LABOUR RELATIONS FILE NO. 122-21

IN THE MATTER OF AN APPEAL TO AN ADJUDICATOR PURSUANT TO

s. 3-56 of The Saskatchewan Employment Act

BETWEEN

Brandt Industries Canada Inc. **APPELLANT**

AND

Director of Occupational Health and Safety **RESPONDENT**

ADJUDICATOR: Terrance Chinn

APPELLANT COUNSEL: John Agioritis and Tarissa Peterson

RESPONDENT COUNSEL: Alyssa Phen and Johan Myburgh

IN ATTENDANCE: Derek Fletcher (witness for Respondent)

Russ Weisgarber (witness for Appellant)

DECISION

BACKGROUND

[1] The Appellant, Brandt Industries Canada Inc. (Brandt), has appealed the amended Notice of Contravention of the Director of Occupational Health and Safety (Director) dated April 27, 2021. The amended Notice of Contravention dealt with contraventions of s. 91 of *The Occupational Health and Safety Regulations, 1996, RRS, c O-1.1, Reg 1 (Regulations*) and more particularly whether Brandt's workers were at risk of injury to their heads as determined by Occupational Health and Safety Officer Derek Fletcher (Fletcher).

[2] Brandt's Notice of Appeal, dated May 18, 2021, disputed that it failed to provide industrial headwear and to require its workers to use them, where they may have been at risk of injury. More particularly, Brandt is of the opinion that their workers were not at risk of injury to their heads in the circumstances observed by Fletcher. Brandt argued that its policies, practices, and procedures for headwear, and whether there was a supply of approved industrial headwear available, was not addressed by Fletcher.

[3] The appeal arises from Fletcher's inspection of Brandt's workplace in Regina, Saskatchewan on January 12, 2021. A Notice of Contravention was issued on that date and was formally served on Brandt on January 15, 2021. Brandt appealed the Notice of Contravention to the Director. The Notice of Contravention was amended by the Director by way of an amended Notice of Contravention dated April 27, 2021. Brandt has appealed the amended Notice of Contravention.

Preliminary Matters

[4] The parties have not objected to my appointment or jurisdiction to hear this matter. There were conference calls and emails with the Parties to settle on an Agreed Statement of Facts and to discuss and schedule a hearing.

[5] The Parties were able to provide an Agreed Statement of Facts, which form part of the record. They also agreed that the Respondent was to present first and had the onus to prove their case. The parties provided respective lists of documents that would be referred to in the hearing. The Parties also agreed that the hearing was to be a *trial de novo*. There were cases referenced by Brandt's counsel to support this approach *(Chinichian v Mamawetan Churchill River (Health Region) 2016 SKCA 89*) and the Respondent agreed to this approach.

[6] A hearing was scheduled for April 12, 2023, and if necessary, April 13, 2023. The hearing was held in the Boardroom of Labour Relations in Regina, Saskatchewan. The evidentiary portion of the hearing was completed on April 12, 2023. Written submissions were requested from the Parties by April 28, 2023, with the option of providing a reply to any submission.

[7] The Parties provided written submissions included in an email from the Appellant dated May 1, 2023. The Appellant's and Respondent's submissions were both dated April 26, 2023, and the Appellant's reply to the Respondent's submission was dated April 28, 2023. The Appellant, by mutual agreement, provided the Respondent's submission to me as Ms. Phen was leaving for a position in the private sector at the end of April 2023. The Respondent did not choose to provide a response to the Appellant's submission.

EVIDENCE

Derek Fletcher Examination

[8] Fletcher gave evidence for the Respondent. He has been an inspection officer with Occupational Health and Safety (OHS) for about 4.5 years, working as a generalist but involved in construction safety issues. Before this he was a "red seal" plumber

[9] Fletcher was the first to provide evidence. On January 12,2021, he was accompanying another OHS officer to Brandt's manufacturing workplace in Regina, Saskatchewan, for an inspection of their lunchroom for possible hygiene issue. They were also to inspect the paint room, which was located in the same building. The officers first met in an office with Brandt's plant manager, its safety coordinator, Russ Weisgarber (Weisgarber) who is the shop manager, and other Brandt employees. They were planning on going to the lunchroom and the paint room.

[10] The evidence given by Fletcher provided that as the group went out on the work floor, Fletcher noticed employees working on what he was told was a grain cart. He wasn't sure if the group was first heading to the paint room or the lunchroom. A part of the grain cart, a panel about 8 feet long, was connected to an overhead crane. The load was in the process of being transferred along the overhead rail to be set down where two other employees were prepared to attach the load to the grain cart.

[11] The load was suspended by riggings attached to the overhead crane and was not resting on the floor. The crane was marked that it had a 5,000 Kg. load capacity. The crane could be moved along a main beam rail, both north south and east west. There were two employees, one behind and the other beside the load. The load was about to move to where the other two employees were seated. The crane was controlled electronically by the employee behind the load. The two workers accompanying the load were not directly under the overhead crane. It was these employees that Fletcher thought were at risk of injury because they were not wearing protective headwear. The other two employees were not considered at risk as the load was not close enough to them.

[12] Fletcher ordered work to be stopped as allowed under s. *3-40* and *3-41* of *The Saskatchewan Employment Act (Act)*. Fletcher said he asked the two employees beside the load if they were supposed to have protective headwear. They responded that it was up to their superiors to decide the necessity. He told them if they got the appropriate headwear, they could continue with their work.

[13] Fletcher then stated that he subsequently was passing by the welding area located in the manufacturing plant. The area was sectioned and screened off. He was about 20 feet away from two workers who were wearing welding helmets that did not offer protection to the tops of their heads. He noticed that a load they were working on was suspended by a jib crane. The jib crane is a floor mounted crane with a moving arm that suspends the load. The crane was marked that it had a 1000 Kg. capacity. There was part of the jib crane above, but not directly, the employees' heads. Again, Fletcher made a stop order and told the employees that work could continue once appropriate headwear was provided.

[14] The notes prepared by Fletcher at the time of these incidents were filed as Exhibit R1. It contradicted Fletcher's evidence that his observations about the welding area was after the grain cart incident. He did provide that his memory could be faulty as to which event happened first as it happened a few years back. He said he normally would make his notes in a chronological order.

[15] The concern that Fletcher had about both incidents was that the components of both the overhead and jib crane could break and fall on anyone below. It was not a concern about the load they were lifting, although there could be a possibility of lateral movement of the loads. Being in the vicinity of the overhead crane and being underneath the overhead crane components could put workers in danger to their heads. Fletcher stated that he had been involved with an incident at another work site where a bolt had fallen from above. Fletcher commented that the risk from overhead may be small but can cause serious injury. The possibility was not likely, but one can't say it couldn't happen.

[16] Fletcher didn't have any video or photo equipment with him at the time as he was just accompanying the other safety officer who was doing the lunchroom inspection.

[17] Fletcher stated that he was next passing by the grain cart area and noticed rigging on an overhead crane that appeared worn and kinked. This was an infraction included in his original Notice of Contravention. The rigging was taken out of service. The Director, on appeal, amended the Notice of Contravention stating that there wasn't sufficient evidence to substantiate the rigging claim.

[18] Brandt's counsel cross examined Fletcher. Fletcher wrote up the Notice of Contravention in his vehicle and it was sent off to Brandt by email. He commented on the training he has received to complete a Notice of Contravention. Normally the Notice of Contravention is served in person but because of Covid the Notice was served by email. He also provided that he would give a courtesy call to his superiors if there was a concern involving Brandt. He also said that he considers that Brandt takes these types of issues seriously. Fletcher also agreed that much of the evidence he was providing was not included in his Notice of Contravention.

[19] Fletcher acknowledged that his notes found in R1 did not specify any "serious risk" when he placed a stop work order for both incidents.

[20] Fletcher also said that the contraventions were pursuant to *s. 91(1)* of the *Saskatchewan Occupational Health and Safety Regulations, 1996* and not the deemed portion, s. *91(2)*.

> Protective headwear
>
> 91(1) Where there is a risk of injury to the head of a worker, an employer or contractor shall provide approved industrial protective headwear and require a worker to use it.
>
> (2) The following places are deemed to be places where a worker is exposed to a risk described in subsection (1)
>
> a) a mine, mill or
>
> b) a forestry or sawmilling
>
> c) a construction
>
> d) a drilling
>
> e) an oil or gas servicing operation

[21] Fletcher had previously reviewed Brandt's policy on head gear in previous inspections and cases involving Brandt. The Brandt facility was often assigned to him. There were eight documents entered as Exhibits by Brandt. They were as follows:

A1 Province of Saskatchewan Compliance Undertakings and Notice of Contravention

A2 Brandt Policy Document on Personal Protective Equipment

A3 Notice of Contravention File Number Report Number 1-00014037

A4 Brandt Health and Safety Program Safe Work Program 9.3.1.13 Jib Cranes

A5 Brandt Health and Safety Program Safe Job Procedure 9.4.1.4 Overhead Crane Operation

A6 Brandt Health and Safety Program Safe Job Procedure 9.4.3 Rigging

A7 Brandt Health and |Safety Program Safe Work Practice 9.3.13 Rigging

A8 Brandt Health and Safety Program Safe Work Practice 9.3.1.12 Overhead Bridge Cranes

[22] Fletcher said that he was aware of all the documents that were filed as Exhibits. He acknowledged that the documents referred to situations where there was a risk of injury to an employee's head. In these situations, there was a need for proper headgear.

[23] Fletcher also said he would issue a contravention order even if only a "minuscule" risk of head injury. He acknowledged that the cranes were inspected and tested annually. Fletcher mentioned the risk of injury was from the components of the cranes, such as bolts, and not the crane loads. Fletcher was then pointed to the Notice of Contravention. There was no specific mention of the actual possible risk. It did say that he considered that there was a serious risk of injury.

[24[Questions were posed about the cranes. The jib crane load wasn't suspended above ground, and the rigging was taut. There wasn't any accident observed, and the arm of the jib crane was not moving or swinging. Nothing had fallen from above. Fletcher said he couldn't quantify the degree of possibility of the load moving. It would be higher if the load was actually suspended above ground.

[25] Fletcher stated that the load held by the overhead crane was suspended and just off the ground and he wasn't sure if it was moving forward. The crane moves very slowly along the rail. There were no dangerous movements noted by him. Nothing failed and there were no injuries in either contravention.

Russ Weisgarber Examination

[26[Weisgarber gave evidence for Brandt. He has worked for Brandt for about 22.5 years and has been a shop manager for 2.5 years.

[27] Weisgarber was present for the incidents in question. He commented that Brandt provided their employees with a specific course on their personal protective equipment policy, including what might be necessary when working with cranes. There was a reference to Exhibit A2, and it was his opinion that both incidents didn't call for protective headwear because no employee was under any suspended load. The paint booth had an overhead rail that held loads and crossed over workers' heads and therefore there was a need for protective headwear when working. The overhead crane load was to be moved to where the other workers were situated. The overhead cranes didn't need to lift the load any higher than shoulder or head level. The overhead crane is designed so that loads do not need to be lifted higher than shoulder or head level. Any lugs holding the crane components are welded in place and the crane uses chains and slings. Weisgarber discussed Exhibit A8 which detailed the policy for overhead cranes.

[28] Weisgarber said rigs are inspected daily and before being used. A third party inspects the cranes annually. He has personally done inspections. The workers in the different incidents were certified on crane usage. No one was directly under the loads in the incidents and if they were seen to be, they would have been disciplined. The overhead crane loads travel at a walking speed. The policy found in Exhibit A5 indicated workers are to assess the risks involved when operating the overhead crane. There were similar policy statements in the Exhibits for riggings, and jib cranes.

[29] Weisgarber was asked questions about the actual incidents. Weisgarber said the inspection started about 10:30 in the morning. He met the group in the middle of the shop floor. The inspection took about 2 hours, going past lunchtime.

[30] The group were first passing by the welding area on the shop floor. He recalled Fletcher talking about roof venting with the other officer. Fletcher then looked over and began discussing the headwear on two workers welding about 20 feet away. These workers were situated around, but not underneath, a tubular load, suspended by a jib crane. Weisgarber didn't think that there was any risk of any head injuries. Fletcher took a contrary view.

[31] The parties then were heading to the lunchroom. My notes of Weisgarber's examination indicated that on the way, they observed a worker working on a grain cart. He was on his knees with his shoulders, but not his head, partially under the grain cart. The worker was told to correct his positioning.

[32] Weisgarber stated that they went back to the work floor after visiting the lunchroom. They were on the opposite side of the work floor from where a 6 by 8 feet panel was in the process of being moved by an overhead crane. This was where grain carts were being assembled. It was to be attached to a trough where two employees were seated and awaiting the load. There were no employees directly under the overhead crane and its load. The load was about 2 feet off the ground. Fletcher ordered the two employees guiding the load to stop work until protective headwear was worn. Weisgarber further stated that the panel was above head level of the employees but not hanging over their heads. He agreed that the chronological order of the incidents that he stated was different than the evidence provided by Fletcher.

[33] Weisgarber provided information about Brandt's paint room that was used for their manufactured products. Employees wear protective headwear because there is a risk of head injury because the monorail carries loads and loops around the room above the workers' heads.

[34] On cross examination by the Respondent, Weisgarber said he didn't make notes from the incident and his evidence was from his memory of the incident. The welding area was about 120 feet by 100 feet. It had two halves. The tubular load in the jib crane incident was about 6 or 7 feet in length.

ARGUMENT OF THE DIRECTOR

[35] The Director's argument is that the issue to be determined was whether there was a risk of injury to any employee's head.

[36] The workers were under the beams of the overhead crane assembly. The tops of the loads were above employee head levels, but the loads were not directly over their heads. The concern was the possibility of the

crane assembly breaking. There could be debris, such as hooks, riggings and the trolley, that could fall on the heads of the employees in both incidents.

[37] Fletcher provided that the risks he identified were an unlikely probability to happen. They did though come across rigging from an overhead crane that was frayed and kinked. This could be considered an example of human error.

[38] There are two cases referred to by the Director for guidance, but not binding on me. The first case is *R v Brandt Industries Canada Ltd., 2022 SKPC 4.*, a decision of the Provincial Court for Saskatchewan. It dealt with s. 91(1) of the *Regulations*. The second case referred to is an unreported case dated October 26, 2012, *CNH Canada Ltd. v Occupational Health and Safety Division,* dealing with the relevant *Regulations*.

[39] In *Brandt (supra)*, a worker stepped up onto a flatbed that was being loaded with steel beams, using an overhead crane. There was a sudden slight shift with one of the loads. The load didn't hit the worker, but she stumbled and fell to the work floor. She suffered a shoulder injury and a serious head injury because of hitting the floor. She was not wearing protective headwear. One of the issues in the case was whether there was the need for protective headwear pursuant to s. 91(1) of the *Regulations*. The Director referenced the following part of *Brandt (supra)*:

> [50] I agree that to ground liability the risk contemplated by s. 91(1) of the Regulations must be realistic. Employers cannot be expected to account for possibilities that are very unlikely. At the same time, the risk posed does not have to be likely; a risk is realistic if it is significant. I am not satisfied that certain actions taken by the workers involved a realistic risk of injury to a worker's head. These actions include the workers' stepping up onto the flat deck, climbing on top of the load and walking along and between the rectangular columns. It is conceivable that a worker might stumble during such actions but, in my view, it is very unlikely that would happen to a worker taking reasonable care. As well, if a worker did stumble, the chance of incurring a head injury is even lower. In viewing the videorecording of the incident, it appeared to me the assemblers completed these actions with no difficulty and were careful while doing so.

The decision stated that in the case, there was a "realistic risk" that the employee might fall and suffer a head injury. The judge went on to say that it was not likely that the employee would fall, and that protective head gear would have helped, but there was a "realistic risk" it could occur.

[40] In *CNH Canada Ltd.(supra)* dealt with similar facts to what has happened in our matter. It stated that:

> 63. Section 91(1) of the OH&S Act and Regulations refers to a risk of injury but does not refer to a degree of risk of injury. It is not in my view to be interpreted as a low, moderate or high risk, but simply a risk.

It went on to state that even though the employer had developed risk assessments, training, procedures, and policies in terms of wearing protective headwear it was not shown that it was enough to prevent a "potential risk.

[41] The Director concluded from the cases that the wording of s. *91(1)* does not modify the degree of risk to low, moderate or high. Further the section is applicable even if risk is unlikely but "realistic". Workers can make mistakes and protective headwear is the "next line of defence" and would minimize, if not eliminate, any risk of injury. In the case at hand, there was a chance of loads being maneuvered above head levels or there could be

lateral movement of the loads. The risk is significant. The Director mentioned the frayed rigging that was part of the original Notice of Contravention as an example of when there could be human failure.

[42] The Director alluded to *Milner Greenhouses Ltd. v. Saskatchewan, 2004 SKQB 160 at paragraph 9,* where it was stated that the legislation is meant "to promote and maintain the highest degree of physical, mental and social well-being of workers in the province and to prevent harassment, injury or ill health stemming from the work environment". The Director argued that *Part III* of the *Act* and the *Regulations* are intended to" suppress the mischief of workplace injuries, including injuries arising from unlikely workplace accidents". The Director argued that the chance of a hook or other component breaking or a forgotten tool falling below or perhaps a cable snapping might be unlikely but realistic.

ARGUMENT OF BRANDT

[43] Brandt takes the position that the Notice of Contravention should be cancelled because "it lacks internal consistency and is not based on reasonable, credible or documented evidence".

]44] The Appellant pointed out that Fletcher confirmed that the infraction was pursuant to s. 91*(1)* and not the deeming section found in s. *91(2*) of the *Regulations.* My comment is that the reading of the relevant section and context of this matter is self-evident to confirm the position.

[45] Brandt argues that s. 91(1) only calls for the need for protective headwear if there is "an actual risk of injury to their heads".

[46] Fletcher confirmed that the Notice of Contravention alleged a "serious risk" to workers. The actual "serious risk" was not clearly stated in the Notice of Contravention. Fletcher did not note in the Notice of Contravention that he had invoked s. 3-40 and 3-41 of the *Act*, that allowed him to shut down work.

[47] Brandt stated that Fletcher's evidence was that he considered that the risks he observed with respect to the cranes were "minuscule" and "very unlikely" to happen, subject to a catastrophic failure. I would add though that my notes differed somewhat in that Fletcher did not go beyond stating a situation can cause a "risk of injury" but that it was up to him to determine if a "serious risk of injury". He then went on to comment that it was not necessary for a risk to be "significant "and he would deem an infraction even if the risk was "minuscule" or the risk was "very unlikely" to happen.

[48] Brandt pointed out that Fletcher said the load held by the jib crane was on the ground and only suspended to prevent it from moving. Further his evidence showed no swinging of the load or the load falling. No crane components fell. He didn't know the probability of anything untoward happening to cause head injury to the workers. The probability would be greater if the load was suspended higher, off the ground. Fletcher did not inquire about Brandt's policies to mitigate head injury besides using protective headwear. There was no inquiry about hazard assessment rules around crane operations or worker training.

[49] Brandt also referred to *R v Brandt Industries Canada Ltd.* {supra}. In paragraph 50, Judge Wiegers stated that it is necessary that the risk must be "realistic" and "possible risks" that are "very unlikely" do not fit into section 91(1). At the same time, the decision went on to state that the risk possibility does not have to be likely, and that the risk can be considered realistic if "significant".

[50] The Appellant argued that while "significant" was not defined by Judge Wiegers, it must mean more than just a mere possibility. The Appellant referenced *Winko v Forensic Psychiatric Institute. {1999} 2 SCR* 625 at paragraph 57, that dealt with "significant threats to the safety of the public". The decision stated:

> The threat must also be "significant", both in the sense that there must be a real risk of physical or psychological harm occurring to individuals in the community and in the sense that this potential harm must be serious. A minuscule risk of a grave harm will not suffice. Similarly, a high risk of trivial harm will not meet the threshold.

[51] In *Brandt* (supra,) Judge Wiegers found in the case before him that there was a "realistic risk" of head injury. The Decision did provide that merely walking through the plant or walking alongside a load suspended by an overhead crane doesn't constitute a "realistic risk". Those situations were very unlikely and too remote to be found in s. 91(1). In paragraph 73 of the Decision, it was also commented that Brandt had taken reasonable steps to avoid risks to their workers. Loads weren't to be raised overhead. The workers received training on hazards and that workers could request protective headwear if they thought it necessary.

[52] Brandt argues that the situation of a remote or' minuscule' risk of head injury is not sufficient to find liability. This was how Fletcher described the risk. *Brandt* (supra) showed that in our circumstances there needed to be a "significant" risk. *Winko* (supra) determined that a 'minuscule" risk is not considered "significant".

[53] The Appellant also referred to s. 3-80 of the *Act*:

> **Onus on accused re duty or requirement**
>
> 3-80 In any proceedings for an offence pursuant to this Part or the regulations made pursuant to this Part respecting a failure to comply with a duty or requirement to do something so far as is practicable or so far as is reasonably practicable, or to use the best practicable means to do something, the onus is on the accused to prove, as the case may be, that:
>
> (a) it was not practicable or not reasonably practicable to do more than was actually done to satisfy the duty or requirement; or
>
> (b) there was no better practicable means than was actually used to satisfy the duty or requirement.

There is a practicable aspect for consideration such that an employer doesn't have to provide for situations where there are "minuscule" risks involved.

[54] Brandt maintains that there is insufficient evidence to show that the workers were either under or close enough to the load to be at risk. There must be more than had been provided in evidence to show a realistic and significant risk of head injury to fall under s. 91(1).

[55] Brandt further submitted that the Notice of Contravention lacked internal consistency and there wasn't "reasonable, credible or documented evidence" to support the Notice of Contravention. The OHS Policy in Exhibit A1 states that the Officer must have an opinion based on "reasonable, credible, and documented evidence" before issuing a Notice of Contravention.

[56] The Notice of Contravention stated there was a serious risk but didn't outline which workers were at risk and what the risk was. This deficiency was lacking in important information. The only evidence that can be considered is the comments from Fletcher about "minuscule" and an "unlikely" event.

[57] There is contradictory evidence from Fletcher and Weisgarber on whether the load hung by the jib crane was above the heads of the worker as stated in the Notice of Contravention. Fletcher noted the inconsistencies in his notes on which event happened first and puts his recollection of events in doubt. Fletcher stated his concern was not about any suspended loads but rather the hook and rigging components potentially breaking and falling below. The Notice of Contravention stated the load was the issue and not the components. This brings into question the necessity of credibility before issuing a Notice of Contravention. There were insufficient grounds to issue any Notice of Contravention.

[58] Brandt, in its Reply to the Respondent's Submissions, pointed out that there was no evidence to show that the rigging taken out of service wasn't inspected before found or that it was frayed before any lift. That is why the Director dismissed the contravention. It is not evidence that an accident was waiting to happen or that there was human error.

[59] As well, the Appellant maintains that the reference by the Respondent to *CNH Canada* (supra) does not align with a proper approach to this type of legislation. The case of *R v Blue Mountain Resorts Limited, 2013 ONCA359 DLR (4th) 276*, which was followed in *Brandt* (supra), stated when dealing with public safety issues *"broad interpretations must be avoided where their adoption would produce absurd or unreasonable results".*

[60] Brandt also argued that before any contravention can be found, there should be sufficient inquiries into its policies, practice, and procedures in terms of the use of approved headwear. Fletcher should have considered Brandt's extensive policies and training requirements. He did state he knew of them but then should have known that Brandt supplied proper headwear if required or requested. The various Exhibits filed by the Appellant demonstrate that proper headwear is important and provided that if there is a risk of head injury, proper headwear was available. Proper headwear was provided to workers in the paint room because there was a recognized risk of head injury. The evidence showed that Fletcher had been to the paint room and would have seen this.

[61] Brandt summarized that Brandt did not contravene s. 91(1) of the Regulations for the given reasons.

ANY FACTS IN DISPUTE

[62] The Agreed Statement of Facts set out that the incidents were viewed at Brandt's agricultural, construction and mining machinery manufacturing plant in Regina, Saskatchewan. It also acknowledged that the inspection by Fletcher happened on January 12, 2021 and that it concerned his observing two workers operating a jib crane and two workers operating an overhead crane. There was a Notice of Contravention served on Brandt on January 15, 2021, which was amended by the Director on April 27, 2021. The parties were not precluded from providing further evidence to supplement the Agreed Statement of Facts.

[63] As it pertains to the incidents that are the subject of the Notice of Contravention, there is some difference in what was observed by Fletcher and Weisgarber. Of course, there is a difference in the chronological order of the two incidents. Fletcher could not answer why his notes were different from some of his evidence in the hearing. He said he normally would make his notes in chronological order. He also stated his memory might not be accurate because of the time that has passed since the inspection. The evidence of Weisgarber was given in a clear and cogent manner. If there is any discrepancy in what was observed by Fletcher and Weisgarber, I prefer the evidence of Weisgarber.

[64] I accept that in both incidents, the loads were suspended but none of the employees were directly under the crane components or loads. The loads were not any higher than shoulder or head level. In both incidents, the workers in question did not have protective helmets that covered the top of their heads. The welding incident occurred before the grain cart incident.

APPLICABLE LEGISLATION

The Occupational Health and Safety Regulations, 1996, R.S.S. O-1.1, Reg 1

Protective headwear

91(1) Where there is a risk of injury to the head of a worker, an employer or contractor shall provide approved industrial protective headwear and require a worker to use it.

(2) The following places are deemed to be places where a worker is exposed to a risk described in subsection (1):

(a) a mine, mill or smelter;

(b) a forestry or sawmilling operation;

(c) a construction site;

(d) a drilling operation;

(e) an oil or gas servicing operation.

[65] It is noted that Brandt's manufacturing plant does not fall under s. 91 (2*) of the Regulation* but rather the requirements found in s. 91 *(1).*

ISSUES

[66} 1 What is meant by "risk of injury" as found in s. 91(1) of the Regulations?

2 On answering question 1, did the incidents involved meet the requirements?

3 If the incidents meet the criteria, was the Notice of Contravention deficient and should therefore be cancelled?

[67] The Decision in *Brandt* (supra) has properly set out what I have concluded as the proper considerations for what is meant by "risk of injury", as contemplated by s. 91(1) of the *Regulations*. The Decision prefers the approach found in *R v Blue Mountain Resorts limited* (supra) compared to the strict interpretation that was stated in *CNH Canada Ltd.*(supra). The facts in *Brandt* (supra) are different from ours but the central issue of what constitutes "risk of injury" in s. 91(1) is the same. Both parties referenced the case in their favour. As stated by Judge Wiegers, the risk must be "realistic ", and "possible risks" that are "very unlikely" to occur are not contemplated by s. 91(1). Judge Wiegers also stated that a risk doesn't have to be "likely" but if it is a "significant" risk, it would be caught in s. 91(1). *Winko* (supra) sets out that at the very least "significant" can't be something "minuscule" and should be a "real risk". Which then leads to the consideration of where the facts in our case lead us.

[68] The evidence of Fletcher showed a most unlikely possibility of any head injury occurring. The assembly parts of the cranes, such as the hook, rigging and trolley or other parts, breaking and falling onto the heads of the workers seemed unlikely, according to his comments. Fletcher stated that he had been involved in one incident at another work site where a bolt had fallen from above. That one incident does not make the possibility likely. Fletcher stated that the risk of falling parts from overhead may be small, not likely, but it could cause significant injury. Fletcher also stated that he would consider an infraction even if the risk wasn't "significant", "minuscule" and "very unlikely" to happen. The inference I take from his evidence was that he thought the incidents were most "unlikely" and the risk "minuscule" to cause any head injury.

[69] Weisgarber's evidence was that in his years of working at Brandt there was never any overhead component failure as contemplated by Fletcher. He further provided how the cranes are checked daily and before each actual use. As well, a third party does a more thorough annual inspection. There are policies set out in the Exhibits filed by Brandt that emphasize the cautions needed when using cranes and concerns for headwear. Training is provided to workers and the workers must be certified to operate the cranes. The *Act* also sets out the concept of "practicable". All of this also leads to the conclusion that the chance of head injury as contemplated by Fletcher was tending towards "minuscule".

[70] The risk was "very unlikely" to occur. It was not shown to be a risk that fit being "significant" as set out in *Winko* (supra). This was a situation of a "minuscule" risk or at least not close to being "significant". The threshold to be considered an infraction of s. 91 of the *Regulations* was not met.

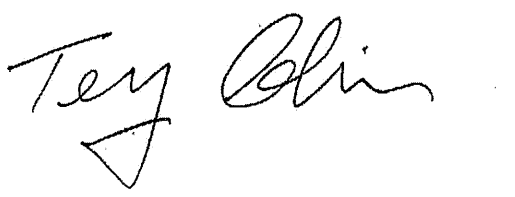
[71] Although not necessary for this decision, I will add my comments on whether the Notice of Contravention was deficient. Exhibit A3 sets out in the words of OHS that a Notice of Contravention must be based on "reasonable or credible" evidence. Fletcher's evidence lacked, in part, credibility because it contradicted his notes. Fletcher commented how his recollection may be limited because of passage of time. The evidence showed that there were no workers standing directly below the load or crane components. There were policies and training in place to prevent the type of failure contemplated by Fletcher.

[72] The Notice of Contravention was not specific enough to show why a serious risk was contemplated. It did not state what possible failure might happen. There was no evidence provided by Fletcher that proper headwear, even if needed, wasn't available. In fact, proper headwear was noticed and available in the paint room.

DECISION

[73] I direct that the amended Notice of Contravention dated April 27, 2021 is cancelled.

All respectfully submitted this 30th day of June, 2023.



Terrance Chinn, 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 or Part V 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 parties to the appeal.