

Manitoba Labour Board

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ORDER NO. 77

Case No. 133/15/WSH

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

- and -

IN THE MATTER OF: An Appeal by

KRUEGER ENTERPRISES LTD.,

Appellant,

- and -

Director, Workplace Safety & Health,

Respondent.

BEFORE: C.S. Robinson, Chairperson

B. Bruske, Board Member

H. Miller, Board Member

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

SUBSTANTIVE ORDER

WHEREAS:

1. On July 8, 2015, the Appellant, Krueger Enterprises Ltd. (the “Appellant”), filed an appeal from a Decision of the Director, Workplace Safety and Health, dated June 26, 2015, issued under *The Workplace Safety and Health Act* (the “Act”) respecting a Stop Work Order and an Improvement Order issued April 29, 2015.
2. On July 30, 2015, following an extension of time, the Director, Workplace Safety & Health (the “Director”), through Counsel, filed its Reply submitting that the Board should dismiss the appeal and confirm the Stop Work Order and Improvement Order #1.

3. On August 31, 2015, the Board conducted a hearing, at which time the parties appeared before the Board and presented evidence and argument. The Respondent was represented by Counsel.
4. The Board, following consideration of material filed, evidence and argument presented, has determined that the following evidence is relevant to the disposition of this appeal:
 - a) The Appellant is an established COR certified roofing contractor and a member of the Manitoba Shingling Contractors Association (the "MSCA"). The MSCA is an industry association, the members of which are companies and contractors engaged in the business of roofing and shingling. There are 11 active members of the MSCA.
 - b) B.I., the Appellant's President and one of its owners, has approximately 23 years of experience in the industry. He is also the current President of the MSCA and has been very active in that organization for many years. His involvement with the MSCA includes the development of variances under the *Act* that apply to the MSCA.
 - c) On April 29, 2015, at approximately 11:23 a.m., a Workplace Safety and Health Officer (the "WSHO") attended an address where the Appellant had secured fascia and eaves installation work. The WSHO observed two of the Appellant's employees on the roof. The workers were not wearing safety harnesses.
 - d) Two photographs taken by the WSHO show the worker(s) taking measurements on the roof. A worker in one of the photographs is making notations in a notebook. In the second photograph, a worker is on the edge of the roof taking measurements. B.I. testified that the employees were required to inspect the fascia and measure the area prior to commencing installation of new product on the structure. He noted that a single safety line and anchor can be seen in one of the photographs. B.I. explained that only one safety line is attached because the only time that there is more than one worker on the roof is when inspection and measuring is taking place prior to the installation work commencing. B.I. testified that the installation work had not started at the point in time that the photographs were taken by the WSHO.
 - e) B.I. testified that the inspection required to measure the roof in the present case would have taken approximately three minutes. He noted that he personally carries out such inspections for the purposes of taking measurements many times a day. Such inspections typically take a very short amount of time.
 - f) The WSHO testified that he talked to the Appellant's workers between 11:23 a.m. and 11:30 a.m. The WSHO indicated his concern to the workers that he could only

- see one anchor point and safety line on the roof. When the workers were unable to locate another anchor at the worksite, the WSHO immediately issued a “verbal” Stop Work Order (“SWO”) and Improvement Order (“IO”). According to his evidence, the WSHO told the workers that he had to issue documentation with respect to the SWO and IO and that he would return to the site in order to do so later in the day. During cross-examination, the WSHO was asked if the legislation provided for the issuance of a “verbal” SWO and/or IO. He responded that he did not know.
- g) The Board heard that the MSCA obtained an exemption from certain sections of the *Workplace Safety and Health Regulation* (the “*Regulation*”) with respect to roof inspections and emergency repairs. Pursuant to section 21 of the *Act*, the Director may make a written order exempting a person or class of persons from any provision of a regulation to meet the special circumstances of a given case. Such exemptions were referred to as variances during the hearing.
- h) By letter dated September 26, 2011, K.D., then the Safety Committee Chairman of the MSCA, requested an exemption on behalf of the MSCA for “Roof Inspections and Emergency Repairs”. K.D. testified at the hearing having been subpoenaed by the Director. He noted that the request for the exemption involved considerable work over a two-year period. The requested exemption was for “short term work” lasting no longer than 20 minutes. B.I. was also actively involved in the MSCA’s work on the exemption request. He testified that the members of the MSCA spent “hundreds of hours” developing the request for the exemption.
- i) By letter dated May 9, 2012 the Director wrote a letter to K.D. in which she stated, in part:
- “...I am of the opinion that an exemption from certain sections of the regulation can be provided as follows:
- ...4. Roof inspections and emergency repairs – exemption from sections 14.3 and 14.6.”

The exemption applied to residential roof work for a period of three years from the date of the letter. Certain conditions relating to safe work procedures are also set forth in the Director’s correspondence. Sections 14.3 and 14.6 of the *Regulation* relate to the requirement to use a guardrail system or, where the use of a guardrail system is not reasonably practicable or would not be effective, a fall protection system.

- j) The WSHO returned to the worksite at approximately 1:30 p.m. B.I. met with him and expressed his view that the exemption which had been granted by the Director applied to the work that the workers had been performing. The WSHO admitted to B.I. that he had never seen the exemption. The WSHO also candidly acknowledged this fact during the hearing. Given that the WSHO was unaware of the exemption, B.I. provided him with documentation relating thereto. However, the WSHO was not satisfied that the exemption applied. The WSHO testified that the purpose of the exemption was to eliminate the need for fall protection during emergency repairs. He felt that if someone was “on the roof for 5 minutes, then it would be reasonable”. However, he added that the workers in the present case had “already installed fall protection, so at that point they determined they needed it. They were just not using it.” Ultimately, the WSHO determined that the work that was being done by the workers was “an installation” rather than an emergency repair or inspection and that the exemption granted to the MSCA, therefore, had no application. A written SWO and IO was given to the Appellant at that time.
 - k) K.D. testified that a “roof inspection” includes an examination for damage, to determine the age of shingles, or to take measurements in order to determine dimensions. During cross-examination, he acknowledged that rough dimensions may be taken for the purposes of putting together a quotation for a customer, but further specific measurements may be required prior to commencing the installation of materials. K.D. opined that the measuring work that the WSHO observed the workers performing in this case was covered by the exemption.
 - l) A retired manager who had worked with Workplace Safety and Health and had worked on the exemption in question also gave evidence at the hearing. She took the view that measuring is part of the estimating process. She believed that “inspection” merely involved observing and that the workers in this case could have taken additional measurements from the ground. She did not believe that the work observed by the WSHO was covered by the exemption granted to the MSCA.
5. The Board, following consideration of material filed, evidence and argument presented, and having regard to the factual circumstances set forth above, has determined as follows:
- a) Section 21 of the *Act* permits the Director to make a written order exempting a person or class of persons from any provision of a regulation to meet the special circumstances of a given case. Such exemptions were referred to as variances during the hearing. An exemption or variance may only be issued if the Director is satisfied that no worker’s health or safety is materially affected by the exemption. As is set

- forth in subsection 1.8(1) of the *Regulation*, the Director may make an exemption order under section 21 of the *Act* on request, or on his or her own initiative. An exemption order is valid for the period specified and may not be for more than three years.
- b) Pursuant to the authority granted by section 21 of the *Act*, on May 9, 2012, the Director issued an exemption order to the MSCA. The exemption order was granted for a period of three years (to May 9, 2015). As a result, the members of the MSCA were exempted from sections 14.3 and 14.6 of the *Regulation* when performing “roof inspections and emergency repairs”.
 - c) At issue in the appeal was Order No. 1 concerning the alleged breach of *Regulation* 14.6.
 - d) The workers observed by the WSHO on the roof without harnesses were engaged in “roof inspection”. Specifically, they were inspecting the roof in order to obtain correct dimensions in advance of installing product on the structure. This is a task that required less than five minutes to perform. The work was done on April 29, 2015 during the period that the exemption order was in effect.
 - e) B.I. and K.D. were involved in developing the request for the exemption. Both agreed that the activities of the workers which led to the imposition of the SWO and the IO fell within the meaning of the exemption granted by the Director. Counsel for the Director submitted that the exemption was “unhappily worded”. While that may be true, even the Director’s own witness accepts that the work in question was “within the variance”.
 - f) The workers were performing work contemplated by the valid exemption granted by the Director and, as such, the SWO and IO should not have been imposed. The Appellant was exempted from sections 14.3 and 14.6 of the *Regulation* for roof inspections.
 - g) Furthermore, the Board is not satisfied that evidence before it supports a conclusion that the Appellant did not comply with the conditions referred to in the exemption. Moreover, no alleged breach of the exemption order is referred to in the SWO and IO.

T H E R E F O R E

The Manitoba Labour Board **HEREBY SETS ASIDE** the decision of the Director, Workplace Safety & Health dated June 26, 2015 and the Stop Work Order and Improvement Order dated April 29, 2015, regarding fall protection systems issued to Krueger Enterprises Ltd.

DATED at **WINNIPEG, Manitoba** this 20th day of November, 2015, and signed on behalf of the Manitoba Labour Board by

“Original signed by”

C.S. Robinson, Chairperson

“Original signed by”

B. Bruske, Board Member

“Original signed by”

H. Miller, Board Member