Case In Point

Appellate Court Upholds Criminal Conviction of Project Manager for Deaths/Injury Resulting from Swing Stage Collapse

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In R. v. Kazenelson, the Ontario Court of Appeal recently upheld the conviction and the sentence imposed on a project manager who had been found guilty under the *Criminal Code* for criminal negligence causing death and criminal negligence causing bodily harm, arising from the collapse of a swing stage in 2009.

The appellant project manager was charged and convicted of "wanton and reckless disregard for the lives or safety of other persons" when he allowed workers he supervised to board a swing stage without adequate fall protection in 2009. The swing stage collapsed and four workers fell to their deaths. Another worker was seriously injured. The project manager was convicted of four counts of criminal negligence causing death and one count of criminal negligence causing bodily harm.

On appeal, the appellant argued, among other things, that (a) the trial judge "stretche[d] the penal negligence too far" in this first conviction of an individual under section 217.1 of the *Criminal Code*, (b) the appellant's acts or omissions did not show a reckless and wanton disregard for the workers, (c) neither the appellant nor the workers could objectively foresee the collapse of the swing stage, and (d) the workers bore some responsibility for their own safety.

In dismissing the appeal, the Court did not find any errors in the reasoning of the trial judge with respect to either the convictions or the sentence. It stated the trial judge properly considered the contextual issues in concluding that the appellant's behaviour was a marked and substantial departure from what a "reasonable supervisor" would have done in the circumstances. This was primarily due to the fact that the appellant had received "suspended access" training for swing stages, he knew that swing stages are not fail safe, he was aware there were only two life lines on a swing stage which was to be used by six workers, he had been on the stage at least 30 minutes prior to the collapse without addressing the missing life lines, and he permitted the workers to board the swing stage along with their tools without regard for the capacity of the stage.

The Court further held the trial judge had not erred in finding that a reasonable project manager would have contemplated the risk of equipment failure, particularly where the entire reason for a fall arrest system (the life lines) was "regarded as the fundamental rule of swing stage work."

The appellant also argued the trial judge had erred by not finding the workers had broken the chain of causation when they failed to insist that life lines be made available to all of them. The Court rejected that argument. It held that as a supervisor, it was the appellant's duty under both the *Occupational Health and Safety Act* and the *Criminal Code* to take reasonable steps to prevent harm to workers. Finally, the Court found that the trial judge appropriately accepted evidence that the appellant was on the swing stage at the time of the collapse and pulled himself to safety, contrary to the appellant's argument that the trial judge had erred in analyzing the evidence before him.

Turning to the appeal of the sentencing decision, the Court found the sentence of 3.5 years in prison was appropriate. It rejected the appellant's argument that the conduct of the workers should be taken into account in the sentencing, and agreed with the trial judge that a worker's acceptance of dangerous working conditions is not always a truly voluntary choice. It noted that this argument would also undermine the purpose of the duty imposed by section 217.1 of the *Criminal Code*, which is to impose a legal obligation in relation to workplace safety on *management*. Finally, the Court rejected the appellant's arguments that the trial judge placed too much emphasis on "general deterrence" for a first time offender and that the sentence went beyond what was necessary for general deterrence.

This case is the first of its kind where a supervisor has been convicted under s. 217.1 of the *Criminal Code* for failing to take reasonable steps to prevent bodily harm to workers. In upholding the lower court decision, the Court of Appeal has sent a strong message to employers and individual supervisors that criminal liability remains a very real possibility in the event of serious workplace accidents.