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Litigation Bulletin

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Ontario Court Provides Some Guidance as to Due Diligence in Health and Safety Charges

In a recent decision *Ontario (Ministry of Labour) v. Cobra Float Service Inc.*, 2017 ONCJ 763, the Ontario Court of Justice dismissed an *Occupational Health and Safety Act* charge in a work fatality, finding that the employer had established due diligence in the circumstances. The Court also commented on the protocol for training between large and smaller organizations.

Cobra Float Services Inc., "Cobra" was charged with failing to ensure that measures and procedures prescribed by Section 37(1) were carried out at a work place ultimately resulting in a tragic fatality where a curb machine was moved at a project in a manner that endangered a worker who was killed. The worker was an experienced operator of the machine who was off loading the machine from a float trailer and it crushed him. There were no witnesses to the accident. The trial lasted 5 days and had numerous witnesses. The Defendant company Cobra was responsible for picking up and delivering the curb machine to the construction site and they would also load and unload the curb machine from and to flatbed trucks.

Although there was no specific training for this work, the worker had completed the task many times. It appears from the evidence that he did not follow the normal procedure for unknown reasons. The Court found that:

1. There was no standard accepted equipment for either the ramp or the transport trailer and therefore it would be difficult to argue that the Defendant was departing from the accepted standards and norms in this particular industry;

2. The company held regular safety meetings;

3. It was widely known that a block of wood would be used as part of the ramp and it was critical that the non use of this block of wood would be deemed unsafe and the worker would have been aware of this fact;

4. There are no formal education courses that one could take with respect to loading and unloading these machines;

5. The company encouraged workers to discuss any concerns, including safety concerns, and provided a forum for these discussions at regularly scheduled meetings;

6. The worker had previous experience and had successfully moved the curb machine 27 times prior to this incident;

7. There was no evidence to suggest that this is an industry wide safety issue or that this had occurred in any previous interactions between the Ministry of Labour and Cobra;

8. The worker had been provided with a Safety Manual and because the worker was experienced and had practical, on the job experience, the failure to follow the normal method of unloading the machine would have made the accident much less foreseeable by Cobra.

As a result, the Court found that the defence of due diligence was established by the Defendant and the charge was dismissed. This decision gives construction companies some guidance as to what is due diligence as a defence to charges under the Occupational Health and Safety Act.

The Court also commented that the Defendant Cobra could have established a more formalized training protocol within the

company but its approach is one that is shared by many small to medium sized companies, and this did not necessarily mean that the company was exposing his workers to foreseeable risks and dangers. In fact, smaller businesses have the same responsibility as that of larger companies with more resources. In other words, formality is not the deciding factor as to whether there is a breach of the Act. Rather the test is whether there are safety meetings, open and free discussion and reasonable safety training to help prevent accidents.

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a cautionary note

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