



Manitoba Labour Board

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ORDER NO. 46

Case No. 97/09/WSH

IN THE MATTER OF: *THE WORKPLACE SAFETY AND HEALTH ACT*

- and -

IN THE MATTER OF: An Appeal by

Rosaire Jean,

Appellant/Applicant,

- and -

Director, Workplace Safety & Health,

Respondent,

- and -

FORAGE ORBIT GARANT,

Employer.

BEFORE: W.D. Hamilton, Chairperson

S. Oakley, Board Member

C. Lorenc, Board Member

SUBSTANTIVE ORDER

WHEREAS:

1. On April 1, 2009, the Appellant filed an appeal (the “Appeal”) with the Manitoba Labour Board, (the “Board”), pursuant to Section 39(1) of *The Workplace Safety and Health Act* (the “Act”), appealing the decision of the Director of the Workplace Safety and Health Division (the “Director”) dated March 17, 2009 (the “Decision”) in which the Director upheld a Report issued on or about September 30, 2008 (the “Report”) by a Mines Inspector (the “Inspector”). In the Report, the Inspector determined that the decision of the Appellant to refuse to work for his Employer, Forage Orbit Garant, (the “Employer”) as a diamond driller at the Rice Lake Gold Mine Site at Bissett, Manitoba, (the “worksite”) on account of alleged excessive noise levels was null and void, the result of which was that the Appellant was no longer entitled to refuse to perform the work [see Section 43.1(4) of the *Act*].

2. In the Appeal, the Appellant asserts that the main reason for his work refusal on or about September 24, 2008 was an account of the "... excessive noise generated by a compressed air-driven diamond drill" he was operating at the worksite and that this noise level was "... higher than the standards in force in the Province of Manitoba." The Appellant also asserts that the hearing protectors recommended and used by the Employer, namely, earmuffs and foam ear plugs used together (i.e. "dual protection"), did not, for the reasons outlined in the Appeal, comply with the requirements of Section 12.4(2) of *The Workplace Safety and Health Regulation* (Manitoba Regulation 217/2006) [the "Regulation"]. The Appellant disputes the Director's conclusion in the Decision that the Inspector was correct in finding that the hearing protection provided by the Employer reduced the noise levels at the worksite to a level below 85 dBA and, therefore, met the requirements of the Regulation. At the hearing, the Appellant confirmed that the basis for the Appeal was his contention that the inspection performed at the worksite did not follow the proper methodology for testing noise levels and that the Board ought to overturn (i.e. set aside) the Decision and declare that, at the time of his refusal to work in September of 2008, the noise levels at the worksite were excessive and did not comply with Manitoba law.
3. On April 29, 2009, the Board granted an extension of time to all parties for the filing of replies to Monday, May 11, 2009.
4. On May 8, 2009, Counsel for the Director filed documentation with the Board requesting that the Board obtain further particulars from both Appellant and the Employer on the basis that the particulars requested were relevant to the substance of the Reply to be filed by the Director.
5. On May 11, 2009, following an extension of time, the Director, through Counsel, filed his Reply to the Appeal, but reserving the right to make further submissions following receipt of the particulars requested. For the reasons contained in the Reply, the Director asserts that the dual hearing protection provided by the Employer at the worksite met the requirements of the Regulation and did reduce exposures to 85 dBA or less. Accordingly, the Director requested that the Board dismiss the Appeal.
6. No reply was filed by the Employer.
7. On June 12, 2009, the Appellant filed a letter dated June 8, 2009 with the Board, responding to the Director's request for particulars (the "Particulars").
8. On June 23, 2009, the Director, through Counsel, filed documentation with the Board in response to the Particulars provided by the Appellant. The Director advanced the following position:

"In light of the fact that Mr. Jean has advised that he is 'no longer employed by Forge Orbit Garant and has not been employed with them since his refusal under the Workplace Safety and Health Act, the Director takes the position, on the facts of this case, that Mr. Jean is unable to appeal the Director's Order as he is not a person that is 'directly affected by the order or

decision of the Director' as required pursuant to section 39(1) of The Workplace Safety and Health Act which reads as follows:

Appeal to Board

39(1) Any person **directly affected** by an order or decision of the director under section 37 may appeal it to the Board. (emphasis added)

The Director submits that this matter is one of legal interpretation and does not require oral testimony as reliance can be placed on information and particulars already provided. The Director submits that this matter should be dealt with in advance of any in-person hearing and requests the Manitoba Labour Board consider establishing a timetable to accommodate written argument on this issue.”

9. On August 18, 2009, the Board informed the parties that, pursuant to Section 39 of the *Act*, the Board determined that the appeal must be set down for a hearing and that any preliminary issues raised by the Director will be addressed at the commencement of the hearing.
10. On September 10, 2009, the Board forwarded a Notice of Hearing to all parties confirming that the Appeal was set down for hearing on December 9 and 10, 2009.
11. On September 23, 2009 the Appellant filed documentation with the Board requesting that San Gold Corporation (formerly Rice Lake Gold Corporation) be summoned to the hearing as the “contractor party” in this matter.
12. On October 1, 2009, the Director, through Counsel, filed a response opposing the Appellant’s request that the Board summon San Gold Corporation to the hearing. In this response, the Director raises the issue of “mootness”, as follows:

“The Director has raised the issue whether Mr. Jean is a ‘person directly affected’ as that term is used in the legislation as Mr. Jean no longer works for Forage Orbit Garant and has not worked at Rice Lake Mine since he refused to work in September, 2008. Mr. Jean no longer has any ties to San Gold Corporation (or to Forage Orbit Garant). I am led to believe that Forage Orbit Garant is no longer under contract with San Gold Corporation. Therefore the Director also takes the position that this matter is moot.”
13. On November 12, 2009, the Board informed the parties that it was not prepared to add San Gold Corporation as a “party” to the proceedings or to order its attendance at the hearing, and further advised that if either party wished to subpoena San Gold Corporation then it may do so in the normal course.
14. On December 9, 2009, the Board conducted a hearing, at which time the Appellant and the Director appeared before the Board. The Director was represented by Counsel. The

Employer did not attend the hearing. Translators from Translation Services of the Government were in attendance at the hearing and provided translation services, as required.

15. At the outset of the hearing on December 9, 2009, the preliminary motion of the Director was addressed, namely, that the Appeal should be dismissed on the grounds that the Appellant was not a person “directly affected” within the meaning of Section 39(1) of the *Act* and that, in the factual circumstances prevailing, the matters raised by the Appellant were moot.
16. The Board heard evidence and argument on the preliminary motion, advising the parties that if the Director’s position was allowed then that ruling would be dispositive of the Appeal. After adjourning to deliberate, the Board verbally advised the parties that the Appeal was dismissed on the ground that the Board was allowing the preliminary motion of the Director because, in the factual circumstances prevailing, the Appellant was not a person “directly affected” within the meaning of Section 39(1) of the *Act* and, further, that the issue(s) brought before the Board are moot. The Board gave brief reasons for its ruling(s), advising the parties that a Substantive Order outlining, in more detail, the material reasons for its conclusion would follow.
17. The material facts relevant to the dismissal of the Appeal on the basis of the Director’s preliminary motion are as follows:
 - (a) The Appellant was hired by the Employer, as a driller assistant at the worksite. The Appellant attended at the worksite on September 17, 2008, following which he took training in various safety practices on September 18, 2008.
 - (b) The Appellant was to work 11 hour shifts between 7:00 p.m. and 7:00 a.m. the following morning. He was to be scheduled to work 28 consecutive days to be followed by 14 days off.
 - (c) The Appellant worked his normal shifts on September 20, 21 and 22, 2008. The Appellant used dual hearing protection, namely earplugs and helmet-mounted earmuffs, as recommended and used by the Employer. The earmuffs were Peltor HP3EO Optime 10124NNR and the earplugs were E-A-R Classic Team 29 NNR. (See p.1 of Appeal).
 - (d) During these days of employment, the Appellant informed his Supervisor, Mr. Richard Alexandre (“Alexandre”), of excessive noise levels, but the issue was not resolved to the Appellant’s satisfaction.
 - (e) On September 23, 2008, the Appellant contacted Mr. Jacques St. Hilaire (“St. Hilaire”) a Workplace, Safety and Health Officer with the Workplace Safety and Health Division regarding his concerns. On September 23, 2008, the Appellant put in a work refusal to Alexandre and also advised St. Hilaire of “... my refusal to work”. The Appellant was told to take the next plane from the worksite on September 24, 2008 and

that he would be called with an offer of work, if there was work available. St. Hilaire advised the Manitoba Mines Inspector of the problem which had arisen.

- (f) The Appellant did not leave the worksite on September 24, 2008 and on September 25, 2008, Workplace, Safety and Health Officers, Mr. Lorne Uruski (“Uruski”) and Mr. Larry Poleschuk, (“Poleschuk”), who were at the worksite, investigated the noise levels and performed certain tests with a sound level meter at the worksite.
- (g) The Inspectors’ determined that, while the Appellant was using dual hearing protection, the noise levels at the worksite fell within acceptable noise limits, as prescribed by the Regulation. Accordingly, the Appellant was advised that the work was not dangerous and that the Appellant was no longer entitled to refuse to do the work. The Appellant was given the following report:

“Subject to the site inspection/investigation on September 25, 2008 by Larry Poleschuk and Lorne Uruski, the values that we obtained were 112-113 dba at the work station. Conversations with the drillers on site inform us that this machine drills for less than 7 hrs/day and the other time would be used for pulling rod or core. This would indicate that this work station is within acceptable limits while using a combination of muffs and plugs. Your work refusal is hereby null and void, and you can return to work, as indicated by your supervisor Richard Alexandre. However conversations with yourself on September 24, 2008 (sic) indicate that you do not wish to return to work for reasons of personal comfort.”

- (h) On September 25, 2008, the Appellant returned to Montreal, Quebec, rather than continue to work as an assistant driller at the worksite.
- (i) Since September 25, 2008, the Appellant has not provided any further assistant drilling or other services at the worksite or anywhere else. He is no longer employed by the Employer (see the Particulars).
- (j) The Employer left the worksite in mid-April of 2009 and is no longer under contract with San Gold Corporation (evid. of Poleschuk).
- (k) The Appellant did not file a complaint pursuant to Section 42(1) of the *Act* with the Division alleging that the Employer had taken any discriminatory action against him.
- (l) On October 2, 2008, the Appellant filed an appeal with the Director pursuant to Section 37(1) of the *Act*, essentially asserting that labour legislation of Manitoba was not followed in relation to his work refusal and, for the reasons recited in that appeal, the Appellant requested the Director to “... order that the noise at my place of work ... be reassessed in compliance with the labour legislation and standards of the Province of Manitoba with all the rigor that that implies and that a fair decision based on the

new results be made with respect in my case and for the sake of the health and well-being of other workers now operating that equipment.” (See Appendix 1 to Appeal).

- (m) On March 17, 2009, the Director issued the Decision and concluded that the testing and inspection conducted by the Inspectors had been proper; that their Report was affirmed; and that there was “... no reason for an inspector to re-attend and take further measurements.”
- (n) The acceptable noise level standard in Manitoba, pursuant to the Regulation, is 85 dB. In the Decision, the Director notes, *inter alia*, the following:

“With respect to the noise exposure level Inspector Poleschuk found noise levels of between 108 to 114 DB. I am advised by Inspector Poleschuk that appropriate hearing protection was available to and used by the workers. Appropriate hearing protection with attenuate noise levels of 30 DB with a resulting exposure of 78 to 84 dB. This would then fall within Section 12(3) of the Regulations.”

- (o) On April 1, 2009, the Appellant filed the Appeal. While the Appellant disputes the manner in which the test was conducted and the results obtained, he does not dispute the noise level measurements actually obtained by Poleschuk and Uruski. In the Appeal, the Appellant states:

“The noise level measured by the Mines Inspector was 108 dB to 114 dB for 7 out of 12 hours of work in the document provided by Mr. Hurst on March 17, 2009, and 112 dB to 113 dB for less than 7 out of 11 hours on the initial decision issued by the Mines Inspector.”

The Appellant states “... all of my calculations were performed with data gathered by the Mines Inspector.”

18. In addressing the preliminary motion(s) of the Director, the Board had regard to and applied the following principles and/or criteria:

- (a) The Appeal only relates to the Decision of the Director. Under Section 5(3) of the Board’s *Workplace Safety and Health Act Rules of Procedure* (the “Rules”) the Board “... shall be limited to the matters specifically raised in the application or appeal.”
- (b) As to whether the Appellant is a person “... directly affected” by the Decision, within the meaning of Section 39(1) of the *Act*, the factual context of the case before the Board is critical. The words “directly affected” are words of limitation and reflect the Legislature’s caution to the Board not to expand an appeal beyond the direct/personal interests of the individual. In the Board’s view, the purpose of these words of limitation are to ensure that a live issue exists between the parties.

See, in this regard, the decision of the Alberta Court of Appeal in *Canadian Union of Public Employees, Local 30 v. Alberta (Public Health Advisory and Appeal Board)* [1996] AJ No. 48, [“*CUPE, Local 30*”] where the Court addressed the scope of appeal under *The Public Health Act* where a person who was “directly affected” had the right to appeal. At paragraphs 18 and 19, the Court states:

“18. In our view, the Chambers Judge was correct in upholding the decision of PHAAB to give the words ‘directly affected’ the common law interpretation enunciated by Lord Hobhouse in *Re Endowed Schools Act* [1898] AC 477 (PC) at 483 where he stated:

‘That term points to a personal and individual interest as distinct from the general interest which appertains to the whole community ...’

This court has previously held that it is necessary to interpret reasonably the term ‘affected’ to make an Act having a right of appeal workable: *Re Pension Fund Properties and Development Appeal Board of City of Calgary* (1981) 127 D.L.R. (3rd) 477. The phrase ‘directly affected’ must mean something more than ‘affected’. However, it cannot be given an expanded meaning simply by virtue of expanding social consciousness: *Canada (A.G.) v. Mossop* (1993) 100 D.L.R. (4th) 658 (SCC).

19. In our view, the inclusion of the word ‘directly’ signals a legislative intent to further circumscribe a right of appeal. When considered in the context of the regulatory scheme, it is apparent that the right of appeal is confined to persons having a personal rather than a community interest in the matter.”

- (c) In Decision No. CAT-2005-06063, *British Columbia Workers’ Compensation Appeal Tribunal*, (“WCAT”), the following appears:

“[29] ... To my mind, the intent of the legislature in limiting the right to request review to ‘directly affected’ persons was to ensure that only persons with some real personal involvement in a matter be able to request review. ... Inasmuch as the workers’ discriminatory action complaint remains under consideration by the Board, I am not persuaded that the April 14, 2004 inspection report involved a ‘workplace that no longer exists’ for the worker.

...

[31] As the Board’s decision on these concerns is likely interrelated with the worker’s discriminatory action complaint, I consider that the worker is a directly affected person. ...”

In this decision, the Appeal Tribunal found that the worker was directly affected by an inspection report there in dispute because the worker had also filed a

discriminatory action complaint (analogous to a discriminatory action complaint under Section 42.1 of the *Act*) seeking individual monetary and other remedies, based upon the improper conduct of the employer. No discriminatory action complaint was filed by the Appellant here and, therefore, it cannot be said that an interrelationship exists between such a complaint and the Decision of the Director.

- (d) The leading case on “mootness” is *Borowski v. Canada (Attorney-General)* [1989] 1 SCR 342, [“*Borowski*”]. Mr. Justice Sopinka, speaking for the Court, states at paragraphs 15 to 17:

“15 The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court’s discretion are discussed hereinafter.

16. The approach in recent cases involves a two-step analysis. First, it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The case do not always make it clear whether the term ‘moot’ applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the ‘live controversy’ test. A court may nonetheless elect to address a moot issue if the circumstances warrant.” (Emphasis added).

- (e) At paragraphs 31 to 42 of *Borowski*, the Supreme Court noted that, even where there is no longer a “live controversy”, the Court (or tribunal) still retains a discretion to hear a case, based upon 3 criteria, namely, the continuing existence of an adversarial context; the concern for judicial economy and allocation of scarce resources; and finally the need for a Court or the Board to demonstrate a measure of awareness of its proper law-

making function. The Court noted that the application of these criteria is not a mechanical process and that the presence of one or two of the factors may be overborne by the absence of the third and vice versa.

- (f) The *Borowski* case was applied in *Sperling Industries Ltd. v. United Association of Journeymen Apprentices of Plumbing and Pipefitting Industry of the United States and Canada, Local 254 and The Manitoba Labour Board* [*“Sperling”*] (2005 MB, QB14, upheld by the Manitoba Court of Appeal, 2005 MBCA 107), where the employer challenged, on judicial review, the jurisdiction of the Board to impose a first contract, when there were no employees in the bargaining unit at the time of the imposition. Mr. Justice Kaufman ruled that, in the circumstances of that case, the question before the court was moot and applied the *Borowski* principles in so ruling. The Court assessed whether a live controversy existed not only at the time of the filing of an appeal or proceeding but also at the time the Court was called upon to make a decision. In a unanimous judgment, the Manitoba Court of Appeal upheld the decision and noted that there was no proper basis to interfere with the discretion of the Motions Judge.
- (g) In *Hamilton Steep GP Inc.* [2007] OOHSA No. 87 [*“Hamilton Steep”*], the Ontario Labour Relations Board heard an appeal under the *Occupational Health and Safety Act*, where a worker’s complaint that the work he was performing was unsafe was not upheld by an inspector. The worker had resigned his employment and, as a consequence, the employer submitted that the appeal before the Ontario board was moot because it had no relevance to the health and safety of any other workers. Under the Ontario legislation at issue, a worker must be “aggrieved” by any order being appealed (somewhat analogous to “directly affected” under Section 39(1) of the *Act*). The Ontario Board dismissed the appeal on the basis it was “moot” and, at paragraph 24:

“I find that Mr. Rooke is not an ‘aggrieved’ worker for the purposes of section 61(1) of the Act. Mr. Rooke has resigned his employment. He no longer has a continuing exposure to the situation and the workplace complained of. The workplace no longer has an effect upon him. His complaint now is academic only. There is no longer an active dispute. The facts of this case are unique to Mr. Rooke. He was complaining that his bifocal safety glasses were incompatible with the respirator. He was not stating that the non-bifocal safety glasses were incompatible with the respirator. It is not necessary to render a ruling in this case to advance or protect the health and safety of other workers. If a similar case were to arise in the future regarding the compatibility of some other workers’ bifocal safety glasses with the respirator, that case would have to be decided on the facts that pertain to that worker, including the size and shape of that worker’s safety glasses, the strength of that worker’s

prescription, and whether on those facts, wearing non-bifocal safety glasses, the strength of that worker's prescription, and whether on those facts, wearing non-bifocal safety glasses is safe for that worker. The Board should not hear and determine cases that fall within the considerations discussed above and have, as a result, been rendered moot." (Emphasis added).

- (h) Similarly, at paragraph 23 of *Hamilton Steep*, the Ontario Board adopted the following statements from another decision:

"To be aggrieved must be something more than intellectual dissatisfaction. There must be a direct and substantive effect on the complainant to the extent, in this case of at least continuing exposure to the environment complained of, or, a complaint concerning the employer's attempted remedy of the situation being, for example, moving the worker to a different environment."

19. The Board, in the context of the material facts and principles recited in paragraphs 17 and 18, **HAS DETERMINED:**

- (a) The work refusal of the Appellant on September 24, 2008, reflected a personal decision of the Appellant under Section 43 of the *Act*. This is not a case where the Workplace Safety and Health Division, based on complaints received or on its own motion, issued an improvement order under Section 26 of the *Act* or a stop work order under Section 36 of the *Act*.
- (b) Although the Board accepts the good faith of the Appellant in bringing the Appeal, the fact is that the Appellant, having left the worksite on September 25, 2008, and, by admission, since that date, has not been employed by the Employer, cannot claim to be "directly affected" by the Decision. This is re-inforced by the fact the Employer left the worksite in mid-April of 2009.
- (c) In *McMechan and Director, Workplace Safety and Health Division and Child and Family Services of Western Canada* (Case No. 702/92/WSH), the Board determined that the fact the applicant in that case was no longer an employee of Child and Family Services meant that the applicant was no longer an employee directly affected by the report and improvement order issued in that case.
- (d) Applying the *Borowski* principles (confirmed by *Sperling*), the time for assessing the Director's position that the appeal is moot is to be determined by reference to two time frames, namely, when the Appeal was filed on April 1, 2009 and as at the date of the hearing on December 9, 2009. The Board is satisfied that on both of these dates, there was no "present live controversy" existing because the Appellant was no longer an employee of the Employer working at the worksite and, after mid-April of 2009, the Employer itself had departed the worksite. It would be impossible to order

the relief which the Appellant initially requested in his appeal to the Director, i.e. that a re-testing be done.

- (e) Unlike the *WCAT* decision, *supra*, there is no interrelated “discriminatory action” complaint of the Appellant outstanding either before the Director or the Board.
- (f) In the result, the Board is satisfied that the tangible dispute which may have existed on September 24, 2008, has disappeared as a “live controversy” and that the three criteria listed in *Borowski, supra*, for exercising the discretion to hear a “moot” case do not exist in the factual circumstances prevailing. In many respects, the Appellant is advancing concerns relating to a general community interest regarding the matter of noise levels, but the facts are that the worksite no longer exists and, since September 25, 2008, the Appellant has had no involvement with the worksite. Similar to the ruling made in *Hamilton Steel GP*, it is not necessary to issue a ruling on this Appeal in order to advance or protect the health and safety of other workers because if similar situations arise in the future (under the pre-determined standards contained in the Regulation), then those cases will have to be addressed on their own facts. Given that the Appeal is restricted to the Decision of the Director and that it focused on the methodology used by the inspectors, and the manner in which calculations were made, the Board is satisfied that, the issue is now moot and that the Appellant is not “directly affected” within the meaning of Section 39(1) of the *Act*.
- (g) Accordingly, pursuant to Section 39(6) of the *Act*, the Appeal is dismissed.

T H E R E F O R E

The Manitoba Labour Board hereby **DISMISSES** the Appeal of Rosaire Jean, filed on April 1, 2009.

DATED at WINNIPEG, Manitoba this 20th day of January, 2010, and signed on behalf of the Manitoba Labour Board by

”Original Signed by”
W. D. Hamilton, Chairperson

”Original Signed by”
C. Lorenc, Board Member

”Original Signed by”
S. Oakley, Board Member

NOTES

Appeal to Court of Appeal

39(9) A person who is a party to an order of the Board made under subsection (6) may appeal the order to The Court of Appeal, but only on a question of law or jurisdiction and by leave of a judge of the Court.