

Winners & Losers: Due Diligence of Supervisors



When OHS violations occur, it's not always the company owner or "employer" that gets into trouble. Prosecutors also have the right to lay charges against other entities and individuals involved in the violation, including supervisors. Once a relative rarity, OHS prosecutions against supervisors have become far more frequent in the past decade. Once supervisors get into court, the same law applies: Once the Crown proves the violation, liability typically turns on due diligence, i.e., whether supervisors can show they took all reasonable precautions to comply with the law and prevent the violation. Here are 2 cases illustrating the facts courts rely on to decide if supervisors exercised due diligence.

GUILTY: SUPERVISOR DIDN'T EXERCISE DUE DILIGENCE

SITUATION

Construction workers remove the plywood covering 2 skylight openings on the unfinished roof a school and replace it with rigid styrofoam board insulation. The area around the skylights isn't cordoned off and there are no warning signs. A worker carrying a ladder falls backward onto the skylight. The styrofoam breaks and the worker falls through the skylight opening to his death on the icy concrete floor 30 feet below. The Crown charges the supervisor with fall protection and other OHS violations.

DECISION

The Nova Scotia Provincial Court says the supervisor didn't exercise due diligence and finds him guilty.

EXPLANATION

The court cites the following factors:

- **Risk was Foreseeable:** The supervisor didn't actually order the plywood covering the skylight openings to be replaced with styrofoam. But he knew that somebody else had. "I am satisfied," the court said, "that the need to better and more properly secure the openings was brought to the

supervisor's attention."

- **Supervisor Didn't Act:** Due diligence requires "reasonable precautions." Securing the openings with styrofoam created an "extreme danger" requiring "nothing short of immediate action," said the court. The supervisor learned of the situation at least 13 days before the incident. But he didn't do anything to rectify it.
- **Victim was Vulnerable:** The victim had no warning. The area around the skylights was neither marked nor fenced. The styrofoam actually heightened the risk. It created a "trap" by making it look as if the openings were secure. The victim's training was also inadequate. The supervisor neglected his duty to hold regular Toolbox meetings with workers, the court noted.

1. *v. Meridian Construction Inc.*, 2004 NSPC 51 (CanLII)

NOT GUILTY: SUPERVISOR DID EXERCISE DUE DILIGENCE

SITUATION

A millwright is summoned to fix a chop saw jammed by wood chips. The millwright sees that the belt is twisted. He turns off the conveyor belt feeding the machine but doesn't lock out the control switch. To free the jam, the millwright reverses the wires to the control switch causing it to run backward. He also grabs the twisted belt and pulls it with both hands. His arm gets caught in a pinch point between the belt and the idler roller and is injured. The Crown charges the millwright's supervisor with 2 OHS violations.

DECISION

The Ontario court says the supervisor exercised due diligence and is not guilty of an OHS offence.

EXPLANATION

The court cites the following factors:

- **Risk wasn't Foreseeable:** There was no way for the supervisor to foresee that the millwright would try to rewire the saw. This wasn't part of the millwright's duties or training. Nor was there any evidence that the supervisor should have been aware of the wiring problem that caused the incident.
- **Supervisor wasn't Summoned:** The supervisor had thoroughly evaluated the millwright and rated him as capable of working with little or no supervision. There was a whistling system in place that the millwright could have used to summon the supervisor if he needed help. But the supervisor wasn't summoned until after the injury occurred.
- **Victim Should Have Known Better:** The millwright was fully trained in safety issues. He had undergone lockout training at least four times. There were safety warnings posted all over the work area. In addition, he had been told not to attempt electric repairs and knew that there was a certified electrician on-call. These and other precautions supported the supervisor's case of taking all reasonable steps necessary for due diligence.

1. v. *Peake*, [1999] O.J. No. 696, Feb. 25, 1999