

It takes more than OHS law to prevent unsafe behaviour

Make sure policies are clear, consistently enforce and discipline

UNFORTUNATELY, IT SOMETIMES seems as though OHS fall arrest legislation is not sufficiently eliminating unnecessary injuries.

The following examples support this view.

- Earlier this year, a 27-year old worker fell from a roof under construction in Halifax. He suffered fatal injuries and later died in hospital. Although the components of fall protection were in place, the deceased had disconnected his harness from his lifeline as he exited the roof. The employer was fined \$25,000 and ordered to provide 200 voluntary service hours to Habitat for Humanity. (R. v. David Busk, Sr. 2012 NSPC 17)

- As a Nova Scotia worker reached to secure his level line, he stepped onto the open edge of a false ceiling. The false ceiling gave way resulting in a fall to a concrete sidewalk below. The worker suffered serious injuries that led to his death a short time later. There was no guardrail, which was required under the province's Fall Protection and Scaffolding Regulations. The worker's supervisor was ordered to donate \$2,000 to the Public Education Trust Fund established by the Minister of Environment and Labour and make 18 safety presentations. (R. v. Eric Eagles 2010 NSPC 18, para. 3)

- An experienced Alberta worker fell to his death when de-icing an airplane while in the bucket of a de-icing truck. Fall protection equipment was readily available and required by company policy. The deceased was not wearing it. The defendant was found not guilty having exercised due diligence. (R. v. Servisair Inc. 2012 ABPC 63, para. 3)

This is just a sample of what can be found in law reports on fall arrest prosecutions, but by now the point is clear — it only takes a single unsafe act to forever impact a family, community and co-workers. The reality is that traditional OHS deterrence methods — although reportedly hav-



REBECCA SATURLEY

LEGAL VIEW

ing some impact — are not making unnecessary fall arrest incidents go away.

Fall arrest prosecutions

If a worker falls when he is performing work for an organization, the Crown is going to be able to establish the organization failed to ensure the worker's health and safety and the criminal liability component of the charge will be satisfied. In this case, employers have only one defence — due diligence.

In R. v. Servisair, the decision provides a framework for the due diligence defence. As a Canada Labour Code matter, the defendant was able to show that it had ensured, as far as reasonably practicable, the health and safety of the worker by conducting the following:

- consulting experts to ensure its safe de-icing practices and procedures were properly developed for its particular workplace
- implementing a sophisticated training program making workers aware of the need to wear fall protection equipment
- making fall protection equipment readily available that was comfortable and easy to use
- carefully monitoring its implemented system for compliance.

What can employers do?

Fall protection has three components:

- fall prevention with travel restraint systems and guardrails
- fall arrest through safety nets or fall arrest systems
- hazard elimination through safe work practices.

The first two points are systems required by law for workplaces depending on height requirements and other safety requirements. They are relatively easy to comply with. The third point is the wild card. It is clear that a company can have policies, but bad things usually happen when policies are ignored by a worker.

What more can be done?

Focus on safe work practices and take steps when they are being ignored.

The chances are good that the policy is often being routinely ignored before a tragedy occurs. Don't wait for a tragedy or an occupational health and safety officer to show up. Here are some tips:

- follow the law — ensure appropriate fall protection systems are in place to protect fatal consequences
- have a clear policy, make sure all those on the worksite are aware of it
- routinely inspect the workplace before work is performed to ensure fall protection systems are in place and let everyone at the workplace know there are consequences if fall protection systems are not worn
- perform random inspections and audits
- when it becomes apparent fall protection is not being used, consistently discipline.

If it is clear the organization is actively monitoring the workplace for safe work practices and disciplinary penalties are a consequence of an unsafe workplace, the workplace will be a safer place for everyone.

Rebecca Saturley is a partner at Stewart McKelvey in Halifax. She can be reached at (902) 420-3333 or rsaturley@stewartmckelvey.com.