Court suggests that Jail Terms May Become the "New Norm" for Roofing Accidents

By: Ryan Conlin

A recent sentencing decision involving the owner of a small roofing company suggests that the Courts may be shedding their historical reluctance to impose jail terms in OHSA cases.

Courts have historically been very reluctant to impose jail terms against individuals convicted of offences under the *Occupational Health and Safety Act*. The maximum sentence under the OHSA for an individual is one year in jail per count.

According to a 2008 decision of the Superior Court of Justice, less than two dozen individuals had been sentenced to jail under the OHSA. The Superior Court also noted that jail was generally imposed in cases where the accused had willfully violated the Act (i.e. lying to an Inspector) rather than being negligent.

R. v. Roofing Medics Ltd.

R. v. Roofing Medics Ltd. involved a worker on a residential roofing project who fell from a ladder and tragically died when he landed on a fence. The worker was wearing a fall protection harness but it was not attached to anything. The worker had experience in the roofing industry and was recently trained in fall protection.

The owner of the company lied to the police and Ministry of Labour Inspectors when he told them the worker was performing some work for him as "a friend" at his home when the accident occurred (the OHSA does not currently apply to unpaid work).

The owner of the roofing company admitted the truth to the Ministry one week later. The company had also been subject to an inspection from the Ministry of Labour about a year before the accident. The Ministry inspection revealed deficiencies in ladder safety and fall protection training. The Court also accepted evidence that the owner of the company was aware that the deceased worker regularly did not tie off to fall protection.

The Court imposed a ten-day jail term for the fall protection charge and a five day jail term for lying to the Ministry of Labour about the nature of the accident. In our view it is not particularly surprising that a jail term was imposed in this case in light of the fact that the owner of the company lied about key information to the Ministry of Labour, had a prior history of fall protection safety violations and the Court accepted that the owner was aware that the worker did not regularly use fall protection equipment properly.

However, the Court went beyond the immediate facts of this case and the made the following comment which appears to be directed to the broader roofing industry,

> *The major reason a jail sentence is necessary for Mr. Markewycz is to deter others from ignoring the legislated fall protection requirements.* ***Others in the industry must pause to consider that each and every time they embark on a roofing project they may go to jail if one of their employees does not use fall protection gear. It is unacceptable for any roofer to be injured or to die as a result of a fall off a roof.*** *These injuries and deaths can be prevented. Since the industry has not been able to accomplish prevention to date, it is appropriate for the Court to send a message that offenders will be dealt with harshly…*
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> *The Crown sought a sentence of 30 days for Mr. Markewycz on the fall arrest offence. For future offenders, such a sentence may well be appropriate; it may even be on the low side. However, given the fact that jail sentences have not commonly been given for this offence, it is appropriate that a shorter sentence be given to Mr. Markewycz. The sentence needs to be of sufficient length to deter other offenders by sending a message that jail is a sanction that the courts will use for fall arrest offences. I am satisfied that a sentence of 10 days in jail for the fall arrest offence is sufficient for Mr. Markewycz in order to meet the sentencing objectives I have identified. I* ***hasten to add that if workers continue to fall off roofs in contravention of fall arrest regulations, supervisors can expect that jail sentences will be longer and may well become the norm. I note that the maximum jail sentence for this offence is 12 months****.* [Emphasis added]

The Court made it clear that it believes that jail terms need to be imposed in a much wider range of fall protection cases and suggests that incarceration could be potentially be the standard penalty in such cases. In our view, this reasoning directly conflicts with the comments of an appeal court in one of the only cases on this issue which suggested, "*…that imprisonment, while it is clearly available in exceptional cases, is meant to be a sanction that is seldom employed*."

Looking Ahead

It remains to be seen whether other Courts adopt the approach suggested in this case to sentencing to other fall protection cases in the roofing industry and beyond. We expect that eventually the Ontario Court of Appeal will have to weigh in on the subject. This case may very well represent a dramatic change in how individuals are sentenced under the OHSA. Employers should anticipate that Crown Prosecutors may now take the position that supervisors, officers and directors should face jail time far more frequently for serious workplace injuries and fatalities, particularly when the case relates to fall protection or potentially machine guarding or lockout. Such an approach would likely result in considerably more trials and contested sentencing hearings.

It is our view that the Courts should not alter the traditional to approach to sentencing to making incarceration the "standard" penalty in fall protection cases. In fall protection cases, the Crown is generally only required to prove that the worker fell from a distance where fall protection was required. The Defendant bears the burden of proving due diligence and the burden of proof is an extremely high one. The Crown frequently takes the position that the failure to exercise a single reasonable precaution is enough to derail a due diligence defence. It is our view that the failure

of a supervisor to take a single reasonable precaution should not result in and of itself in a person going to jail.

The Criminal Code remains available for cases where there has been an egregious level of negligence by corporations and individuals, as the recent Metron Construction fall protection case shows. Jail terms should only be imposed in our view where there has been an element of wilful violation of the law by an individual accused. The actions of the roofing company in lying about the circumstances of the accident in the case at issue represent a good example of where a jail term may very well be appropriate.

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