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**ORDER NO. 83**
**Case No. 62/16/WSH**

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

**- and -**

**IN THE MATTER OF: An Appeal by**

**D.F.,**

**Appellant,**

**- and -**

**JAMES MINSKY operating as JAMES MINSKY TRUCKING,**

**Employer,**

**- and -**

**Director, Workplace Safety & Health,**

**Director.**

**A N D**

**Case No. 118/16/WSH**

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

**- and -**

**IN THE MATTER OF: An Appeal by**

**JAMES MINSKY operating as JAMES MINSKY TRUCKING,**

**Appellant,**

**- and -**

**Director, Workplace Safety & Health,**

**Respondent,**

**- and -**

**D.F.,**

**Employee.**

**BEFORE: C.S. Robinson, Chairperson**
**P. LaBossiere, Board Member**
**R. Panciera, Board Member**

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

## SUBSTANTIVE ORDER

**WHEREAS:**

1. On March 21, 2016, D.F. (the "worker") filed an Appeal of the Decision of the Director, Workplace Safety & Health dated March 10, 2016 (Case No. 62/16/WSH)., with the Manitoba Labour Board (the "Board") under *The Workplace Safety and Health Act* (the "*WSHA*").

2. On April 13, 2016, following an extension of time, the Employer filed its Reply.

3. On April 14, 2016, following an extension of time, Counsel for the Director, Workplace Safety & Health (the "Director") filed its Reply. The Director stated that a Corporations Branch search did not locate a business under the name of "James Minsky Trucking Ltd." and, therefore, requested that the Board change its style of cause to reflect the name "James Minsky operating as James Minsky Trucking."

4. On April 14, 2016, the Board directed that the matter proceed to hearing.

5. On June 2, 2016, the Board convened the hearing. At the hearing the Employer indicated that it wished to appeal the Decision of the Director (the "Decision") but that the Director had only advised the Employee and not the Employer of the right of appeal. The Worker contested the Employer's position. Counsel for the Director agreed that the manner in which the Decision was conveyed to the parties was "unfortunate" and that the Board had the jurisdiction to extend the time to file an appeal. The Board determined, pursuant subsection 39(2) of the *WSHA,* that it would allow the Employer 14 days from the date of the hearing to file an appeal of the Decision. Accordingly, the hearing was adjourned pending the appeal and any responses filed in response thereto.

6. On June 14, 2016, the Employer filed its Appeal with the Board (Case No. 118/16/WSH).

7. On June 23, 2016, Counsel for the Director filed its Reply.

8. The worker did not file a Reply.

9. On July 5, 2016, the Board directed that Case No. 62/16/WSH and Case No. 118/16/WSH be heard together.

10. On August 25, 2016, the Board convened a hearing at which time all parties appeared. The Director was represented by counsel.

11. In his Decision dated March 10, 2016, the Director determined that:

    a) the worker engaged in conduct as described in section 42 of the *WSHA* when he raised a concern with the Employer relating to the condition of a vehicle posing a potential tipping hazard;

    b) the worker was later dismissed and this action constituted a "discriminatory action" as defined in the *WSHA*;

    c) the Employer failed to meet its "onus to show a reason, other than the worker's Section 42 conduct, was the real and only reason for the dismissal"; and

    d) the appropriate remedy was to issue an Improvement Order requiring the Employer to stop the discriminatory action and to remove any reprimand or other reference to the matter from any employment records maintained about the worker and to issue a new Record of Employment that does not contain the comment that "driver called to work but declined each time".

12. The worker and the Employer each appealed the Director's decision. The Employer denies that it dismissed the worker or that it took any discriminatory action against the worker because he engaged in any conduct set out in Section 42 of the *WSHA*. The worker does not dispute the conclusions of the Director with respect to his finding that the Employer took discriminatory action against him contrary to Section 42 of the *WSHA*; however, the worker contests the Director's failure to reinstate him or to compensate him for all lost wages resulting from the alleged breach of the statute. The worker added that compensating him for lost wages is his preferred remedy at this stage.

13. The Board, following consideration of the material filed and the evidence presented, has determined that the following facts are relevant to the disposition of this matter:

a) The Employer is a construction company which operates various pieces of equipment including tandem trucks, semi trailers, backhoes, graders and excavators. The company is contracted by cities, municipalities, and other companies to perform work in the province.

b) The Employer's founder, L.O., has been involved in the construction business for more than 45 years. He estimated that his company has employed approximately 1,500 workers over the course of that time. He testified that the Employer has never been subjected to a complaint of this kind in the past.

c) L.O. emphasized that, as a family owned and operated company, the Employer takes safety and health matters very seriously. Industry associations provide updates and assistance to the Employer regarding health and safety thus ensuring that it remains current with respect to applicable legislation.

d) The worker is an experienced truck driver. He commenced employment with the Employer on June 24, 2015. He earned $20/hour. W.N., who is responsible for accounting and payroll for the Employer, testified that the worker was employed on a casual, on-call basis. She was not cross-examined on that evidence. The Employer pointed out that the work that it does is often seasonal and subject to weather and other conditions beyond its control. The worker testified that he was "under the impression" that he was hired as a regular driver and, further, that he was not advised that he was a casual employee; however he acknowledged that availability of work could be subject to weather and that the Employer's business is, at least in part, seasonal in nature. The worker was not asked questions about his evidence on this point.

e) The worker only performed work for the Employer for eight days. He worked for a total of 90½ hours and his Record of Employment reflects the amount of $1,882.40 in insurable earnings. It was acknowledged by witnesses for the Employer that the worker was a capable driver and completed the tasks assigned to him.

f) During his employment with the Employer, the worker operated a 30-foot long tandem trailer to haul mud at various places at which he was given direction by contractors at the worksites.

g) The worker testified that he detected a problem with the trailer assigned to him by the Employer when he dumped his first load. Specifically, he felt that the trailer had a "twist" that caused it to tilt towards the passenger side when dumping loads. He stated that he brought this matter to the Employer's attention immediately and that he subsequently demonstrated the problem for L.O.

h) Despite his concern in this regard, the worker acknowledged that he never advised the Employer that he could not or would not use the trailer. Rather, he testified that he told the Employer that he "could use it so long as I could compensate" by picking suitable spots to dump loads. In answer to questions from the Chairperson, the worker said that he did not at any point exercise his right to refuse unsafe work because, in his view, it was "safe to dump if you compensate for the tilt". He added that even a perfectly straight trailer may tilt in certain circumstances.

i) The Employer requires its drivers to complete a daily pre-trip inspection on the equipment that they will be operating. The worker drove the same truck every day that he worked. The pre-trip inspection reports completed by the worker indicate "no defects found" on the vehicle for each of the eight days. L.O. emphasized that the worker should never have taken the truck on the road if he did not believe that it could be operated safely. In contrast, the worker suggested that his confirmation that there were no defects merely signified that the truck was safe to "drive down the road" and was not necessarily indicative of a properly functioning trailer.

j) On July 6, 2015, the worker attended at a contractor's work site with the trailer. He was able to successfully dump his load following repeated attempts to pick a safe spot to do so. According to the worker, a dozer operator on the site became frustrated with the mess that had been made by the repeated re-positioning required and told him not to return to the site. In the words of the worker, the dozer operator "basically kicked me off the dumpsite".

k) After leaving the site, the worker says that he pulled the vehicle over and phoned the Employer at 9:14 a.m. to report what had occurred and suggested that he be dispatched to a different site so that he could adequately compensate for the problem with the trailer. The worker claimed that M.P. called him back at 9:23 a.m. and advised him to bring the vehicle back to the shop.

l) Upon his return to the Employer's shop, the worker met with M.P. He recalled being told to "go home, we'll get it fixed". The worker says that he then asked how long the repair would take and M.P. responded that it would take approximately two weeks. M.P. denied that he provided the worker with any estimate of the time the repair would take, as he had no idea how long it would be. The worker further testified that, during the same conversation, M.P. advised him that he had made inquiries and that the dozer operator denied ordering him off the site. The worker said that he went home following this conversation. He noted during his testimony that he had "stuff to do at home".

m) The worker claims that he received a call from M.P. later that day at 1:07 p.m. He testified that M.P. reiterated that the dozer operator denied his claim that he was kicked off the site.

n) The Employer's witnesses testified that alternate driving work was offered to the worker on July 6, 2015. M.P. recollected that his call to the worker at 1:07 p.m. was an offer to work that day and not, as the worker maintained, a reiteration that the dozer operator had denied the worker's allegation. According to the Employer, the worker responded that he could not return to work that day due to a personal matter. The Employer also suggested that an offer to work had been made during the earlier call at 9:23 a.m., but M.P. acknowledged that he could not be sure of what he said at that time.

o) On July 8, 2015, the Employer called the worker at 5:42 a.m. to ask if he could come into work that day. The worker declined, telling the Employer that he had a medical appointment.

p) There was no further contact between the worker and the Employer until August 18, 2015. On that date, the worker attended at the Employer's workplace and had a conversation with M.P. It is the worker's evidence that he inquired about the status of his employment and was told that the vehicle had been fixed but the Employer retained someone else to operate it. The worker testified that he asked M.P. if he had been dismissed and he responded "I guess so" and added "you cost me $5,000 and two weeks". The worker says that he said that this constituted "discriminatory action" and asked for his Record of Employment.

q) The Employer's evidence of the meeting on August 18, 2015 differed significantly from that of the worker. M.P. claimed that the worker did not inquire as to his employment status but instead asked for his Record of Employment. He denied telling the worker that he was dismissed or having said "you cost me $5,000 and two weeks".

r) Witnesses for the Employer, including L.O. and M.P., emphatically denied that the worker had been dismissed for having raised a purported safety issue with the vehicle. Indeed, the Employer's evidence is that the worker was never dismissed. Rather, he was offered work on July 6 and again on July 8, 2015, but he refused to accept those offers. Thereafter, the worker made no attempt to contact the Employer until over six weeks later when he showed up and asked for his Record of Employment. The Employer points out that it did not issue a Record of Employment to the worker until he asked for one precisely because it had not terminated him. The worker conceded that he did not communicate with the Employer between July 6 and August 18, 2015. He said that he believed that

he was in a “precarious position” with the Employer and that he did not make earlier contact to inquire regarding potential work as a result.

s) The Record of Employment, dated August 21, 2015, was prepared by W.N. It indicates that the reason for issuing the document was Code “K” or “other”. In the comments section, the Employer indicated “Driver called to work but declined each time”.

14. The Board notes the following provisions of the legislation:

a) Section 1 of the *WSHA* defines a "discriminatory action" to mean:

> **"discriminatory action"** means any act or omission by an employer or any person acting under the authority of the employer or any union which adversely affects any term or condition of employment, or of membership in a union, and without restricting the generality of the foregoing includes lay-off, suspension, dismissal, loss of opportunity for promotion, demotion, transfer of duties, change of location of workplace, reduction in wages, or change in working hours but does not include the temporary relocation of a worker to other similar or equivalent work without loss of pay or benefits until a condition that threatens the safety or health of the worker is remedied;

b) In the context of the foregoing definition, subsection 42(1) of the *WSHA* states:

> **Discriminatory action against worker prohibited**
> 42(1) No employer, union or person acting on behalf of an employer or union shall take or threaten discriminatory action against a worker for
> (a) exercising a right under or carrying out a duty in accordance with this Act or the regulations;
> (b) testifying in a proceeding under this Act;
> (c) giving information about workplace conditions affecting the safety, health or welfare of any worker to
> (i) an employer or a person acting on behalf of an employer,
> (ii) a safety and health officer or another person concerned with the administration of this Act,
> (iii) another worker or a union representing a worker, or
> (iv) a committee or a representative;
> (d) performing duties or exercising rights as a member of a committee or as a representative;

c) Subsection 42.1(4) of the *WSHA* states:

> **Onus on employer or union**
> 42.1(4) If, in a prosecution or other proceeding under this Act, a worker establishes
> (a) that discriminatory action was taken against him or her; and
> (b) that the worker conducted himself or herself in a manner described in section 42;
> it shall be presumed that the discriminatory action was taken because of the worker's conduct. The onus is then on the employer or union to prove that the decision to take the discriminatory action was not influenced by the conduct.

15. The germane legal principles applied by the Board in respect of discriminatory action cases generally and in the context of the present Appeal are as follows:

    a) The *WSHA* prohibits employers, or persons acting on their behalf, from taking "discriminatory action" against workers on the basis of specified grounds. The term "discriminatory action" is defined in section 1 of the legislation to include an act or omission which adversely affects any term or condition of employment. A "discriminatory action" includes such things as dismissals, reductions in wages, or changes in working hours.

    b) Subsection 42(1) of the *WSHA* provides that no employer or person acting on behalf of an employer shall take or threaten discriminatory action against a worker for, *inter alia*, exercising a right under or carrying out a duty in accordance with the legislation or the regulations or giving information about workplace conditions affecting the safety, health or welfare of a worker to an employer or a person acting on behalf of an employer.

    c) Subsection 42.1(4) of the *WSHA* creates a "reverse onus" which compels the employer to prove that the decision to take the discriminatory action was not influenced by the worker having conducted himself in a manner described in subsection 42(1). However, before the onus shifts to the employer, subsection 42.1(4) requires the worker to establish that: a) a discriminatory action was taken against him; and b) that he conducted himself in a manner contemplated by subsection 42(1). In other words, the worker must establish a *prima facie* case in order for the onus to shift to the employer to prove that its action against the worker was not because of, or in any way influenced by, improper considerations prohibited by subsection 42(1).

    d) A *prima facie* case is comprised of two elements, namely:

1) that a discriminatory action was taken against an employee. In most cases, this is not in dispute because the definition of "discriminatory action", *supra*, is very broad; and

2) there must be a reasonable basis to conclude that the worker has conducted him/herself in a manner described in subsection 42(1) in relation to the discriminatory action. There must be some reasonable evidence that a worker engaged in one or more of the types of conduct referred in clauses (a) to (h) of subsection 42(1) and that such conduct can be linked to the discriminatory action in a *prima facie* manner.

e) Given the conflicting evidence tendered by witnesses for the parties in a number of areas, the Board is required to make some credibility findings. In the case of *Farnya* v *Chorney* [1952] 2 DLR353 (B.C.C.A.), Mr. Justice O'Halloran at pages 356 and 357 noted that: "In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would reasonably recognize as reasonable in that place and in those conditions." The Board consistently applies this test in matters before it when it must make credibility determinations.

16. The Board, following consideration of material filed, evidence and argument presented, and in the context of the facts as summarized above and the legislation and legal principles discussed herein, has determined the following:

a) With respect to the issue of whether the worker has established that a "discriminatory action" was taken against him, the worker submitted that the Employer reduced his hours/wages and subsequently terminated his employment. Witnesses for the Employer maintained that the worker was a casual employee who repeatedly declined work when it was offered to him and who failed to contact the Employer for a period of six weeks before showing up to request his Record of Employment. The Employer denied terminating the worker. Noting the breadth of the definition in the *WSHA*, the Board is satisfied that the worker has established that a *prima facie* "discriminatory action" was taken against him.

b) It is not contested that the worker reported a concern with the condition of the vehicle that the Employer asked him to drive in that, in his view, a defect created a potential tipping hazard when dumping loads depending on the terrain. The Board is satisfied that the worker's conduct in reporting this issue to the Employer could be considered conduct described in clause (c) of subsection 42(1) of the *WSHA* as he was giving information about workplace conditions affecting the safety and health.

c) As a result of the foregoing determinations, the worker has established a *prima facie* case that: a) a discriminatory action was taken against him; and b) that he conducted himself in a manner contemplated by subsection 42(1). Accordingly, the onus shifts to the Employer, under subsection 42.1(4) of the *WSHA*, to prove that the decision to take the discriminatory action was not influenced by the worker having conducted himself in a manner described in subsection 42(1).

d) The evidence presented by the parties with respect to certain aspects of what occurred on and after July 6, 2015 differed significantly. The worker submitted that the Employer sent him home on July 6, 2015 and then only offered him work on July 8, 2015 (which he turned down due to a medical appointment). He further submitted that on August 18, 2015 he attended at the Employer's office to inquire as to his employment status and was told that he was terminated because he had cost the Employer money and time due to his reporting of the defect with the vehicle. The Employer says that it offered the worker other work on July 6 and July 8, 2015 (both of which offers were rejected) and that the worker failed to make any further contact with it until August 18, 2015 when he attended to request his Record of Employment. The Employer denies that it terminated the worker.

e) The worker's account of what occurred July 6, 2015 with respect to the alleged offer of employment on that date is open to question. It is the worker's evidence that he received a call from M.P. at 1:07 p.m. on July 6, 2015 at which time he reiterated that the dozer operator denied his claim that he was kicked off the site. It does not seem likely that M.P. would have called the worker to relate information about the dozer operator's account that he had previously disclosed to the worker during their meeting when he brought the vehicle back. The Employer's account that the call at 1:07 p.m. was a request of the worker that he return to complete work (which request was denied for personal reasons) is, in contrast, in harmony with the preponderance of the probabilities which a practical and informed person would reasonably recognize as reasonable in that place and in those conditions. On the balance of probabilities, the Board accepts that the Employer offered work to the worker on July 6, 2015 during the telephone conversation at 1:07 p.m. and that the worker refused to accept the offer for personal reasons.

f) There is no dispute between the parties that on July 8, 2015, the Employer called the worker to offer him work and that he refused the offer on the basis that he had a previously scheduled medical appointment.

g) In addition, there is no dispute that the parties did not communicate with one another following the telephone conversation of July 8, 2015 and the worker's attendance at the workplace on August 18, 2015. The worker's evidence is that

he did not want to contact the Employer fearing that he would antagonize it by doing so. That fact that the worker did not contact the Employer for a period of six weeks and his explanation for avoiding contact is curious indeed. The evidence of the Employer is that the worker was a casual employee who refused offers of work on July 6 and 8, 2015. The Employer submitted that it did not feel that it should have to waste time chasing employees who repeatedly refuse shifts. The Employer believed that the worker was a good driver and that it was prepared to give him work, but he made no effort to contact it for approximately six weeks.

h) The evidence relating to the August 18, 2015 meeting differed markedly between the parties. The worker's evidence is that he attended to clarify his employment status and was told that he had been dismissed because he cost the Employer money and time. M.P. denied having made that comment and testified that the worker was seeking his Record of Employment and did not inquire as to his employment status. Neither the worker's account nor that of M.P. was particularly compelling. As counsel for the Director correctly observed, given the evidence, it is difficult in this case to make some findings of fact. We are left with significantly different accounts as to what occurred on August 18, 2015. However, it is not contested that prior to August 18, 2015, the Employer had not communicated to the worker that he was dismissed or that it would no longer offer him work. W.N.'s unchallenged evidence was that she did not issue a Record of Employment earlier as no one advised her that the worker's employment had been terminated. Given that, it seems is more likely than not, on the balance of probabilities, that the worker was not told that he was dismissed on that day. The Board is satisfied that the Employer's evidence is more in harmony with the preponderance of the probabilities which a practical and informed person would reasonably recognize as reasonable in that place and in those conditions.

i) The Board is satisfied that the Employer has discharged its onus to prove that the decision to take the discriminatory action was not influenced by the worker's subsection 42(1) conduct. The worker raised safety issues with the Employer regarding the vehicle immediately upon commencing employment. Despite the worker's position that he could continue to operate the vehicle safely provided that he could select appropriate spots to dump loads, the Employer asked him to bring the vehicle back so that it could be examined and repaired by a mechanic. Even though the vehicle was then unavailable, the Employer continued to offer the worker shifts on July 6, and July 8, 2015, but the worker refused. The worker made no effort to contact the Employer for approximately six weeks and then attended to the worksite to seek his Record of Employment. The Board accepts that the worker was never told that he was

terminated and the Record of Employment indicates that the document was being issued because the worker had been called to work but declined each time.

j) The Board accepts that the Employer did not take any discriminatory action against the worker due to him engaging in conduct described in subsection 42(1) of the *WSHA*. We were satisfied that the Employer takes health and safety seriously. It pays its drivers to come in early to perform daily pre-trip vehicle inspections; it sought assurances from the worker that the vehicle was safe to use (which he confirmed); L.O. attended to watch the worker dump a load to personally assess the safety of the vehicle; and the Employer ultimately told the worker to bring the vehicle back when he related an issue that he had on July 6, 2015. There is no evidence that the Employer expressed disappointment to the worker when he returned the vehicle. He was not disciplined or dismissed at that time or thereafter. Indeed, the Employer continued to offer the worker shifts that very day and on July 8, 2015 but those offers were not accepted. These do not strike the Board as the actions of an Employer that was engaging in conduct prohibited by the legislation.

## **T H E R E F O R E**

The Manitoba Labour Board **HEREBY DISMISSES** the worker's appeal. The appeal of the Employer is **ALLOWED** and the Board **RESCINDS** the Improvement Orders issued.

**DATED** at **WINNIPEG**, **Manitoba** this 1st day of November, 2016, and signed on behalf of the Manitoba Labour Board by

*"Original signed by"*

**C.S. Robinson, Chairperson**

*"Original signed by"*

**P. LaBossiere, Board Member**

*"Original signed by"*

**R. Panciera, Board Member**

CSR/lo/lo-s