

## ONTARIO LABOUR RELATIONS BOARD

**2299-09-HS Hastings and Prince Edward Counties Health Unit, Applicant v. Ontario Nurse's Association, Canadian Union of Public Employees, Lorelee Idler, Inspector, Responding Parties.**

**BEFORE:** Brian McLean, Vice-Chair.

**DECISION OF THE BOARD:** November 10, 2009

1. The employer requests suspension of an Order made by a purported Ministry of Labour Health and Safety Inspector.

2. By decision dated November 2, 2009, clarified by decision dated November 4, 2009, I abridged the deadline for responses to the request for suspension to be filed. CUPE, ONA and the Inspector filed responses by the deadline. The employer filed reply submissions. This decision determines the suspension request.

3. These applications concern H1N1 Influenza Immunization Clinics in Hastings and Prince Edward Counties which have been vaccinating for high priority groups. The clinics are staffed primarily by members of the Ontario Nurses' Association. The Orders, set out below, are in relation to workers (nurses) who screen clients for Influenza-like illness. The point of the screening exercise is that if patients appear to have influenza they are not permitted to be given a vaccination shot and are sent home.

4. Signage is posted at the front door to all clinics which reads:

**You will not be vaccinated today if you have:**

- 1) A fever or
- 2) An eye allergy.

5. Upon entering the clinic, a greeter directs patients to a hand washing station. Next to the station is a sign which reads:

**Respiratory illness like the flu spread easily**

**STOP**

Clean your hands.

1. Are you feeling unwell?
2. Do you have a cough?

If the answer to any of these questions is yes: **PLEASE PUT ON A MASK.**

Surgical masks are located directly below the sign.

6. Clients who are unwell are sent, wearing a surgical mask, to another screening area where their temperature is taken by a nurse. If the patients' temperature is greater than 38 degrees celsius they will be sent home.

7. Surgical masks and gloves are available from the greeter and the nurse taking patients' temperature. There are hand-washing stations at the entrance to every clinic, and hand sanitizer is widely available at the clinics.

8. On October 26, 2009, MOL Inspector/Hygienist Lorelee Idler, accompanied by MOL Infection Control Consultant Craig Lawrie, inspected the Belleville Clinic. As a result of the inspection, Inspector Idler issued the following four orders:

1. Clients are being screened for symptoms of influenza-like illness in areas well inside the building where they can come in contact with unprotected workers not involved in the screening process. The employer shall take the reasonable precaution to protect the health of workers of ensuring that active screening is done by clinic staff as close as practicable to the entrance and ensuring that the screening areas are well-separated from other work areas.

Compliance date of 30 Oct 2009

2. Workers who screen clients for influenza-like illness, including clients who self-report as ill, are not provided with eye or respiratory protection. The employer shall take the reasonable precaution to protect the health of workers of providing appropriate respiratory and eye protection for workers who screen clients for influenza-like illness.

Compliance date of 12 Nov 2009

3. Workers doing active screening of clients have not been fit-tested to ensure that they can achieve adequate fit with the respirators provided to them. The employer shall take the reasonable precaution to protect the health of workers of providing qualitative or quantitative fit-testing for all workers who may be required to wear respirators.

Compliance date of 12 Nov 2009

4. Workers who may be required to wear respirators have not been trained in the care or use [of] respirators. The employer shall ensure that every worker required to wear respiratory protection is trained in the care and use of respirators.

Compliance date of 12 Nov 2009

9. To be clear, the parties agree that the Orders require the employer to provide the workers with an N95 respirator. This respirator requires training for proper use and must be "fit-tested" to every individual who will be wearing one. Some employees with particular facial features will have to have masks specially ordered. The employer has a concern that it may not be able to get enough N95 respirators because there is such a demand for them.

10. The employer challenges the last three Orders (the "Orders"). The employer also asserts that Ms. Idler, a Ministry Hygienist, is not an Inspector under the Act.

11. The factors the Board considers in determining whether to suspend the operation of an inspector's Order are:

- (a) whether the suspension of the order would endanger worker safety;
- (b) whether the employer would be severely prejudiced by not suspending the operation of the order; and
- (c) whether there is a *prima facie* case for a successful appeal of the order.

(See *R.J. Dungey & Sons Ltd.*, *supra*, at para. 17, and the decisions cited therein.)

*Whether the suspension of the Order would endanger workers' safety*

12. This question is very difficult to evaluate. On one hand, it is clear that workers would likely be safer, if only barely, with the use of the N95 respirator. Obviously, if the mask is tighter fitting, there is less chance of virus carrying liquid finding its way into the mouth or nose of the worker. The real issue is the magnitude of the benefit. In my view the benefit is likely a small one, perhaps a very small one, but is a benefit nonetheless.

*Whether the employer would be severely prejudiced by not suspending the operation of the order*

13. The employer advises that the N95 respirators are "more expensive to provide than surgical masks and they must be individually fitted to each worker, adding additional costs".

14. ONA suggests that the employer has estimated that the cost to the employer to provide the N95 respirator is approximately \$4,500.00 every four weeks and \$1000 for eye protection.

15. The prejudice to the employer is accordingly small.

*Whether there is a prima facie case for a successful appeal of the Order*

16. The Ministry of Health and Long Term Care on October 27, 2009 published a document "Personal Protective Equipment in Mass Immunization Clinics" which states:

Active screening should be carried out by clinic staff at the entrance to the clinic itself. Staff members who are performing the screening should have the appropriate PPE (fit-tested N95 respirator and eye protection in addition to Routine Practices) available for use in case an individual with H1N1 has bypassed the passive screening and entered the clinic.

17. In view of the Ministry's position, provision of the respirator would appear to be at least arguably a reasonable precaution.

18. Moreover, it is not at all clear to me, as the employer suggests, that the Ministry must prove "additional risk" to their workers than to any other workers in Ontario. The question is: is the provision of the equipment at issue a reasonable precaution? That can be answered in the affirmative without a finding that other workers in the province are more at risk.

19. It seems to me that the Order is at some level a succumbing to unjustified alarmism. It seems obvious to me that the workers in question are better protected than almost any other group of employees in the province who regularly deal with the public. The measures adopted by the employer and the expertise of the workers in identifying ill people give them substantial protection not available to many other public workers. Moreover, health care workers have priority for vaccination. The end result of all of this, is that to date no workers have become ill. Therefore, I conclude that there is a *prima facie* case for a successful appeal of the Order.

20. Since the suspension of the Order may endanger workers' safety, albeit minimally, and since the employer would not be severely prejudiced by not suspending the Order (except possibly as discussed below) and although it can be said that there is a *prima facie* case for a successful appeal of the Order, I decline to suspend the Order in this case. I make this decision with considerable misgivings. Nevertheless, I decline to suspend the Order because all three criteria in *R. J. Dungey & Sons* have not been met.

21. Having said that, in my view whatever danger there or suspending the Orders is would not justify shutting down the clinics. Therefore, if the employer is unable, using normal efforts, to secure sufficient number of N95 respirators it may advise the Board and the Board will then consider whether the order should be suspended pending obtaining the respirators.

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"Brian McLean"

for the Board