the OHC dated August 12, 2015, summarizing the events of August 10, 2015. Referred to in the OHC report at Tab 10 of the Appellant Employer' Book of Documents, but not included.

j) R-1, Page 87, transcription of conversation between Fehr and Stewart prior to the meeting convened to discuss his August 10, 2015 refusal;

k) R-1, Page 91, generic promotional photograph depicting parts to be blasted hanging from a rail system on hooks, moving toward the first safety 'door' ("safety fingers") of the blast system.

Background

[13] The Employer operates a manufacturing plant in Frontier, Saskatchewan. Honey Bee employs 190 workers engaged in the production of agricultural (harvesting) equipment, such as headers and swathers.

[14] Stewart was hired by Honey Bee in August, 2007. Stewart started on the assembly line, but is said to have worked on the paint production line since 2007 as a blaster operator, running the Pangborn Blaster

[15] The Pangborn Blaster[1] facility is a flow-through shotblast surface preparation system described as being the size of a small house. The Pangborn's blaster function is to put a "finish" on machinery parts prior to painting by blasting the surface with abrasive material—in this case, steel shot—as the parts flow through' the blast system into the blast chamber hanging on a monorail line.

[1] Exhibit R-1, page 13 Scale drawing of the Pangborn system and photographs pp 66, 67

[16] The Pangborn facility as a whole appears to be roughly 40 feet in length, including the infeed and exit areas at either end of the facility, each of which have side-walls draped by industrial strength protective safety curtains. Between the safety-curtained infeed and exit areas is the 20-foot-long blast system, the outer walls of which are armoured steel. The blast system is comprised of the blast chamber approximately six long and five feet wide, and an internal safety system at either end to contain debris from the blaster.

[17] The process begins by loading the infeed line in an area approximately 75 feet from the blaster. Parts are loaded (hung on hooks or tees) on a monorail line which runs to the infeed area of the facility, and feeds the machinery parts into the blasting system. At the entry point to the blasting system, the moving parts flow through the above-mentioned safety system, comprised of three sets of safety fingers at the entry, at two feet and six feet into the system. Through the third set of fingers, the parts flow into the blast chamber. As depicted in Ex R-1, Page 91, the safety fingers resemble a solid set of double doors but are, in fact, independent horizontal strips that act as a safety barrier to contain internal debris from the shotblaster, while still allowing the parts to pass. The parts pass through the blast chamber at a variable, but pre-set speed from approximately 1.5' feet per minute to 7 feet per minute , passing through three more sets of safety fingers before exiting into the safety-curtained exit area.

[18] Shotblasting, also referred to as sandblasting or beadblasting, is a highly abrasive process that continuously wears on the components, notably the paddles on the blast wheels or rotoblasters which propel the abrasive material. Such components are referred to as "easily replaceable sacrificial wear components" [R-1, Page 10], meaning that when paddles on the rotoblaster are worn, they internally self-destruct in situ. That is not to suggest that self-destruction supplants regular maintenance, and timely replacement of worn paddles, but to acknowledge that worn sacrificial wear parts are known and intended to disintegrate (or "explode") for ease of maintenance. The Employer's careful maintenance of the Pangborn facility has not been challenged. The Employer has in place the recommended safety systems to contain blasting debris inside the armoured system, including "shrapnel" from disintegrating paddles.

[19] The blaster operator operates the Pangborn system. It is important to note that "the Pangborn" and the Blaster run on separate power systems. The Pangborn system powers the monorail line which moves the parts from the loading area, through the blasting system and on to the next stage of production. In practice, the monorail is "live", i.e. continuously powered, throughout the paint production line's hours of the operation. In that sense, "running the Pangborn" consists of starting the Pangborn at the beginning of the shift, and turning it off at the end of the shift.

[20] Once the line is loaded with parts to be blasted, the blaster operator sets the speed that the parts will pass through the system, and initiates the start-up sequence for the blaster at the control panel. [R-1, Page 67] As depicted, the control panel on the outer wall of the system positioned about midway between the entrance to the blast system and the third set of safety fingers leading in to the blast chamber. During the blasting process, the operator monitors the progress from the blow off position and via 'windows' intended for that purpose. The photograph at R-1, Page 66 depicts a blast operator at the blasting or blow off position, illustrating that the operator's back is to the safety curtains at the exit area. (See also Stewart's depiction of his position ("Me") in the upper left of his line drawing of the blaster (top view) at R-1, Page 13). Thus, during the blasting process, the blast operator is some distance from the control box where the emergency stop button is located.

[21] The blast operator is periodically expected to load, or to help load the infeed line, particularly when the facility is operating with minimal staff. The blaster function is not in operation when the blast operator is loading the line.

Evidence

[22] In large measure, the oral testimony of the witnesses in these proceedings mirrors the exhibited documentary evidence. Due to the heavy reliance on documentary evidence, in my view the oral testimony offered little, if any, additional information. True of both parties, cross-examination was minimal, as was closing argument. In short, the majority of the evidenced is on the record in the form of exhibited documentary evidence. I assure both parties that I have had the opportunity to review the Officer's investigative file, and I have heard or read and carefully considered all of the testimony, documentary and other evidence submitted and argument made. I now turn to the evidence.

[23] The Employer called three witnesses: Human Resources Manager Henry Fehr ("Fehr") and two supervisors, Tony Cadoy ("Cadoy") and Darren Duxbury ("Duxbury"). The Respondent Grant Stewart ("Stewart"), was self-represented and testified on his own behalf.

July 10, 2015 Refusal

[24] Henry Fehr ("Fehr") has held the position as the Employer's Human Resources Manager for six years, during which time he has managed a full range of personnel issues on behalf of the Employer.

[25] Fehr testified that on July 10, 2015, the Paint Line Supervisor (Heggestad) sought his assistance to address an issue with Stewart, who had refused to perform duties associated with his job. Apparently, the production line had been moving slowly, and Heggestad had asked Stewart, who was standing around

doing nothing, to begin loading the infeed line. Stewart refused. Heggestad sought Fehr's assistance because Stewart's refusal would, in effect, bring the entire paint production line of 20 employees to a standstill. Together, they spoke with Stewart.

[26] Fehr stated that when asked why he refused to follow his Supervisor's instructions, Stewart first said it "wasn't his job". Fehr testified that Stewart had run the line since 2007, and had always loaded the infeed line as part of his job. When he said as much to Stewart, Stewart offered other reasons for his refusal, including that: he did not know the order for loading the components; it made other workers mad when he loaded the line; and other workers would just walk off and leave him to do the work all by himself. Fehr stated that Stewart did not raise any health or safety issues.

[27] Fehr asked Stewart three times whether he "couldn't or "wouldn't do the work". Each time, Stewart stated he "wouldn't do the work". Stewart was told to leave the floor pending a meeting to discuss the matter. Once the line was running smoothly again, he and Heggestad met with Stewart, whereupon Stewart agreed he was ready to go back to work and do the work that Heggestad had requested of him. Fehr testified that as Stewart departed, he said "*I really thought you were going to fire me this time*". Fehr replied that he didn't want to fire Stewart, he just wanted him to do his job.

[28] When asked in cross-examination whether he recalled Stewart raising any health issues, Fehr replied "no", he did not.

[29] Stewart's testimony about the July 10 incident was largely in accord with Fehr's, and he was not cross-examined on it.

[30] Stewart testified that a blaster's job is to operate the blaster and loading the line was not his job. However, Stewart further stated that he had taken on "extra work" such as loading the line and had been doing it for years without "so far" raising any health and safety issues. He claimed that he had mentioned his "bad feet" to Fehr as a reason he couldn't load the line. He went on to explain that he has flat feet and loading the line involves walking back and forth—walking a distance of 75 feet, or up to 150 feet loading the line and walking back to operate the blaster, repeatedly, i.e. 150 to 300 feet round-trip. It appears that Stewart saw his options as "being sent to see a doctor" or "quitting". Contextually, it was clear that Stewart meant "quit" loading the line, not quitting the Employer. He concluded his testimony in this regard by saying he "*never loaded the blaster again after July 10*".

[31] Fehr's uncontested evidence is that on July 28, 2015, an Occupational Health Officer conducted a workplace inspection at the Honey Bee plant. It appears the inspection was by happenstance. Fehr's

evidence indicates that the Officer issued a Notice citing various contraventions to be remedied by the Employer, none of which pertained to the operation of the Pangborn. [Tab A2] Fehr indicated Stewart raised no health and safety concerns with the Officer at the time and made no effort to speak to the Officer about any health and safety concerns as documented in his memo at Tab A4.

> Ten days prior to this incident an OH&S Officer had completed a thorough inspection of the entire Honey Plant [sic] including the Paint line, and no mention was made by the OH&S Officer of any safety issues relating to the Pangborn Bead Blaster nor did Mr. Stewart make any effort to speak to the Officer. [Ex A4]

August 8 Refusal

[32] Stewart was asked, and agreed to work an overtime shift on Saturday, August 8. 2015. The paint production line was minimally staffed, and at the start of the shift Supervisor Cadoy, informed Stewart that he would be required to load the infeed line. Stewart refused.

[33] Cadoy testified as to their conversation, his recollection of which is reflected in his incident report [Ex A6], reproduced below. Their conversation as to Stewart's reason(s) for leaving occurred as Stewart was walking away to punch out and leave the area. Cadoy testified that Stewart's parting comment was to never again ask him to come in on a weekend. Cadoy responded by Stewart not to bother coming in on Monday either, and they would call him on Monday about when to come in, in effect suspending Stewart for at least one day.

henry.fehr

From: Tony Cadoy <tony.cadoy@honeybee.ca>
Sent: Wednesday, August 12, 2015 2:21 PM
To: henry.fehr@honeybee.ca
Subject: Grant Stewart Incident Report (Aug. 8, 2015)

Henry,

Here the detailed incident report from last Saturday (August 8, 2015) with Grant Stewart,

Around 7:45 am I instructed Grant Stewart that he can fill the empty line (west side of the double line) in between the Pangborn and the Paint booth, and he asked me,
Grant: who's going to feed the track?
Tony: You will
Grant: NO! I'm not going to, it's against the rules
Tony: WHY? Why is it against the rules? (He started walking away while we are having the conversation)
Grant: I won't tell you, it's the OH&S law, and you can ask Henry it's against the rules. (At this point he is already walking out of the production floor)
Tony: Tell me why it's against the rules?
Grant: You should know! Go ask Henry and don't ever ask me again to come in on a weekend.
Tony: Ok, don't even bother coming in on Monday. We'll let you know, we'll call you Monday when you can come in. (at this point he already punched out and was walking towards the entrance door)

Regards,
Tony

[34] Cadoy testified that Fehr was on holidays when the incident occurred, so he sent an email on the 8th to Fehr (and his fellow supervisors) saying he had advised Stewart not to come in on Monday. His email indicated that he had written an incident report, and said that he told Stewart that they would call him after discussing the incident on Monday. Because he had "suspended" Stewart, Cadoy was surprised when Stewart showed up to work on Monday, but didn't say anything until he talked to Fehr who gave him instructions to have Stewart come to a meeting at 10:00 a.m.

[35] On cross-examination, Stewart questioned why Cadoy's incident report was dated August 12 and sent to Fehr later the same day as Stewart had been dismissed. Cadoy explained that he had made handwritten notes as an incident report the same day, as reflected in his email, [Tab 3] which he typed in an email when Fehr asked him to submit an incident report.

[36] When asked why he left out of his incident report that Stewart told him he was leaving because he was sick, Cadoy stated that he did recall hearing Stewart say so, but did not discount the possibility. He said he had documented what happened to the best of his recollection, bearing in mind that Stewart had been talking while walking away, and only half-way facing him when he spoke.

[37] Cadoy's testimony was not otherwise challenged in cross-examination.

[38] Stewart testified that when Cadoy told him he had to load the line, he experienced a huge wave of anxiety, heartburn and nausea. He says he told Cadoy *"you can't ask me do that...now I'm sick. I'm going home"* but Cadoy had left that out of his report.

[39] Stewart testified that it is very loud on the production floor (120 decibels) and he never heard Cadoy say not to come in on Monday.

[40] Stewart testified that he also told Cadoy it was against the rules for him to load the line and Cadoy couldn't ask him to do it. He felt his supervisor and Employer should know the rules without him having to explain. He testified that his point about the "rules" (which he did not explain either)) was that the Pangborn was "never" turned off, and it was the against the rules to leave the Pangborn running constantly and just turn the blaster on and off. Stewart's documentary evidence indicates that his supervisor would ask him to go 150 feet away to load the line while the Pangborn machine [as opposed to the Blaster] was running.

[41] Stewart said that when he left work, he went home and *"read the rules"* over the weekend, in particular, sections 135 and 136 of the Regulations (respectively titled "Operating controls", and "Unattended and suspended machines") where he found out he wasn't to leave the machine running when

he wasn't there and that he wasn't supposed to be out of arm's reach of the controls when the machine was running.

[42] On cross-examination, Stewart said that he had volunteered for the overtime shift on Saturday, August 8 but left the shift early. When asked if he left because it was unsafe, Stewart replied *"no, I left when Tony asked me to load the line because I had an anxiety attack"*. Stewart said that he just told Cadoy he was "sick", not that he was having an anxiety attack "*about safety*".

[43] Stewart acknowledged that when he came in on Monday, he did not go to anyone to complain about being asked to load the line, but that Cadoy didn't come and tell him he wasn't supposed to be working either.

August 10, 2015 Refusal and Meeting

[44] Fehr testified that he returned from vacation on Monday, August 10, 2015. Early that morning, Cadoy advised him that Stewart had shown up for work even though Cadoy had suspended him for the day and pending further instructions once Cadoy had had a chance to discuss the matter with Fehr.

[45] Fehr instructed Cadoy to inform Stewart he was to come to Fehr's office for meeting at 10:00 a.m. When Cadoy did so, Stewart again mentioned the "rules", this time mentioning that he was not supposed to be more than 10 feet away from the machine or an arm's length from the machine's emergency stop button. Cadoy said they could discuss that at the 10 a.m. meeting. At some point prior to the 10 a.m. meeting, Cadoy reported Stewart's further explanation of the "rules" to Fehr.

[46] Around 9:30 a.m., as Cadoy was passing by the Pangborn, Stewart informed Cadoy that he refused to run the Pangborn because it was dangerous to operate, and proceeded to shut down and lock out the machine, effectively shutting the down the entire paint production line. Cadoy immediately reported it to Fehr, then the two men went to talk to Stewart. Fehr confirmed that Stewart was refusing to run the Pangborn, and told him to wait in the lunchroom while they sorted out who would replace him. They then discovered the lockout key was missing. Stewart said he had hidden the key, then agreed to go back to the Pangborn with them to show them where he put it. As Cadoy handed the keys to the replacement operator, Stewart informed his replacement he had refused to operate the machine because it was dangerous and that it was illegal for [the replacement worker] to operate the machine.

[47] Unknown to the Employer, Stewart recorded the conversation in the lunchroom and with the replacement worker. Stewart prepared a transcription of their conversation. With regard to the key, Stewart said, "I put it. I hid it out there". [page 87]

[48] Fehr and Cadoy then met with Stewart in Fehr's office. The meeting was also attended by supervisor Darren Duxbury as an observer. Unknown to the Employer, Stewart recorded also recorded the meeting. A transcription of the recorded meeting prepared by Stewart was submitted in evidence by the Employer [Ex A5].

[49] When asked at the meeting, whether he was refusing to run the Pangborn, Stewart responded affirmatively. When asked why, Stewart said that it was "unsafe". When asked why it was unsafe Stewart alluded to the "rules" that say he was not allowed to get more [than 10 feet] or out of eyesight of the stop button, and the Employer wasn't allowed to ask him to do so.

[50] Fehr attempted to demonstrate to Stewart with reference to his copy of the Regulations, that there was no rule-based justification for shutting down or refusing to operate the Pangborn for the reasons and that he didn't understand where Stewart's 10 feet or line of sight thing came into play. Stewart was not satisfied and demanded to know whether Fehr was going to call OH&S or not and insisted on his right to refuse to operate the Pangborn in the meantime.

[51] Fehr then indicated that they would be offering Stewart a different job on the [paint production]. Stewart refused. Fehr asked him two more times and Stewart continued to refuse a different position until an Officer came and checked the machine and told him what the rules were. At that point, Fehr suspended Stewart for two days to reconsider his rejection of alternate work, indicating that he would meet with Stewart on August 12.

[52] Fehr subsequently contacted a member of the Occupational Health Committee who was also the Supervisor of Maintenance, Steve Garamszeghy, to proceed with an OHC investigation. The investigation revealed no safety concerns or unusual danger. The OHC's Employee Representative (Spencer) was involved in the taking of statements from both Cadoy and Stewart prior to the August 12 meeting and dismissal.

[53] On cross-examination, Stewart questioned Fehr as to why he was not included in the OHC investigation and was not provided with a copy of the OHC's written report obtained via pre-hearing disclosure [Tab 10]. Stewart also questioned the bona fides of the report due to the differing dates on the report. Fehr's evidence is after the August 10 meeting, Stewart had apparently contacted OH&S with his complaint about the Pangborn being unsafe. On August 17, OH&S apparently asked the OHC to submit its report. Then, or later (it is not clear) OH&S requested that Honey Bee also have the Employee Co-Chair of the OHC (Spencer) conduct an investigation of the system. Fehr testified that the report bears the date of the refusal to work investigation, but was signed (and submitted to OH&S) on August 31 by the Employee

Co-Chair (Spencer) and the Employer Co-Chair (Fehr) in compliance with the OH&S request. Fehr expressed the opinion that there was no requirement that Stewart be present for the OHC investigation, but that Stewart had participated in it by providing his statement to the OHC Employee Representative on August 12. Fehr said that Stewart had the opportunity to be present in the sense that he met with the Employee Representative and had the opportunity to express his interest to the OHC member.

[54] In further cross-examination, Fehr did not that dispute that Stewart mentioned calling OH&S on August 10, even though it was not mentioned in his memo [Tab 4]. He indicated that once it was clear Stewart's refusal to run the Pangborn was not going be resolved by discussion, his focus shifted to the assignment of Stewart to alternate work in a new position. In his view, Stewart's rejection of alternate work raised the question whether Stewart wanted to continue working for the Employer in another capacity, and became a disciplinary issue. He suspended Stewart for two days to reconsider his position.

[55] Duxbury and Cadoy's brief testimony about the August 10 meeting was consistent with Fehr's testimony. On cross-examination, Cadoy had no specific recollection about what Stewart said in relation to OH&S. Duxbury confirmed he recalled Stewart mentioning OH&S. Duxbury was asked what other job Stewart had been offered. Duxbury said that Stewart had been offered another job on the paint line which he understood to encompass "*whatever position(s) might have been available.*"

[56] In his direct testimony, Stewart said his point was that the Pangborn machine was never turned off, but ran continuously. Fehr made it clear to him that he did not see any reason based on section 136(2)(a) and (b) that the machine could not run continuously or that he had to be within a specified number of feet or line of sight from the controls or emergency stop button Citing section 136 to justify turning off the Pangborn, Stewart said he shut down the Pangborn for safety reasons because he was *"upset"* and *"thought [he] was going to get fired"*. Distilled, I infer his reason to be, at least in part, that Stewart interpreted section 136 to mean he was not to leave the Pangborn machine unattended or in a suspended position unless it was immobilized. On that basis, he shut down the machine and locked it out before he left the production floor to attend the meeting in Fehr's office, and against the event that the meeting concluded, as he thought it would, with his dismissal.

[57] Stewart's documentary material [Tab 11, page 2 of 5, first full paragraph] written post-termination, indicated that he also believed that the Pangborn machine would remain shut down until an OH&S Officer spoke to him.

[58] Stewart reiterated that he shut the machine down because he was upset. He was upset because the Employer let the Pangborn run continuously. He was upset because the blaster's safety systems were by-

passed daily when blasting decks and frames, particularly those with cutters. He said that due to length, decks and frames going through the blaster by-passed the safety system by holding all six sets of safety fingers open such that the operator could see the flames inside the blaster, and wave to friends on the other end. In those circumstances, if components exploded, the operator in the blow out position is not within easy reach of the emergency shut off button and could be killed by debris not contained by safety barriers. Stewart said he hadn't given the danger to himself a thought until recently, when his son covered for him as blaster operator when he had surgery. He said he was "choked" when he realized his son's safety had been compromised. Stewart claimed these thoughts were the cause of his anxiety attack on Saturday, August 8, 2015.

[59] Stewart claims that he was not given the opportunity to raise his safety concerns about the decks and frames, and had the Employer talked to him about that concern, in particular, they could have cured the problem.

[60] Stewart testified that it was for the above-stated concerns for his safety that he refused alternate work on the paint line anywhere "in front of or behind the blaster" which he described as the "danger zone".

[61] Stewart testified that Fehr scoffed at his safety concern and changed the subject to offering him alternate work. Stewart said he wanted to talk to OH&S about how far he could be from the Pangborn's controls and the emergency stop button. He recognized that Fehr disagreed with his understanding of the legislation, but he believed that, in those circumstances, he could insist on talking to an OH&S Officer, and that the Pangborn had to remain shut down until he could do so.

[62] Stewart testified that after he was sent home on August 10, he called OH&S and notified the Duty Officer that he was refusing to work on the Pangborn Blaster as he considered it to be unusually dangerous work. He next contacted OH&S on August 17, 2015 to advise the Officer assigned to the area that his employer had terminated his employment.

[63] Stewart blames the OH&S Duty Officer for not telling him that the Officers investigate "very casually", i.e. that it might take a while before OH&S Officers attended the workplace to investigate his refusal and provide a written decision as to whether the work refused was unusually dangerous and advising him accordingly. Had the OH&S Duty Officer told him that it would be a good idea to accept alternate work on the paint line in the interim, he then he could have informed the Officer that a large part of the paint production line is in a life-threatening danger zone.

[64] On cross-examination, Stewart stated that as soon as he realized there was a chance he could get killed, he knew the Pangborn was unsafe and he locked it out. He says he left the key near the machine and denies that he hid it. When he was sent to the lunchroom, he started recording their conversation with his phone because he was expecting to get fired and would need a recording for EI (Employment Insurance).

[65] Stewart reiterated that he refused to taken another job on the paint production line in front of or behind the blaster. When asked whether he made a blanket refusal to Fehr about working anywhere on the paint line, Stewart was unresponsive to the question. Stewart understood that the Employer was offering him a job on the paint line anywhere that the supervisor, Cadoy, wanted him to go. When asked the rephrased question whether he considered the entire paint line to be a danger zone. Stewart said it was *"quite likely a danger zone"*.

[66] Stewart testified that he *"didn't want to work if the Employer was not going to call OH&S...let them fire me, but they should know the rules"*. At the time, it was his understanding that he had a right to refuse pending an investigation by OH&S. When asked whether he thought he had the right to refuse all work, Stewart said "no" he didn't think that. He said if the Employer had offered him alternate work elsewhere, like on the Assembly Line, he would have taken it.

August 12, 2015 Meeting

[67] As instructed, Stuart attended the workplace on August 12 to meet with Fehr. He went early in response to a request from the Employee Representative of the Occupational Health Committee to sign his statement.

[68] The meeting convened with Stewart, Fehr, Cadoy and Duxbury in attendance. Fehr started to re-cap that the purpose of the meeting was to discuss future direction for Stewart subsequent to his suspension for insubordination (in reference to the incident on August 8). Fehr said that Stewart became belligerent and wanted to know why an OH&S Officer was not present. Fehr told Stewart he could call OH&S anytime he wanted to do so, which is acknowledged by Stewart.

[69] Fehr said he informed Stewart that the purpose of the meeting was in regard to whether he would accept the alternate work offered to him on August 10. Stewart refused. Fehr informed him that if he continued to refuse alternate work, the Employer would have to terminate his employment. Fehr said he asked Stewart two more times, and each time, Stewart refused. Fehr then advised Stewart that his employment was terminated. Stewart demanded his Record of Employment which was provided later the same day.

[70] Fehr testified that after requesting his ROE, Stewart became angry and began making accusations of sexual perversion against Cadoy, in the course of which he grabbed his own crotch and started jerking it up and down. On cross-examination, Stewart acknowledged the conduct.

[71] Despite having just terminated Stewart's employment, when escorting Stewart off the premises, Fehr offered Stewart a further opportunity to reconsider his decision to refuse alternate work—to sleep on it overnight. Stewart refused.

[72] On the whole, Fehr's testimony was not effectively challenged on brief cross-examination about the August 12 meeting. However, Stewart did make reference to a document found at page 73 of his materials, suggesting that the worker requested or assigned him as blaster operator on August 10 had not been in accordance with section 3-34 until August 10. Fehr acknowledged the letter signed by him and the replacement worker dated August 13, 2015, without further elaboration, and Stewart did not pursue that line of questioning.

[73] Cadoy and Duxbury's testimony with regard to the August 12 meeting (Ex A7 and A9] was consistent with Fehr's testimony and need not be recited. Neither were cross-examined in relation to the August 12 meeting.

[74] Fehr's testimony was uncontradicted by Stewart, who made the aforementioned acknowledgements in cross-examination and otherwise barely mentioned the August 12 meeting. Stewart's evidence is that he fully expected OH&S Officers would be in attendance at the August 12 meeting and was upset when there was no Officer in attendance. Stewart also acknowledged in cross-examination that Fehr told him that he could call an OH&S Officer any time he wanted, but denied telling Fehr that he was looking forward to getting them on the stand.

ANALYSIS, REASONS and FINDINGS

Framework for Analysis

[75] In a discriminatory action complaint, section 3-36 provides a framework for analysis. The initial step, as per section 3-36(1) requires consideration whether the worker had reasonable grounds for believing that the Employer has taken discriminatory action against him for a reason mentioned in section 3-35. There is then, an initial onus on the worker to establish in a *prima facie* manner, that:

(1) he suffered an adverse employment consequence within the scope of the description of "discriminatory action" found in section 3-1(1)(i) of the Act;

(2) he was engaged in a health and safety activity protected by section 3-35 of the Act; and

(3) there is a connection between the employer's discriminatory action and the worker's protected section 3-35 activity that is the reasonable basis for the worker's belief the discriminatory action was taken "for a reason" described in section 3-35 of the Act.

[76] Where these essential elements are established, the worker is said to have demonstrated a *prima facie* case of discriminatory action which prevails until contradicted or overcome by other evidence. In the meantime, a presumption arises in favour of the worker that the discriminatory action was taken against the worker *because* the worker acted or participated in an activity described in section 3-35, triggering a "reverse onus". The reverse onus operates to shift the burden of proof to the Employer to establish, on a balance of probabilities, that the discriminatory action was taken against the worker for good and sufficient other reason and to rebut the presumption.

[77] Before a reversal of the onus can occur, it is fundamental to determine whether the worker exercised his or her right to refuse pursuant to section 3-31. That is, in order to determine whether Stewart engaged in an activity protected by 3-35(f), I must first be satisfied that he had reasonable grounds to believe the work refused was unusually dangerous. If Stewart did not have reasonable grounds, then it cannot be said that he exercised a right to refuse protected by section 3-35 of the Act.

[78] Before turning to my analysis, I pause here to mention briefly, the Officer's decision under appeal. Apart from the remedial directions which follow it, the Officer's conclusion, in full, states:

> It is my decision that the termination of Grant Stewart prior to exhausting the above-mentioned work refusal process is an unlawful discriminatory action pursuant to section 3-35.

[79] Without straying too far from my path, I am compelled to say, with due respect, that the Officer's stated reason, without more, cannot be determinative of the question whether the employer's discriminatory action was unlawful. Though indicative of a conclusion as to *prima facie* discriminatory action, the Officer's stated reason serves only to trigger the reverse onus provisions in section 3-36, by which measure a discriminatory action is not unlawful unless it is determined that an employer has failed discharge the onus and rebut the presumption set out subsections (a) and (b) of section 3-36. Though the Officer acknowledged receipt of the Employer's explanation for its action against Mr. Stewart, in accordance with OH&S' request to provide s good and sufficient reason, the Officer's decision does not reflect any consideration or determination regarding the Employer's reason(s). All of that said, it is critically important to point out that the within appeal is a new hearing, and not a review as to the reasonableness or correctness of the Officer's decision.

The Refusal(s)

[80] As set out in evidence, there were three work refusals: July 10, August 8 and August 10, 2015. On July 10 and on August 8, 2015, Stewart refused to perform a work activity referred to as loading the infeed line. On August 10, 2015, Stewart refused to run the Pangborn. That is, he refused to operate the blaster.

[81] In his complaint, Stewart alleged only the exercise of his right to refuse invoked on Monday, August 10, 2015 as the reason for the Employer's discriminatory action against him. Though my decision has a corresponding focus, the events of August 10 are, to some extent, a continuation of the events which transpired during Stewart's overtime shift the previous Saturday, August 8, 2015.

[82] In both Stewart's originating complaint of discriminatory action and supporting statement [Tabs 11 and 12], and at the hearing, Stewart advanced as his reason for refusing to run the Pangborn that the entire safety system of the Pangborn blaster was by-passed daily in circumstances that were (allegedly)known by the Employer to be dangerous. In that regard, Stewart's specific concern was that due to the shape and length of some of the machinery parts passing through the blaster, notably frames with cutters which exceeded the length of the whole blast system, would hold open all six sets of safety fingers designed to contain debris from the blaster. Stewart characterized this activity as "life-threatening" danger---the danger of being killed by "shrapnel" (flying debris), particularly in the event that some of the self-destructing paddles of the rotoblaster were to explode at such times. Moreover, Stewart contends that his refusal to accept alternate work anywhere on the paint line is because he regarded the area in front of, or behind, the blaster to "likely be a danger zone".

[83] Initially, a worker may refuse to perform work which he or she has reasonable grounds to believe is unusually dangerous which is a test that is subjective in its nature. The Act does not describe a formal process or the exact words a worker must use to communicate the existence of an unusual danger, nor is it required at any time that the worker be proven to be correct with respect to that the work believed to be unusually dangerous. However, it is imperative that the worker communicate to the employer at the time of the refusal, the reasons (grounds) he or she perceives that an unusually dangerous circumstance exists. In turn, I must be satisfied objectively with the reasonableness of the worker's grounds based on the information available to the worker at the time of the refusal.

[84] Though it is my abiding impression that the aforementioned safety concern may have an historical background in the workplace, the evidence submitted by Stewart himself clearly demonstrates that this was **not** the safety concern expressed or the reason given at the time of his refusal on August 10, 2015 or thereafter, prior to his dismissal, and I so find.it as fact. This is not a situation in which it was necessary to

balance competing interests and assess the credibility of each party's version as to what was communicated about the refusal. In this instance, Stewart secretly recorded the August 10 meeting on his phone, transcribed the conversation and provided the transcript of the conversation to counsel for the Employer and to the tribunal and included it in his set of documents at pages 87-90. The transcript has been entered in evidence with by consent (as Tab 5) with both parties acknowledging its accuracy.

[85] On the evidence, I find this alleged life-threatening situation to be have been raised as a post-termination afterthought. Counsel for the Employer attributes Stewart's motivation and timing in relation to the denial of Stewart's Employment Insurance claim by Service Canada on September4, 2015. For that reason, I am inclined to turn my analysis immediately to the safety concerns Stewart *did* identify at the time of his refusal rather than proceed with a determination of the reasonableness of an unstated reason for the work refusal. However, in acknowledgement that Stewart advanced the semblance of an argument explaining why he did not raise it, I propose to consider Stewart's explanation before making a finding of fact as to whether or not this belief prompted Stewart's refusal.

[86] Stewart submits that he informed the Employer that the Pangborn was known to be dangerous. The evidence at Tab 5 clearly demonstrates that this is not a true statement. In other evidence, Stewart explains that his supervisor had blown off many cutters and frames himself [as a blast operator] and for that reason his supervisor, and therefore his employer would or should have known that the safety system was bypassed daily. On its face, this falls immeasurably short of having informed his employer about a life-threatening activity as a reason for his work refusal, and I do not accept it as such.

[87] Stewart submits that he was not given the opportunity to state fully his reasons for the August 10 refusal. I disagree. My reasons are several, and are set out below.

[88] Stewart clearly had an opportunity to give his reasons at August 10 meeting intended for that purpose, and he did so by his general references to sections 135 (1) and (2) of the Regulations. If he had a safety concern other than those given, it would have been reasonable for him to raise it at that time. Though the meeting was short, there was nothing offered in evidence that prevented Stewart from raising an additional safety concern, particularly one with the significance later alleged in his complaint and at the hearing. In light of his characterization of the activity as "life threatening", I find it incredible that Stewart would have left unstated a reason of such significance, only to focus, instead, on his insistence on obtaining an OH&S ruling to satisfy his uncertain interpretation of the referenced sections of the Act.

[89] Stewart submitted that the Employer dismissed his safety concern and changed the subject to whether he would perform alternate work, implying thereby that he was further denied the opportunity to

raise fully his reasons for refusal. I am satisfied on the available evidence that Fehr very quickly determined, due to Stewart's immediate and steadfast insistence that an OH&S Officer be called to interpret the Regulations, t hat Stewart was not to likely to be "satisfied otherwise" by further discussion. Fehr moved on next steps. In accordance with the process set out in section 3-31 of the Act that an Employer is obliged to follow in response to a work refusal, Fehr later contacted a member of the OHC to engage the Committee in the next step of the statutorily prescribed process. In the meantime, at the meeting, Fehr moved on to the matter of assigning Stewart to alternate work.

[90] Stewart refused to consider alternate work. Post-termination, in his complaint of discriminatory action and the investigation thereof, and at the hearing, Stewart contended that he would not work in front of, or behind the blaster, on the basis that he would still be at risk of injury or death in the "danger zone". Again, at that point in the meeting, it would have been a reasonable time and context in which to raise the alleged "danger zone" as well as his reason for regarding it as such, as justification for both his work refusal and his refusal of alternate work. He did not do so. Instead, he again asserted that he would not work anywhere on the line until he spoke to an OH&S Officer. Stewart testified that he would have accepted another job, such as the assembly line, had it been offered to him. If that were true, it would be reasonable for Stewart to have said so at the time he was offered alternate work on the paint line or when it became apparent, on August 12, that he was going to be fired unless he reconsidered his position.

[91] Stewart was suspended for two days to reconsider his position, and Fehr informed him they would reconvene on August 12. On Stewart's evidence, as soon as he got home he called OH&S and spoke to the Duty Officer. He then had the unfettered ability to state his reasons for refusal to the Officer. Although it appears he did tell the Officer that he had refused to work on the Pangborn blaster because he considered it to be unusually dangerous, the documented reason he gave to the Officer for his refusal was that he had been asked to operate the Pangborn while out of eyesight of the shutoff button. In short, Stewart stray from the referenced Regulations given as the reasons for his refusal. The Officer's memorandum at Tab 20 also indicates that Stewart was advised to discuss his concern with his employer and the Occupational Health Committee. Stewart had ample time during his suspension on Monday and Tuesday to take one or both of these actions to raise his life-threatening safety concern. He did neither. However, the Employee Representative who is the employee Co-Chair of the OHC contacted him to request a meeting and obtain his statement for purposes of the OHC's investigation. Stewart met with the Employee Representative earlier in the morning of his scheduled meeting with Fehr (at which his employment was terminated). It is difficult to imagine a better opportunity for Stewart to voice his as-yet unstated reason for the work refusal than to the Employee Co-chair of the OHC. There is no evidence before me (nor did Stewart allege) that he did so.

[92] It may be redundant, at this point, to say that I found Mr. Stewart not at all credible, as many of my reasons therefor are encompassed by the foregoing analysis and the implausibility of the position Stewart maintains with regard to the "life threatening" situation as the real reason prompting his refusal. Other factors contributed to my assessment, including the inconsistency, if not falsity, of his denial that he hid the key when his own transcription clearly recounts his statement to the contrary. [page 87]. Another example is found in testimony that he locked out the Pangborn on August 10 as soon as he came to the realization that he could be killed, followed by his testimony that he locked out the machine because he was angry and thought he was going to be fired. Yet he also maintained that he refused to load the line

[93] Turning to reasons Stewart did advance for refusing to run the Pangborn, my analysis is brief. I find that the only grounds Stewart gave for refusing to run the Pangborn were that he wanted to know, with references to sections 135 and 136 of the Act, exactly how far he was allowed to be from the controls and the emergency button. In my view, his apparent need to know applied both to running the Pangborn blaster and to loading the line. He did not assert, as he did post-termination in his complaint, that his concern was his liability in the event someone got hurt or killed. In fact, apart from demanding an interpretation of the referenced sections by an OH&S Officer, there was no reference to the existence of a danger, unusual or otherwise

[94] On the evidence as a whole, it is clear that Stewart believed there ought to be two blast operators, one to stand set the speed of the blaster and do the blasting and one to remain within easy reach of the emergency stop button. He was also of the opinion that the Pangborn should not run continuously, even though the only purpose of the Pangborn, exclusive of the blaster function, was to power the monorail line. Finally, I find that he did not want to load the infeed line anymore. He expressed no belief, reasonable or otherwise, that the continual running of the monorail posed any danger whatsoever. Though he may have been out of the line of sight of the emergency stop button when he was loading the line, the blaster was turned off. He expressed no belief, reasonable or otherwise, that being out of the line of sight posed any danger whatsoever. The same may be said of his apparent need to know how far he could be from the controls and emergency stop button when he was running the blaster. At best, . The same may be said with regard to his concern about how far he could be from the controls and the emergency stop button.

[95] In the result, I am inclined to conclude that Stewart used the work refusal process improperly to prove a point or bring to a head his opinions that there should be two operators, that the line should not run continuously and justify why he should not have to load the line anymore. In any case, I am not satisfied that Stewart had reasonable grounds to believe the work refused on August 10 was unusually dangerous. In

the result, I must find that Stewart has failed to establish *prima facie* that he was engaged in an activity protected by section 3-35(f).

[96] In the further result, the reverse onus is not triggered, and it is not necessary that call upon the Employer to provide good and sufficient other reasons for its actions. It follows that I need not consider the sufficiency of the Employer's reason for terminating Stewart's employment. That said, had it been necessary to do so, I would have found myself satisfied, on balance, that the Employer established Stewart's dismissal was not because of his work refusal, but because he would not consider taking alternate work. I find that the Employer's other reason was sincere, not a pretext and was the real and only reason for its actions. I find support for that conclusion in the extent to which sought to have Stewart reconsider his refusal to consider alternate work. The fair warning of the consequences of maintaining that position and ample opportunity to reconsider—to the point where even after Stewart had been dismissed, the Employer gave him yet another opportunity to 'sleep on it' and reconsider his position. I digress to say that I find it remarkable that Stewart points the finger of blame the OH&S Officer for not advising him that it might be a good idea to accept the alternate work, when, in my view, the Employer made sincere efforts to point Stewart in that very direction. On balance, I do not find that the Employer's actions were tainted by the faultiness of its compliance with the approach set out in section 3-31 and the assignment of the replacement worker in accordance with section 3-34. In my view, the Employer made a sincere effort to

[97] Before concluding my decision, I feel compelled to say that by his post-termination complaint, Stewart has raised a safety concern that the Employer would be well-advised to consider further. While an worker may be mistaken in their assessment of an unusually dangerous situation, they have the right to be wrong and still be protected from discipline. Had I been persuaded that Stewart raised his specific concern prior to his termination, the outcome of this appeal might have been quite different.

Conclusion

[98] For the all of the reason stated above, **I allow the Employer's appeal,** with the effect that Officer's Decision dated December 3, 2015 and the corresponding Notice of Contravention Case Number 4783, Report Number 5251, are **hereby revoked.**

Dated at Regina, Saskatchewan this 8th day of August, 2016

"Rusti-Ann Blake"

Rusti-Ann Blanke, Adjudicator

Right to appeal adjudicator's decision to board

4-8(1) An employer, employee or corporate director who is directly affected by a decision of an adjudicator on an appeal or hearing pursuant to Part II may appeal the decision to the board on a question of law.

(2) A person who is directly affected by a decision of an adjudicator on an appeal pursuant to Part III may appeal the decision to the board on a question of law.

(3) A person who intends to appeal pursuant to this section shall:

(a) file a notice of appeal with the board within 15 business days after the date of service of the decision of the adjudicator; and

(b) serve the notice of appeal on all persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.

(4) The record of an appeal is to consist of the following:

(a) in the case of an appeal or hearing pursuant to Part II, the wage assessment or the notice of hearing;

(b) in the case of an appeal pursuant to Part III, any written decision of an occupational health officer or the director of occupational health and safety respecting the matter that is the subject of the appeal;

(c) the notice of appeal filed with the director of employment standards pursuant to Part II or with the director of occupational health and safety pursuant to Part III, as the case may be;

(d) any exhibits filed before the adjudicator;

(e) the written decision of the adjudicator;

(f) the notice of appeal to the board;

(g) any other material that the board may require to properly consider the appeal.

(5) The commencement of an appeal pursuant to this section does not stay the effect of the decision or order being appealed unless the board orders otherwise.

(6) The board may:

(a) affirm, amend or cancel the decision or order of the adjudicator; or

(b) remit the matter back to the adjudicator for amendment of the adjudicator's decision or order with any directions that the board considers appropriate.