

## ARE YOUR LEAD HANDS MINDING THE SHOP? A CAUTION FROM THE COURTS

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Any Canadian employer who does not empower its “supervisors” with proper authority over safety matters is exposed to more risk than they might think. A decision of an Ontario Court, involving prosecution of an employer and supervisor engaged in construction work, sends the message that lead hands on site may not be sufficient to serve as “supervisors” as contemplated the Ontario OHSA. The issue of whether “lead hands” or “work leaders” or “safety leaders” are “supervisors” is a question which interested employers have asked many times over the years. This question arises particularly in the context of situations where lead hands are left “minding the shop” during evenings, weekend shifts, or during the absence of a regular supervisor.

### **The Jetter’s Roofing and Wall Cladding Decision**

In the relatively recent decision of *R. v. Jetter’s Roofing and Wall Cladding Inc.*, the employer was engaged in construction at a commercial site, when a four worker crew moving a scaffold contacted an overhead power line. One worker was fatally injured, and three critically injured. The employer and a supervisor were prosecuted, and took the position as part of their “due diligence” defence that the supervisor had assigned responsibility to the lead hand at the site, who had authority over, and was giving instructions to, the crew.

The facts, in more detail, were as follows. The company appointed an individual, M. Holdam, to direct the crew installing roofing and wall cladding on a new addition to an existing commercial building. Installation of roofing required the use of scaffolding erected to a height of approximately 30 feet, so that employees could guide the roof

panels into place and ensure proper placement. Scaffolding was pushed forward along the side of the building as work progressed. A 115,000 volt power line ran almost parallel to the building, and although everyone was very much aware of the hydro wires, the court heard that the four person crew nevertheless pushed the erected scaffolding directly into the hydro lines, with horrific results. The corporation and another individual, a R. Blouse, were charged with failing to ensure that workers were advised of a danger, and failing to ensure compliance with provisions which require that objects not be brought close to power lines. The individual who the employer stated was the supervisor for the site, Holdam, was not prosecuted as supervisor.

The evidence showed that at the start of each job, R. Blouse met with all workers to go over safety requirements for the job. This meeting involved everyone in the crew and the lead hand, M. Holdam. After this meeting, R. Blouse did not reattend at the site. Holdam was left in charge. He did not have authority to hire or fire, although he could send someone home if there was a problem, and R. Blouse would deal with this. He did not have authority to determine the type of equipment to be placed on site, and he did not play a role in discussing potential dangers at the project; rather this was all dealt with on the first day through the meeting involving R. Blouse and the crew.

The defendant submitted that Blouse was not a supervisor for the purposes of the Ontario OHSA. The OHSA defines a supervisor as a person “who has charge of a workplace or authority over a worker” and it was argued that Blouse did not exercise either of these functions, but rather that Holdam directed the crew and was considered to be the supervisor. It was argued that Blouse did not direct the work on a day to day basis and did not have direct day to day authority over the work crew.

On the other hand, the Crown prosecutor argued that R. Blouse was a supervisor at the site, and submitted that approximately 15 factors ought to be taken into account as indicating “charge and authority” over a workplace. These factors include:

1. Ability to hire
2. Ability to fire

3. Ability to exercise discipline
4. Controlling rate of pay
5. Ability to give awards or bonuses
6. Deciding hours of work
7. Ability to approve vacation time
8. Deciding makeup of a work crew
9. Deciding which equipment is to be brought onto the job site
10. Controlling what equipment can be rented
11. Placing tenders
12. Meeting with workers to go over details of a job
13. Meeting with workers to review issues of safety
14. Holds a position on a permanent basis
15. An ability to promote or demote

The court overwhelmingly accepted the Crown prosecutor's submissions, and rejected the defence submissions. The court found that the defendant Company had not taken all reasonable care or "due diligence", by virtue of their failure to have a supervisor in place for the crew who was doing the work at the workplace, to ensure that the Act was complied with and to advise workers of the dangers they faced using a scaffold near the power lines. Further, the defendant Company was found not to have taken reasonable care or exercised "due diligence" because they failed to give their "so-called supervisor", M. Holdam, the necessary power, authority and knowledge to fulfill the duties of supervisor at the site. The court found that as the true supervisor of the site, Blouse had an obligation to inquire how Holdam's crew was going to do the job they were sent there to do. "In other words, had Blouse put his mind to the problem of how the crew was going to move the scaffold around the corner past the uneven ground, he would have, or should have at least realized the employees would likely take the easiest way around the blockage, a route that would bring them much too close to the high voltage power lines".

The court convicted both the corporation Jetter's Roofing and Wall Cladding Inc., and the supervisor R. Blouse in an unreported judgment ((November 1, 2000), unreported decision of Ont. Ct. Justice, Stafford JP, Stratford, Ontario). The corporation received a

fine of \$80,000, and the supervisor R. Blouse, an owner of the company, was fined \$10,000 plus probation for a period of eighteen months. One of the terms of probation included requiring Blouse to enroll in an occupational health and safety management course within a period of six months ((February 14, 2001), unreported decision of the Ont. Ct. Justice, Stafford JP, Stratford Ontario). It should be noted that the Crown prosecutor has appealed the sentence in this matter, and the defence has appealed the conviction.

### **Implications for Employers Following This Case**

This case will clearly have implications for any employer that leaves a site or workplace in the charge of a lead hand, whether for a single shift, or to cover for a supervisor's temporary absence, or during nights or weekends. Since the court decided not only that the company failed to meet a "due diligence" standard, but that the absent party who is "supervisor" can be convicted as such, a dual risk will exist in relation to any work site left in charge of a party who does not fully exercise supervisory authority. It is recommended that Canadian employers and supervisors take three steps to assess their risk following this decision:

1. The specific definition of "supervisor" and the specifics of supervisory responsibilities for the particular province or jurisdiction should be consulted. This definition and these duties will vary by province. Where the definition involves similar "charge" or "authority" to the Ontario provisions, the risk will be greater;
2. Every employer should carefully assess whether individuals being left in charge of workplaces have true "hands-on" authority in the sense that they have real power and authority to direct workers on safety matters and to enforce safety requirements. The above list of fifteen items would be one reference to be consulted to determine whether the party left in charge has real authority. Any definition of "competency" for supervisors should also be consulted (for example in the Ontario OHSA there is a specific definition of "competence" which must be met in relation to any supervisor appointed);

3. Any supervisor who is absent from the workplace and leaves a work site in charge of or under authority of a person who does not have real and clear authority, as described above, should be taking additional steps to ensure that they are not liable as “supervisor”, despite their absence from the workplace. Supervisors should work with their corporate employer to ensure that the individuals appointed on site as their replacements have real, “hands-on” authority. Alternatively, the “actual” supervisor must have a regular and ongoing and meaningful supervisory presence.

No employer or supervisor will wish to experience the unpleasant surprise of a court determining that the party put in place to exercise authority over a job or work location is not really a “supervisor” in the legal sense, and the consequences which flow from this.

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