

# OHSA Prosecutions: The Court and New Regulations Up the Ante

written by Rory Lodge | March 25, 2014



New developments from the court and new regulations significantly increase the risks associated with non-compliance with Ontario's *Occupational Health and Safety Act* (the "OHSA").

In recent articles and posts, we have reported on both the significant increases in fines being levied in OHSA cases over the last several months, and the increased vigilance on the part of OHSA inspectors bringing charges under the Act. Two recent developments further this trend with respect to potential liability, while also increasing what is at risk when there is non-compliance.

## **The Court Case: J.R. Contracting Property Services Ltd.**

In this recent case, a company involved in garbage removal and hauling was engaged to remove shingles from a one storey bungalow. The company hired workers on an on-call, cash basis. One of its workers was seriously injured after he slipped and fell off the roof while tossing shingles from the roof into a bin, resulting in permanent paralysis of his lower body. Tina Lootawan worked for J.R. She was responsible for directing workers to the job, authorizing the work in question, paying them or providing them with cash advances if needed. Based upon these factors, the court found that she was a supervisor within the meaning of the OHSA. The court also found that the injured worker had not been trained in fall protection and that no fall protection equipment had been provided in the truck that was used for transportation to the job site.

The Company was charged and fined \$75,000, plus the usual 25% surcharge. Ms. Lootawan however was sentenced to forty-five days in jail. The court ruled she had failed as a supervisor to ensure workers used protective devices required by the OHSA and Regulations and failed to take the reasonable precaution of ensuring fall protection was provided. Jail time is, to say the least, highly unusual in OHSA prosecutions. This case is further evidence that courts are taking a far more serious approach to the failure by companies and individuals to abide by the OHSA and its Regulations.

## New Regulations

Two further recent changes bring this point home forcibly.

First, the Ministry has recently distributed proposed new training requirements for employees working at heights – as in the case above. This new training protocol will require training by an ‘approved’ trainer and will apply to all construction projects once implemented. This is only part of a complete overhaul of the Health and Safety strategy of the provincial government. That includes a new Chief Prevention Officer appointed last year to oversee the new ‘strategy’; increased inspections at night and on weekends; targeting with respect to the most vulnerable workers, small businesses and the highest hazards; and new regulations.

Second, Regulation 297/13, published on November 15, 2013, *will come into effect on July 1, 2014*. This Regulation requires OHS training to be provided by Ontario employers for every ‘worker.’ Recall, that ‘worker’ has a broader definition than ‘employee’ in other employment-related legislation. In addition, supervisors must complete a basic OHS awareness training program within *one week* of performing work as a supervisor.

The Regulation spells out the training that must be received by both workers and supervisors and requires that records be kept of when such training was received. Workers and supervisors do not require such training if they can prove to the employer they have received training that complies with the requirements prior to the Regulation coming into effect. In addition, where an employer is required to have a health and safety committee, the employer is required to ‘carry out’ the training program required for a committee member to become ‘certified,’ and ‘carry out’ includes paying for the training.

The new Regulation will affect every employer in the Province. In our view, the risk of not complying with this new Regulation may be substantial, especially in a case where a worker is injured and that worker or his/her supervisor has not received the training required.

In our view, the government has not taken sufficient steps to bring these requirements to the attention of every employer in the Province. There do not appear to be any exceptions, so even the employer with one or two workers appears to be caught.

With the recent trend in fines and now imprisonment, non-compliance has become very risky to say the least!

Article by Mark E. Geiger

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