Case In Point

Mere compliance with OHSA order not a mitigating sentencing factor, says Ontario Court of Appeal

Date: January 29, 2014

Flex-N-Gate, an automobile parts manufacturer, was charged under the *Occupational Health and Safety Act* ("OHSA") after a worker badly injured her foot while unbundling 5200 bounds of metal sheets. At the time of the accident the injured worker was following company procedure. A Ministry of Labour ("MOL") inspector investigated the accident and issued two orders – the first order requiring compliance with applicable regulatory provisions for the safe movement of material, and the second, a stop work order prohibiting the company from using the equipment until such compliance.

The company took immediate corrective action and implemented a new procedure, as required by the compliance orders. However, there was no evidence that this new procedure, implemented after the accident, went beyond the requirements of the compliance orders. A Justice of the Peace convicted the employer of two offences under the OHSA: failing to ensure that material was moved in a manner that did not endanger the safety of a worker as prescribed by the Industrial Establishments Regulation and contrary to s. 25(1)(c) of the OHSA; and failing to provide information, instruction and supervision to protect the health and safety of workers, contrary to s. 25(2)(a) of the OHSA.

A fine of $25,000 was imposed for each offence, totalling $50,000, plus the mandatory 25% victim fine surcharge. The Ontario Court of Justice dismissed the conviction appeal but allowed the sentence appeal, finding that the actions taken by the employer after the accident was a mitigating factor. Accordingly, it ruled that the two $25,000 fines could be paid "concurrently," which resulted in a total fine of $25,000, plus the victim fine surcharge.

The MOL appealed, and the Ontario Court of Appeal found that the lower court judge erred in treating post-offence corrective action required to achieve compliance with a MOL order as a mitigating factor for sentencing purposes. It ruled that doing so would both undermine the OHSA goal of accident prevention, and the statute's most important sentencing principle – deterrence. Here, the lower court judge sought to reward the employer for "doing the right thing." The Court stated:

If, after having contravened a safety standard, an employer then acts to correct the problem, it is not "doing the right thing"; it is doing what the statute requires it to do. It ought not to be "rewarded" for its compliance.

However, the Court also noted that action taken after an accident, which goes beyond the requirements of an inspector's order, is a relevant mitigating factor which the Court is entitled to take into account on sentencing.

The Court also stated that action taken to promote health and safety before an accident occurs is treated differently from corrective action taken only in response to an inspector's order. In this case, the employer had retained a health and safety consultant, prior to the accident, to do an independent compliance audit of its health and safety program. The company implemented a number of changes recommended by the consultant, and the Justice of the Peace correctly acknowledged the steps taken by the company "to establish a safe working environment."

With respect to imposition of "concurrent" fines, the Court found there is no authority to impose concurrent fines under the OHSA and that a separate fine must be imposed on each separate offence.

The Court allowed the appeal and reinstated the total fine of $50,000, plus the victim fine surcharge, ordered by the Justice of the Peace.

This decision underscores the importance of employers taking proactive steps to promote health and safety in the workplace. Proactive steps can form part of a "due diligence" defence to any charges and, in the event of conviction, can be used as to advocate for a lighter sentence. On the other hand, post-accident actions of an employer are not, in any way, a defence to charges under the OHSA and mere compliance with an inspector's order will not be a mitigating factor on sentence. Importantly though, post-accident remedial actions of an employer which go above and beyond any inspector's orders, can be used by the employer to advocate for a lighter sentence.

Ontario (Labour) v. Flex-N-Gate Canada Company, 2014 ONCA 53 (CanLII)