

Fixing Safety Problem after Incident Doesn't Warrant Lower Fine Says ON Court



When companies are convicted of violating the OHS laws, courts consider numerous factors when determining the appropriate sentence, which is usually a fine. For example, the court will consider aggravating factors that warrant a higher fine, such as any gross negligence that caused the violation. It'll also consider mitigating factors that weigh in the company's favour, such as its remorse for the violation. But if a company fixes the safety problem that resulted in the incident and/or violation after it occurred, should that act be considered a mitigating factor for sentencing purposes? An Ontario court recently examined this question, concluding that subsequent repairs aren't a mitigating factor. Here's a look at its analysis.

THE CASE

What Happened: A forklift operator for a car parts manufacturer placed a bundle of metal sheets on the floor near a cradle by the production line. Another worker cut three of the four bands holding the bundle together. When the forklift operator tried to lift the bundle into the cradle, it slipped off the fork, scattering metal sheets. One of the sheets struck the worker's foot, breaking several bones and requiring surgery. An MOL inspector investigating the incident ordered the manufacturer to comply with the OHS regulations on the safe movement of materials. The manufacturer did so by introducing a new procedure for moving bundles. It was convicted of two safety violations. The court fined it \$25,000 for each, totaling \$50,000. On appeal, the court said the manufacturer should pay the fines concurrently, resulting in a \$25,000 total fine, due to the corrective action it took after the incident. The Crown appealed.

What the Court Decided: The Ontario Court of Appeal ruled that the manufacturer wasn't entitled to a reduced fine for doing what it was required to do under the OHS law.

The Court's Reasoning: The lower court considered the manufacturer's compliance with the MOL inspector's order to be a mitigating factor on sentence, ruling that it should be 'rewarded' for doing 'the right thing.' But the Court of Appeal said the lower court shouldn't have discretion to treat an employer's post-offence compliance, which is statutorily required, as a mitigating factor

on sentence. It explained that doing so would undermine one of the most important goals of the OHS laws 'preventing safety incidents' and the law's most important sentencing principle: deterrence. Workers are best protected when their employers implement procedures in their workplaces that will prevent incidents from occurring, said the Court. Rewarding an employer for taking corrective action only in response to an inspector's order reduces its incentive to take this action *before* an incident happens. In short, 'deterrence is undermined by treating statutorily required compliance as a mitigating factor on sentence,' ruled the Court. So it reinstated the \$50,000 total fine [*Ontario (Labour) v. Flex-N-Gate Canada Co.*, [2014] ONCA 53 (CanLII), Jan. 23, 2014].

ANALYSIS

The lesson from this case is that you shouldn't expect the steps you take to comply with the OHS laws after a violation or incident has happened to reduce your sentence for any related offences. (You also shouldn't expect those steps to help you prove due diligence, either.) After all, if an employer violates an OHS regulation and then takes steps to correct the problem, it isn't 'doing the right thing' it's doing what the law required it to do. So it shouldn't be rewarded for its compliance. This approach is consistent with that used for environmental offences. In fact, the Court noted that in the environmental field, several sentencing courts have rejected the argument that a company's remedial action after a mishap has occurred should be mitigating.

But the Court in *Flex-N-Gate* made two important additional points. First, it *is* appropriate for courts to consider any steps a company took to promote health and safety and ensure compliance *before* the incident or offence as mitigating factors. Such steps, if not enough to establish due diligence, at least demonstrate a company's attempts to comply with the OHS law. Second, if an employer takes corrective action that goes beyond what was required by an inspector's order or the OHS regulations, then a court may take that additional action into account in sentencing.