

ONTARIO COURT OF JUSTICE

DATE: 2013-11-21
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Citation: *R. v. Roofing Medics Ltd.*, 2013 ONCJ 646

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

ROOFING MEDICS LTD.

PAUL MARKEWYCZ

Before Justice C.A. Nelson
Heard on March 15, August 29 and October 28, 2013
Reasons for Sentence released on November 21, 2013

Ms. J. Malabar **counsel for the Crown**
Ms. Madeleine Loewenberg **counsel for the defendants Roofing Medics Ltd.**
and Paul Markewycz

NELSON J.:

Introduction

[1] On August 16, 2011, John Hill fell from a ladder while he was working on a residential roofing project for his employer, Roofing Medics Ltd. (“Roofing Medics”). Mr. Hill landed on a fence. Shortly after the fall, Mr. Hill died as a result of his injuries. The circumstances of Mr. Hill’s tragic death and the events which followed give rise to the charges before the Court.

[2] On March 15, 2013, I found Roofing Medics guilty of two offences under the *Occupational Health and Safety Act* (“OHSa”):

1. failing to comply with the prescribed regulation that required that a fall arrest system be in place at a workplace [s. 25(1)(c) *OHSa*]; and

2. failing to notify and send a report to the Director as to Mr. Hill's death within 48 hours [s. 66(1) *OHS*A]

[3] In addition, I found Paul Markewycz, the owner and operator of Roofing Medics, guilty of two offences pursuant to the *OHS*A:

1. In his capacity as a supervisor, failing to ensure his workers used a fall arrest system as required by the Regulations [s. 27(1)(a) *OHS*A]; and
2. Furnishing an inspector with false information [s. 62(3)(a) *OHS*A].

[4] This is my decision as to the appropriate sentences on the above charges for both Roofing Medics and Mr. Markewycz.

Crown's Position

[5] The Crown seeks a fine of between \$90,000 and \$100,000 for Roofing Medics on the failure to ensure the fall arrest system was in place and a fine of \$10,000 for the failure to notify offence.

[6] The Crown seeks a jail sentence for Mr. Markewycz of 30 days for his failure as a supervisor to ensure the use of a fall arrest system and an additional consecutive jail sentence of 15 days for the offence of providing false information.

Defence Position

[7] Counsel on behalf of Roofing Medics submits that the fines for the two offences should not exceed \$42,500. On behalf of Mr. Markewycz, it is submitted that a jail sentence is unwarranted; instead he should be fined for both offences in a total amount in the range of \$8,000 to \$12,000.

The Offences

[8] John Hill was 45 when he died on August 16, 2011 from injuries sustained from falling off a ladder at 248 Brooke Avenue. Mr. Hill had been employed by Roofing Medics as a roofer for several months at the time of his death. Roofing Medics is a small roofing company owned and operated by Mr. Markewycz. The particular residential roofing contract that Mr. Hill was working on at the time of his death was worth \$17,500. At the time in question, in addition to Mr. Markewycz, there were four workers on site. Mr. Markewycz was the workplace supervisor.

[9] Prior to his fall, Mr. Hill was working on a ladder about 6 meters off the ground. He was wearing a harness and a lanyard but the lanyard was not attached to anything. When Mr. Hill fell, he landed on a fence. He stood up after the fall and said that he wanted to go home. Mr. Markewycz knew something was wrong with Mr. Hill. Mr. Markewycz and another of his employees, Mr. Igras, drove Mr. Hill to Humber River Hospital where he was pronounced dead shortly after arrival.

[10] When police later contacted Mr. Markewycz to investigate the circumstances of Mr. Hill's death, Mr. Markewycz lied and told police that at the time of his fall, Mr. Hill had been helping out as a friend at Mr. Markewycz' home installing roofing. The police and Ministry inspectors pursued an investigation based on this false information. Seven days after the fall, Mr. Markewycz told Ministry inspectors the truth – that Mr. Hill fell at a workplace location in the course of installing roofing for Roofing Medics. Thus, Roofing Medics did not notify the Ministry nor file a written report with the Ministry within 48 hours of the accident as required.

The Offenders

[11] Mr. Markewycz is married with two young children and a third on the way. He has no prior findings of guilt pursuant to the *OHSA* or the *Criminal Code*.

[12] Roofing Medics was incorporated in 2008. Its gross revenue in calendar year 2011 was \$1,240,752. At the time of Mr. Hill's death, the company had 7 employees. The company has no prior findings of guilt pursuant to the *OHSA*.

[13] Each year since its incorporation, Roofing Medics' gross revenue has increased. Correspondingly, its expenses have increased as well. Mr. Markewycz' Director's fees have also increased so that in calendar year 2011 he was able to take out director's fees of \$55,160. I note that in that calendar year the company incurred \$6,550 for legal fees. The company had no expenses for legal fees in calendar year 2010 nor in any prior year. The inescapable inference is that the legal fees related to the within prosecution. Further, in 2011, the corporation earned \$34,251 after taxes to bring the total retained earnings by the end of that year to \$109,898. During calendar year 2011, the company was able to acquire assets to increase the book value of its total assets to \$109,990, an increase of almost \$35,000 over the prior year. The company was able to do this without incurring any debt. Included in the company's assets at the end of 2011 was a receivable of \$18,020 due from the company's sole director, Mr. Markewycz.

The Law

[14] There is very little appellate guidance as regards sentences for offences under the *OHSA*. Indeed, it appears that the only relevant Ontario Court of Appeal case is the oft cited *R. v. Cotton Felts Ltd.* [1982] O.J. 178 (Ont. C.A.). That case dealt with the sentencing of a corporate defendant but both counsel agree that the principals referred to also have application to personal defendants.

[15] In *Cotton Felts*, Justice Blair emphasized that the paramount consideration in sentencing for offences under the *OHSA*, and other similar public welfare statutes, is deterrence. At paragraph 19 of the decision, he stated:

To a very large extent the enforcement of such statutes is achieved by fines imposed on offending corporations. The amount of the fine will be de-

terminated by a complex of considerations, including the size of the company involved, the scope of the economic activity in issue, the extent of actual and potential harm to the public, and the maximum penalty prescribed by statute. Above all, the amount of the fine will be determined by the need to enforce regulatory standards by deterrence.

[16] While the principal of deterrence is easy to articulate, its application in the circumstances of this and similar cases is challenging. There is an abundance of case law at the trial level, particularly from Justices of the Peace of this Court, which provide some guidance. However, it is a fair comment to observe that the case law reflects a wide and disparate sentencing range. The typical sentence involves a fine, the amount of which varies widely in the cases. It is rare that jail sentences have been imposed for individual offenders, and when jail sentences have been imposed, they are typically of short duration. The typical cases where jail sentences are imposed are very different cases than the one presently before the Court. In many of the cases where jail sentences have been imposed, the defendant did not participate in the proceedings, and an *ex parte* trial was held. Invariably in these circumstances, the presiding justice commented on the defendant's absence as an aggravating factor, viewing it as an indication of the defendant essentially thumbing his nose at the charge. In other cases where a jail sentence was imposed, it was based on a joint submission of counsel. Given the deference that the Court must accord a joint submission, these sentencing decisions are of little precedential value.

[17] For personal offenders, the *OHSA* allows a maximum fine for of \$25,000 and/or imprisonment for up to 12 months for each offence. The maximum fine for corporate offenders is \$500,000 per offence.

The Appropriate Sentences

[18] Before discussing the appropriate sentence for Mr. Markewycz and Roofing Medics separately, it is useful to summarize some of the relevant aggravating and mitigating factors:

Mitigating Factors

1. Mr. Markewycz and Roofing Medics pled guilty, which is an indication of remorse. By pleading guilty, a trial was avoided thus freeing up state resources for other cases.
2. Neither Mr. Markewycz nor Roofing Medics have been found guilty under the *OHSA* prior to these offences. Mr. Markewycz has no criminal record.
3. Mr. Hill was an experienced roofer. He had recently been trained in fall protection. He was wearing fall protection equipment, yet he did not have his lanyard secured to anything.
4. Working Medics' payroll expenses have increased for 2013 as a result of Mr. Hill's death, to 18.5% from 14.80% for every \$100 in payroll.

Aggravating Factors

1. The offending conduct in this case contributed to Mr. Hill's death. The victim impact statements filed by Mr. Hill's mother and sister speak eloquently about a son and brother much loved. He was a man who had faced challenges in his life that had taken him away from his family for some time. Yet, in recent years, as his circumstances became more stable, Mr. Hill started to rebuild his family connections. His death destroyed the family's hope of reunification.
2. Mr. Markewycz first lied about what happened when he got to the hospital with Mr. Hill. Even after he had an opportunity to reflect on his lie, he persisted in it for a number of days. Thus, his conduct demonstrated a planned and deliberate attempt to mislead police and the Ministry in order to avoid consequences for himself and his company.
3. Mr. Markewycz' lies resulted in many hours of wasted police and Ministry time.
4. In May 2010, just over a year prior to Mr. Hill's fall, Roofing Medics received a Field Visit Report from an Occupational Health & Safety Inspector highlighting a number of safety concerns *including* a concern about securing ladders and ensuring workers had adequate fall protection training. Indeed, on August 10, 2011 just a week prior to Mr. Hill's fall, Mr. Markewycz and seven of his workers (including Mr. Hill) received fall protection training. In these circumstances the need for, and importance of, fall arrest protection for his workers should have been at the forefront of Mr. Markewycz' mind at the time of Mr. Hill's fall.
5. Mr. Igras, one of Roofing Medics employees, reported that while Mr. Hill always wore his safety belt, Mr. Igras had only seen his belt secured to a fixed anchor point once or twice in all the time he worked with Mr. Hill. Given Mr. Markewycz' role as supervisor on Mr. Hill's work sites, there is an inference available that Mr. Markewycz was aware that Mr. Hill did not always secure his safety harness. This should have heightened Mr. Markewycz' attention to the requirement for Mr. Hill to secure his fall arrest equipment.
6. Counsel for the Ministry argued that it was an aggravating factor that Mr. Markewycz did not call 911 after the accident and instead drove Mr. Hill to the hospital himself. I do not agree that this factor was aggravating. In my view, it is a neutral fact. Mr. Hill stood up after his fall and indicated that he wanted to go home. Although Mr. Markewycz knew Mr. Hill needed medical treatment, there is no way he could have known how serious Mr. Hill's injuries were. There is no evidence that Mr. Hill's life could have been saved had an ambulance been called.

Discussion

[19] As previously indicated, the primary sentencing principal for the offences in

this case is deterrence, both general and specific. Before addressing the appropriate sentences for each of the defendants separately, it is useful to discuss those sentencing principals that have application to both defendants.

[20] Ms. Malabar, counsel for the Crown, highlighted exactly why deterrence is so important in the circumstances of this particular case. She filed a series of Event Reports under the *OHSA* for the period commencing January 1, 2011. What became clear from the reports was that during roofing season, hardly a week goes by without a report, or several reports, of a roofer falling off a ladder or a roof during the course of a project. Obviously, in these cases, fall arrest protection was not in place. Time after time workers are injured, sometimes grievously, sometimes fatally. None of these accidents should have happened. All could have been avoided had the required fall protection devices been in place. Yet, roofers keep falling off roofs despite all efforts of the Ministry to educate and prosecute these types of offences. In 2011, Ministry statistics make clear that the majority of lost time injuries in the roofing sector were due to falls. Further, in that same year, 41% of all deaths at construction sites were due to falls. This reality highlights the need for the Court to fashion a sentence for Mr. Markewycz and Roofing Medics which will deter both defendants, and more importantly, other supervisors and roofing companies, from failing to protect their employees. The penalty must not be such that it can simply be considered part of the cost of doing business and likened to a licensing fee. At the same time, the penalty must be responsive to the individual circumstances of Mr. Markewycz and Roofing Medics. It must be proportionate to the culpability of Mr. Markewycz and Roofing Medics. The sentence must not destroy the corporation or Mr. Markewycz financially. Jail must not be used as a disposition because Mr. Markewycz has limited financial resources. It must only be imposed if it is necessary to hold Mr. Markewycz accountable in order to deter him and other offenders.

Sentence for Mr. Markewycz

[21] I am satisfied that a jail sentence is the appropriate disposition for Mr. Markewycz for the two offences for which he has been found guilty. I reach this conclusion recognizing that historically jail sentences are the exception, not the norm, for these types of offences. I reach this conclusion recognizing that individual deterrence is not a significant concern regarding Mr. Markewycz personally. I also reach this conclusion recognizing that there are mitigating factors in Mr. Markewycz' situation.

[22] The repercussions of this incident on Mr. Markewycz have been significant. He has incurred significant financial consequences and will continue to do so. Most importantly, a man he employed died in his car while he was being driven to the hospital. I am confident that Mr. Markewycz will be diligent in future in ensuring all of his workers wear and use fall protection gear. Individual deterrence does not play a significant role in the sentencing decision I make regarding him.

[23] 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.

[24] Mr. Markewycz' counsel submitted that Mr. Markewycz should not be held responsible for the industry wide failure to use fall protection. He should not be made an example. I agree. He is not being sentenced for the failings of his industry. He is being sentenced as a result of his own failings. His own failings, however, must be viewed within the context of an industry that has not been able to prevent the devastating consequences of its failure to comply with fall protection legislation. The reality is that fines have not been sufficient deterrence for these offences; not for Mr. Markewycz and not for others. The offence and its consequences are serious enough to warrant more intrusive sanctions.

[25] 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.

[26] Mr. Markewycz has also been found guilty of providing false information to an inspector. In the circumstances of this case, Mr. Markewycz' conduct was very serious. He wasted the valuable resources of police and ministry inspectors as they spent fruitless hours pursuing an investigation based on lies. He started his deception early – right after delivering Mr. Hill to the hospital – and continued it for 7 days until he finally admitted the truth as to what happened. Mr. Markewycz' behaviour must be sanctioned with a sentence that emphasizes deterrence and denunciation. I am satisfied that a sentence of 5 days in jail is appropriate for this offence. This sentence will be served consecutive to the 10 day sentence for the fall arrest offence.

[27] Both counsel agreed that if Mr. Markewycz was sentenced to jail that he should be permitted to serve that sentence intermittently. Thus, he will serve his sentence on weekends – from Friday evening at 8:00 p.m. until Monday morning at 6:00 a.m. – commencing Friday November 22, 2013.

Sentence for Roofing Medics

[28] The appropriate fines levied on Roofing Medics for the fall arrest offence and the failure to notify and report offence must take into consideration the following factors (as articulated in *Cotton Felts, supra*), amongst others:

- Roofing Medics is a small roofing company with an owner operator which had 7 employees at the relevant time.
- The roofing project at issue, a residential roofing project on a single home, had a value of \$17,500.
- The harm occasioned in this case was the most serious harm possible – death of a worker.
- The maximum fine under the applicable legislation is \$500,000 for each offence.

[29] Fashioning an appropriate fine for Roofing Medics requires consideration of the company's financial situation. It is clear from the financial statements for the company that Mr. Markewycz has operated his company in a financially prudent manner. The company has no debt. Mr. Markewycz pays himself reasonable amounts and retains earnings in the company. Thus, the company was able to acquire assets in 2011 worth about \$35,000 without incurring debt. It is important to recognize that any fine levied on the company will likely have repercussions on the amount of money available for Mr. Markewycz personally as remuneration for his own services. I am mindful that time can be given for the company to pay any fine. Indeed, counsel has requested a period of three years for the company to pay any fines.

[30] The Crown has sought fines totalling \$100,000 to \$110,000 for the two offences against the company. In my view, such significant fines do not properly reflect the small size of the company and its realistic ability to pay. Total fines of \$100,000 amount to approximately three times the company's after tax earnings in 2011. Fines in the requested amounts would risk destroying the company financially. Further, Mr. Markewycz' livelihood could be compromised. Instead, I am satisfied that fines totalling \$50,000 are more appropriate, especially given that I am prepared to give the company an extended period of time to pay the fines.

[31] On the fall arrest offence, Roofing Medics is fined \$47,500. The company is given 3 years to pay the fine.

[32] On the failure to notify offence, Roofing Medics is fined \$2,500. The company is given 1 year to pay this fine.

Conclusion

[33] This case is a tragedy at all levels. John Hill lost his life in a manner that was easily preventable. Mr. Markewycz will have to live with his own role in Mr. Hill's death for the rest of his life. Mr. Hill's family have lost a treasured family member. There is no remedy and no solace that can be offered for what happened to Mr. Hill. There is only hope - hope that such a needless tragedy can be prevented in future.

Released: November 21, 2013

Signed: "Justice C. A. Nelson "