

Manitoba Labour Board

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ORDER NO. 49

Case No. 317/11/WSH

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

- and -

IN THE MATTER OF: An Application by

KINETIC MACHINE WORKS LTD.,

Appellant,

- and -

Director, Workplace Safety & Health,

Respondent.

BEFORE: W. D. Hamilton, Chairperson

This Decision/Order has been edited to protect the personal information of individuals by removing personal identifiers.

SUBSTANTIVE ORDER

WHEREAS:

1. On August 25, 2010, a Safety and Health Officer (the “Officer”) of the Workplace Safety and Health Division (the “Division”) issued an Improvement Order (the “I.O.”) pursuant to the provisions of *The Workplace Safety and Health Act* (the “Act”). The I.O. contained nine separate improvement orders but only Improvement Order No. 2 (the “Order”) is before the Manitoba Labour Board (the “Board”) in this proceeding. The Order related to the alleged failure of Kinetic Machine Works Ltd. (“Kinetic”) to provide adequate or satisfactory safeguards on lathes and other machinery which Kinetic uses in its enterprise. In the Order, the Officer stated:

“Guards on machinery are either missing or insufficient to protect a worker from the hazards present while operating the machine. This creates a risk of serious injury, amputation or death to workers operating or in proximity to the machine.”

In issuing the Order, the Officer relied on Section 16.5(1) of Part 16 of the *Workplace Safety and Health Regulation, Regulation 217/2006* (the “*Regulation*”).

2. Section 16.5(1) of the *Regulation* provides as follows:

“Safeguards required

16.5(1) Subject to section 16.6, an employer must ensure that a machine has safeguards on it that will prevent a worker from coming into contact with the following hazards:

- (a) Moving parts on the machine;
- (b) Points of the machine at which material is cut, shaped or bored;
- (c) Surfaces with temperatures that may cause skin to freeze, burn or blister;
- (d) Energized components;
- (e) Debris, material or objects thrown from a machine;
- (f) Material being fed into or removed from the machine;
- (g) Any other hazard that may pose a risk to the safety or health of the worker.

16.5(2) An employer must ensure that any safeguard required under this Part is designed, constructed, installed, used and maintained in accordance with CSA Standard Z432-04, *Safeguarding of Machinery*.

Alternative mechanism

16.6(1) When it is not reasonably practicable to provide a safeguard on a machine, an employer must ensure that an alternative mechanism, system or change in work procedure is put into place to protect the safety and health of a worker.

16.6(2) An alternative mechanism, system or change in work procedure must offer protection to a worker that is equal, or greater to, the protection provided by a safeguard that meets the requirements of section 16.5.”

3. The Order contained a compliance date.
4. On or about September 16, 2010, Kinetic appealed the Order to the Director of the Division (the “Director”) pursuant to the *Act*.
5. On May 10, 2011, the Director dismissed the appeal of Kinetic and, for the reasons recited in his decision (the “Decision”) [Ex. 3], the Director concluded that the Officer had not erred in issuing the Order and, therefore, the Director confirmed the Order.
6. In the Decision, the Director advised Kinetic as follows:

“You have the right to appeal my decision to the Manitoba Labour Board pursuant to Section 39 of The Workplace Safety and Health Act. You may do so by filing a notice of appeal with the Manitoba Labour Board within fourteen days of this decision.”
7. By letter dated May 13, 2011 (Ex. 3), Kinetic advised the Director, *inter alia*, as follows:

“We will be appealing your decision to the Manitoba Labour Board pursuant to Section 39 of The Workplace Safety and Health Act as suggested in your conclusion. A copy of the appeal will be sent to your office.”
8. On October 5, 2011, Kinetic filed an appeal with the Board regarding the Order (the “Appeal”) [Ex. 10]. Attached to the Appeal were the Order, the Decision, and the letter of May 13, 2011 [Ex. 3]. As to the relief sought, Kinetic requested “...removal of Improvement Order No. 2 on WSH Inspection Report.”
9. On October 24, 2011, following an extension of time, the Director, through Counsel, filed its Reply to the Appeal. One of the grounds raised by the Director is that the Appeal is untimely because it was filed some five months following the issuance of the Director’s decision on May 10, 2011. Further, the Director stated that, although Section 39(2) contemplates that the Board may extend the time for filing an appeal, the Board, in the circumstances of this case, ought not to grant Kinetic any extension of time to file the Appeal.
10. On October 31, 2011, following a consideration of material filed and having noted the Director’s request that the Appeal be dismissed because it was filed out of time, the Board directed that the matter be set down for hearing to address the preliminary issue of “timeliness” raised by the Director and that the Board would deal with the merits of the appeal at a later date only if it determined that the case should proceed to a full hearing.
11. At the request of Counsel for the Director, the Board adjourned the original hearing date of November 4, 2011 to December 1, 2011 to address the question of “timeliness” and the

Board directed that the merits of the Appeal would be heard on February 14 and 15 of 2012, if required.

12. On December 1, 2011, the Board conducted a hearing on the issue of “timeliness”, at which time both parties appeared before the Board and presented evidence and argument, the Director being represented by Counsel.
13. At the hearing, certain documents were admitted by agreement of the parties and they were marked as Exhibits in the proceeding. Further, Mr. Jacques St. Hilaire, a Workplace Safety and Health Officer, testified in respect of his dealings with Kinetic on the matter at issue. Mr. St. Hilaire was not cross-examined and the representative of the Kinetic confirmed that the testimony given by St. Hilaire was true.
14. During his evidence and submissions before the Board, the Chief Executive Officer for Kinetic (the “Kinetic representative”) advised the Board that the key concern of Kinetic in filing the Appeal related to the process contemplated by the *Act* rather than the fact the Order itself required that the lathes and other equipment must be protected by safeguards. In particular, the Kinetic representative advised the Board that he felt the focus of Section 16 of the *Regulation* was incorrect in that it put an improper onus on the consumer of manufacturing equipment. In his view, there ought to be a legal obligation on the manufacturer of equipment to have the safeguards in place for the consumer at the time of purchase. In this regard, the Kinetic representative confirmed the evidence of the Officer that it was never a question of the cost for the safeguards or the fact that the machinery in question ought to be guarded. In Kinetic’s view, the key issue was who should bear the responsibility for installing guards, particularly for new equipment.
15. From the perspective of the Director, Section 16 of the *Regulation* is clear in that it expressly states that it is the responsibility of an employer to comply with this Section and there is no basis for the Board to accept the contention of Kinetic that the primary obligation ought to be on a manufacturer to sell equipment with proper guarding. This would require the Board to rewrite requirements of the *Act* and the *Regulation*. The Board has no jurisdiction to amend the legislation.
16. In addressing the preliminary motion of the Director on the matter of timeliness, the Board had regard to and applied the following principles and/or criteria:
 - (a) Section 39(2) of the *Act* addresses appeals from a decision of the Director to the Board in the following terms:

“39(2) The person appealing must send a written appeal notice to the Board within 14 days after the date of the order or decision, or within any further period that the Board may allow. The notice must be in the form and contain the information the Board requires.”

(b) In this case, the Decision was dated May 10, 2011 (see Ex. 2). In the Decision, the Director expressly advised Kinetic of its right to appeal under Section 39(2) of the *Act* and that a notice of appeal should be filed with the Board within fourteen days of the date of the Decision.

(c) That Kinetic was aware of this requirement is corroborated by Kinetic's letter to the Director of May 13, 2011 (Ex. 3) advising the Director that Kinetic:

“...will be appealing your decision to the Manitoba Labour Board pursuant to Section 39 of The Workplace Safety and Health Act as suggested in your conclusion. A copy of the appeal will be sent to your office.” (emphasis added)

The Board accepts that this letter expresses an intention on the part of Kinetic to appeal the Decision and that this intention was evident within the fourteen day appeal period itself.

(d) There was an exchange of e-mails between a representative of Kinetic and St. Hilaire between July 11 and July 13, 2011 (Ex. 5) at which time Kinetic was directed to the offices of the Board to obtain the relevant appeal forms and procedures. The Board accepts that this information was provided by the Board to Kinetic.

(e) The Appeal of Kinetic was filed with the Board on October 5, 2011 (Ex. 10).

(f) There is no question that the Appeal was filed beyond the fourteen day period prescribed by Section 39(2) of the *Regulation*. If Section 39(2) of the *Act* prescribed that this fourteen day period was the mandatory time limit for filing an appeal then the Appeal would be untimely and be dismissed by the Board. However, Section 39(2) does provide the Board with a discretion to allow an appeal to be filed beyond the fourteen day period. This is confirmed by the phrase “...or within any further period that the Board may allow”.

(g) While allowing an extension of time to file an appeal is “discretionary”, the Board must exercise this discretion in a reasonable and judicial manner, bearing in mind that the purpose and intent of the *Act* is to resolve disputes surrounding matters relating to workplace health and safety in an expeditious manner. This is confirmed by the fact that the initial appeal period prescribed by Section 39(2) itself is fourteen days.

(h) While Kinetic did not apply within the initial fourteen day time period for an extension of time, the letter of May 13, 2011 to the Director (Ex. 3) revealed Kinetic's intention to appeal. However, there was still time to meet the fourteen

day deadline after sending the May 13, 2011 letter. At no time, even after the Director filed its Reply raising the issue of timeliness, has Kinetic ever expressly advised the Board that it was seeking leave to extend the fourteen day time limit. Nevertheless, in the circumstances of this case and given the position(s) advanced by Kinetic and the Director, the Board is prepared to address the issue of timeliness from the perspective that Kinetic is requesting the Board to extend the time for filing the Appeal to October 5, 2011. The Board has the right to consider a request for an extended appeal period under Section 39(2) of the *Act*, even where the fourteen day appeal period has expired, but the length of time which elapses beyond the expiry of the initial fourteen day period is a factor which the Board will consider in deciding whether or not to grant any extension.

- (i) When determining whether to grant an extension of time, the Board will be guided by the criteria used by the Manitoba Court of Appeal when that Court decides whether it will extend time for filing a notice of appeal or a notice of motion seeking leave to appeal under either the *Act* or the *Employment Standards Code*. These criteria were succinctly summarized in *Kildonan Ventures Ltd. v. MacKenzie et al.*, 2006 MBCA 52 where, in considering two applications for leave to appeal under Section 130 of the *Employment Standards Code*, Freedman, J.A., stated:

“Three criteria must normally be satisfied before an extension of time for the filing of a notice of appeal, or, as in this case, a notice of motion seeking leave to appeal, will be granted:

1. The applicant must demonstrate it had a continuous intention to seek leave to appeal from a time within the period when the leave motion should have been filed; i.e., within 30 days of the Board’s orders;

2. The applicant must offer a reasonable explanation of the delay; and

3. The applicant must establish that it has an arguable ground of appeal.

See, e.g. *Elias v. Wolf* (2004), 190 Man.R. (2d) 40, 2004 MBCA 99, *Pelisek v. Pelisek* (2003), 173 Man.R. (2d) 192, 2003 MBCA 55, *Bohemier et al. v. CIBC Mortgages Inc.* (2001), 160 Man.R. (2d) 39, 2001 MBCA 161. See also *Hunter v. Hunter* (2000), 150 Man.R. (2d) 291, 2000 MBCA 134, where Scott C.J. M. said, *inter alia*, that the applicant for an extension of time must also establish “that it is right and just in all of the circumstances that time ... be extended” (at para.6).”

- (j) While the Board recognizes that these criteria are not restricted only to safety and health appeals filed pursuant to the *Act*, the Board is satisfied that they are relevant guidelines for the Board when determining whether it ought to exercise its discretion and extend the time for filing an appeal pursuant to Section 39(2) of the *Act*.
- (k) Further, in the Director's written Brief, reference is made to *Decision No. 1458/OOE*, of the Ontario Workplace Safety and Insurance Appeals Tribunal where, in considering whether or not to grant an extension of time to a party to file an appeal in a workers' compensation context, that Tribunal summarized the factors which have been considered by appeals tribunals in similar circumstances. At Para. 9:

"Previous decisions of the Appeals Tribunal have noted some of the factors to be considered when making this determination. (See Decision Nos. 1493/981 (1998), 48 W.S.I.A.T.R. 239 and 1522/9812 (1998), 48 W.S.I.A.T.R. 252.) The criteria include:

1. The lapse of time between the expiration of the time limit and when the appeal was filed and whether there is an explanation for this;
2. The nature and significance of the issues under appeal and whether the appeal presents a bona fide case on its face and is not frivolous or vexatious;
3. Whether there is a prejudice to a respondent;
4. Whether the case is so stale that it cannot be reasonably adjudicated;
5. Whether the appellant ought to have known of the time limit;
6. Whether the appellant acted diligently once he or she learned of the time limit;
7. Whether a refusal to hear the appeal by the Tribunal could result in a substantial miscarriage of justice due to defects in prior process or clear and manifest errors;
8. Whether there is evidence to show an intention to appeal prior to the expiry of the time limit."

The Board is satisfied that these criteria also constitute useful guidelines for the Board and any party seeking an extension to the appeal period.

- (l) In all cases where an extension of time is sought pursuant to Section 39(2) of the *Act*, the onus falls on the appellant to satisfy the Board that an extension ought to be granted in the particular circumstances of the case. Further, the Board notes

that the guidelines referred to above are not exhaustive or inflexible and each case must be addressed on its own facts.

17. After considering the principles and criteria outlined in the preceding paragraph, the Board has **DETERMINED** the following:

- (a) Kinetic was well aware of the time limit as the provisions of Section 39(2) were expressly brought to its attention by the Director in the Decision.
- (b) Kinetic has demonstrated that it had intention to appeal during the initial fourteen day time limit (Ex. 3).
- (c) Even if the Board was prepared to allow for some initial confusion regarding the appeal process, there is no doubt that by July 13, 2011, Kinetic was well aware of the process to be followed regarding the filing of an appeal and had, by that time, received the relevant information and appeal documents from the Board. However, the Appeal was not filed until October 5, 2011. This latter delay of some three months stands unexplained. Further, Kinetic does not dispute the fact that the Appeal was only finalized by a representative of Kinetic on the day that an Officer attended at Kinetic's premises to ascertain whether or not there had been compliance with the Order.
- (d) The Board is satisfied that Kinetic did not act diligently when it learned of the fourteen day time limit either in the first instance or after it became aware of the precise procedures to be followed.
- (e) In the result, the Board is not satisfied that Kinetic has offered a reasonable explanation for the delay in filing the Appeal.
- (f) The Board is not satisfied that Kinetic has established it has an arguable ground of appeal. The obligations on an employer under Section 16 of the *Regulation* are designed to ensure that adequate safeguards are utilized on equipment for the protection of employees. In this case, Kinetic neither disputes the requirement for safeguards *per se* nor does it raise cost as an issue (even if relevant). From the outset (i.e. Ex. 3) Kinetic has challenged, from its perspective, the legitimacy of the requirement in the *Act* and the *Regulation* and has asserted that the legal obligation ought to rest on the manufacturers of equipment to install safeguards on equipment prior to a sale to consumers. The Kinetic representative acknowledged he was advancing the position that the legislation itself was faulty. In this regard, the Board cannot rewrite a provision of either the *Act* or the *Regulation*. Seeking such relief does not constitute an arguable ground of appeal.

18. For all of the foregoing reasons, the Board is not satisfied that valid grounds exist to extend the time for Kinetic to file an appeal under Section 39(2) of the *Act*. Kinetic has failed to satisfy its onus and the Board declines to grant an extension of time to file the

Appeal. Accordingly, it follows that the Appeal will be DISMISSED. Given the Board's decision on the timeliness issue, there is no need to address the Director's submissions on the question of whether the Board ought to suspend the operation of the Order pursuant to Section 39(7) of the *Act*. The Board notes that Kinetic never made any application to the Board under this provision in any event.

T H E R E F O R E

The Appeal filed by Kinetic Machine Works Ltd. on October 5, 2011, pursuant to Section 39(2) of *The Workplace Safety and Health Act*, is **DISMISSED** and, pursuant to Section 39(6) of *The Workplace Safety and Health Act*, the decision of the Director, issued May 10, 2011, is **CONFIRMED**.

DATED at WINNIPEG, Manitoba this 9th day of December, 2011, and signed on behalf of the Manitoba Labour Board by

“Original signed by”

W. D. Hamilton, Chairperson

WDH/lo/lo-s