LITIGATION - CANADA

Court dismisses health and safety charge given due diligence

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Facts
Decision

In *Ontario (Ministry of Labour) v Cobra Float Service Inc* (2017 ONCJ 763 (CanLII)) an Ontario court dismissed an Occupational Health and Safety Act charge in a fatality case, finding that the employer had established due diligence. The court held that the courts should be careful not to measure the practices of "smaller concerns" against those of large companies with far more resources.

Facts

The Occupational Health and Safety Act charge against the company resulted from a fatality at a construction site after a curb machine overturned while being off-loaded from a float trailer, crushing a worker who later died. There were no witnesses to the accident. The charge against the company alleged that the curb machine was moved in a manner that endangered the worker.

Decision

The court decided that the worker had deviated from the standard practice that he and other workers had followed on previous occasions. No training courses were available for the task in question; however, the worker had previously demonstrated his experience and ability to perform the task. The employer was entitled to rely on the experience of the worker.

The court stated as follows:

> *"(260) Despite the fact that [a company witness] could have presented better while on the witness stand, and could have established a more formalized training protocol within his company, his approach is one that is shared by many small to medium sized companies. These smaller concerns, in general typically have less resources to devote to formalized training (if any existed) but that does not necessarily mean that he was exposing his workers to foreseeable risks and dangers. In fact the court must be careful not to measure the practices of smaller concerns against those of larger companies with far more resources as it might lead to potential prejudice and be antithetical to the very noble purposes that the court (and the MOL) would wish to uphold."*

With respect to due diligence, the court found that:

- the company had held regular safety meetings;
- there were no formal education courses that workers could take on the loading and unloading task;
- the worker knew or should have known that what he was doing was unsafe;
- the company encouraged workers to discuss any safety concerns and provided a forum for those discussions at regularly scheduled meetings;
- the worker had successfully moved the curb machine 27 times; and
- there was no evidence that this was an industry-wide safety issue.

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The employer had therefore established due diligence and the charge was dismissed.

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