

Occupational Health & Safety Law

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Are You a Supervisor and Why Should You Care?

By: Cynthia R.C. Sefton*

Introduction

In recent years, those who regulate conduct in the workplace have increasingly looked at individuals who are in a position to affect when, where, how and with what tools, training and supervision people do their jobs. This, of course, is in addition to looking to the businesses for which such individuals work.

More investigations and prosecutions of such individuals are likely in the foreseeable future, as are higher fines and even jail terms for the very worst offenders.

Who is a Supervisor Under the Occupational Health and Safety Act ("OHS")?

Under the definition section of the OHS, a supervisor is someone who has charge of a workplace or authority over a worker. The test is an objective one. The title of the individual is not the determining factor, nor is whether the individual considers himself or herself to be a supervisor.

Indicia of a hands-on supervisor include factors such as whether the individual:

- a. directed the workers to the job site;
- b. set price quotes and answered the workers' questions;
- c. paid the workers their weekly wages based on the number of hours they worked;
- d. provided the workers with cash advances when they were needed;
- e. controlled bonuses or gifts;

- f. controlled hiring, promotion and firing; and
- g. had the power to discipline employees.

While it is not surprising that someone with hands-on, front-line authority has specific supervisory duties in law, we might think twice about whether such obligations apply to the head of a division of 400 employees, sitting in his or her office.

In the case of the division head who did not have direct interaction with the field workers, the workers themselves testified that they regarded the acting field foreperson of the work crew as their "supervisor."

However, the court stated that the OHS should be interpreted in a manner consistent with its broad purpose of promoting and maintaining the protection of the health and safety of workers. This meant that someone sitting in an office who signs off on budgets, and has overall responsibility for when certain work is scheduled, can fit the bill.

Qualifications of a Supervisor

When an employer appoints someone as a de facto supervisor, that individual must be a competent person as defined in the OHS. This means he or she is (a) qualified because of knowledge, training and experience to organize the work and its performance; (b) familiar with the OHS and applicable regulations; and (c) knows about any potential or actual danger to health or safety in the workplace.

There are specific training requirements for such individuals.

What Obligations Does a Supervisor Have?

The duties of a supervisor are set out in s.27(1) and (2) of the OHSA. These include,

- ensuring that workers work in the manner and with the protective devices, measures and procedures required by the OHSA and the regulations; and
- ensuring that a worker uses the equipment, protective devices and measures that the employer mandates.

In addition, under s.27(2) a supervisor must,

- advise a worker of the existence of any potential or actual danger to health or safety of which the supervisor is aware; and
- take every precaution reasonable in the circumstances for the protection of a worker.

It is worth remembering that these duties are owed to not only other employees of the business, but also to workers of its subcontractors.

It is also worth remembering that it is not a defence if a supervisor closed his or her eyes to a potential or actual danger, and therefore did not become “aware” of it. Some common sense inquiry is required.

Sentencing

The maximum fine for an individual under the OHSA is \$25,000 per count, plus a mandatory 25% victim fine surcharge.

Generally speaking, the higher range of fines is handed out for the more serious offenders or offences. Jail time is reserved for the most egregious offences and offenders.

However, even at the lower end of the range, a fine of \$4,000 plus 25% can have an impact on an individual. That does not take into account the personal toll of living with having been responsible for an injury or death and being prosecuted, or the effect a conviction can have on future prospects.

Examples of jail time include a 2013 sentence of 15 days for a supervisor of a roofing installation company, whose worker died while he was installing a roof at a residence. The deceased was wearing fall protection equipment, but it was not attached to anything on the roof. There were also aggravating factors. The supervisor, who was also a director and owner of the company, failed to notify the Ministry of Labour as required and initially misled the police as to the location of the accident. His company was fined \$50,000.

In that same year, a worker fell and was paralyzed from the waist down when he was removing shingles from a residence. He did not have any fall protection equipment, nor was he trained in the use of such equipment. L was charged as a supervisor, though she was not present at the time of the accident. The court found that L had “authority over a worker.” She directed the workers to the job sites, paid them weekly and gave them cash advances when required. Whether she considered herself to be a supervisor was irrelevant.

At the sentencing, the Crown provided the court with L’s prior provincial offence convictions, all of which were under the *Environmental Protection Act*. The court relied on these as prior convictions, which it was entitled to do under the 2007 *Regulatory Modernization Act*. Based on what the court found to be L’s “toxic behaviour,” which showed...” a serious disregard for public welfare statutes and the consequences of her actions,” it imposed a sentence of 45 continuous days.

What Can We Expect?

A sentence is supposed to demonstrate denunciation of the offence and to provide deterrence for the future, both specific to the defendant and in general. Where workers are injured in completely preventable accidents, it is fair to say that the Ministry of Labour will take a very close look at those who are supervisors, whether hands-on or hands-off, all in the interest of preventing the accident in the first place.

Stay tuned for our next article about upcoming changes to the working at heights requirements for construction projects.

**with assistance from Aaron Bain, an articling student at Aird & Berlis LLP.*



Cynthia R. C. Sefton
T 416.865.4730
E csefton@airdberlis.com

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