Canadian Employment Safety and Health Guide

February 2018
Number 449

APPELLATE COURT CONSIDERS SCOPE OF AN EMPLOYER'S OHSA OBLIGATIONS TO PROTECT WORKERS

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An appellate court recently overturned a decision acquitting a company which had been charged following a workplace fatality, holding that there may be circumstances where an employer is required to do more to protect its workers than what is prescribed under the regulations to the *Occupational Health and Safety Act* ("OHSA").

In *Ontario (Labour) v. Quinton Steel (Wellington) Limited*,[1] the Ontario Court of Appeal considered a workplace fatality at a custom steel fabrication business. A welder was working on a large "slide" of steel using a temporary elevated platform, when he fell to his death. The platform was 6' 6" tall, did not have guardrails and no fall arrest equipment was utilized. The employer was charged under the OHSA for "failing to inform, instruct and supervise a worker to protect their health and safety" [section 25(2)(*a*)], and "failing to take every precaution reasonable in the circumstances for the protection of a worker" [section 25(2)(*h*)].

At the Ontario Court of Justice, the trial justice held that under section 85 of the *Industrial Establishments Regulation* (which applied to the employer), there was no requirement to wear fall protection equipment as the worker was working at a height of less than three metres. He noted an "inconsistency" within the *Industrial Establishments Regulation*, as section 13 required guardrails be in place at the open side of any raised surface, but found that if section 13 required guardrails to be installed on any raised surface, no matter how high, "its scope would be breathtaking." The trial justice acquitted the employer, concluding that the *Industrial Establishments Regulation,* and section 85 in particular, was a "complete and discrete code with respect to the requirements for protecting workers from falls in a case such as this." Moreover, it was not appropriate for the Crown to use the general duty clause ("to take every precaution reasonable in the circumstances") in the OHSA to extend the employer's duty beyond what was contained in the regulation. This decision was upheld by a summary conviction appeal judge.

The Court of Appeal disagreed, finding that the trial justice erred in his interpretation of the interplay of the OHSA and its regulations. It noted that the OHSA is public welfare legislation which should be interpreted "generously" to achieve its purpose of worker protection, and, importantly, stated that an employer's duty under section 25(2)(*h*) to take every precaution reasonable in the circumstances does not depend on the existence of a specific regulation prescribing or proscribing particular conduct. Rather, the Court found an employer's duty under 25(2)(*h*) is broader than what is contained in the prescribed regulations, as "the regulations cannot reasonably anticipate and provide for all the needs and circumstances of the many and varied workplaces across the province."

[1] 2017 ONCA 1006.

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The Court also found that the trial judge had failed to answer a key issue of whether the installation of guardrails was a reasonable precaution necessary in the circumstances of the case; he had merely concluded that the employer had not breached section 25(2)(*h*), since the regulations had not been violated. The Court found this reasoning was not sound, as it inverted the relationship between the OHSA (primary legislation) and its regulations (secondary legislation).

The Court of Appeal's decision has important implications for employers across Ontario. It highlights that it may not be sufficient for employers to merely comply with a workplace's requirements under any given OHSA regulation. Rather, the decision is an important reminder that employers must not only comply with regulations under OHSA, but also consider whether there are further precautions that should be taken to protect worker safety in order to fulfill their duties under section 25(2)(*h*) of the OHSA.

This article was published in the *Canadian Employment Safety and Health Guide* Newsletter, No. 449.

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