

From: David Reece
Sent: Tuesday, 3 August 2010 5:57 PM
To: Mark Parcell; Phil Reed
Subject: Have you seen this?

Queensland first: Mining employee sentenced to imprisonment for breach of safety and health laws

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In a Queensland first, a metaliferous mine worker has been sentenced to eight months imprisonment for failure to comply with his safety obligations under mining occupational health and safety laws, which resulted in the death of a fellow employee.

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Background information

On 17 January 2008, an underground mine worker was crushed to death after being caught between a Toyota Landcruiser utility and a basket attached to the front of a Volvo L120D loader (**loader**). The defendant was operating the loader at the time of the accident. Both the defendant and the deceased were employees of a mine contractor. Neither the SSE nor the Operator nor Contractor were charged.

The defendant was working in a crew of three workers consisting of himself, the deceased, and another worker at a depth of 375 metres underground at the time of the incident. The men had not worked together before. Prior to the incident, the defendant had parked the loader directly behind the utility and walked to the back of the utility to engage in discussion with the deceased and the other worker.

At or about that time, the defendant completed a 'Take 5' document in which he ticked/nominated four potential risks, one being *'can I be caught in or between anything associated with the task about to be undertaken by all 3'*. The deceased then instructed the defendant to drive the loader to the back of the utility contrary to normal procedure. The defendant took no issue and proceeded to follow the deceased's instructions and carried out appropriate pre-start checks on the loader. The defendant had the lights switched on and the basket attached to the front of the loader raised approximately 0.5 to 0.75 metres from ground level.

As the defendant moved the loader forward he was able to see the deceased and the other worker standing at the rear of the utility **with their backs faced towards him**. The other worker motioned towards the defendant to move forward. Shortly thereafter the other worker signalled to the defendant to stop. **The defendant did not stop in time and did not apply the brakes until he was approximately one metre or less away from where the deceased and the other worker were standing.** The Defendant panicked, stood up and lost control of the loader which surged forward crushing the deceased between the basket and the back of the utility. The other worker was fortunate to escape without injury.

Prosecution

The Department of Employment, Economic Development and Innovation (**the Department**) commenced a prosecution against the defendant alleging that he failed to discharge his safety and health obligations under section 31 of the *Mining and Quarrying Safety and Health Act 1999* (**the Act**). The Department alleged that:

- The defendant failed to ensure, to the extent of the responsibility and duties allocated to him, that the risk of injury to the deceased was managed in the work and activities under his control and that the risk was at an acceptable level. The duty allocated and the work activity under the defendant's control was the driving of the loader into the rear of the utility. The Department alleged that the risk was not managed at an acceptable level due to the defendant's failure to safely operate the loader, including failures to operate and apply the brakes appropriately and to stop the vehicle colliding with the deceased.
- The incident was caused by the defendant's lack of attention, failure to keep a proper look out for other workers, judgement and inability to apply any braking mechanisms sufficiently and in time.
- The real and apparent danger of the situation was known to the defendant by way of his training.

Training and experience

Forty-five days before the incident, the defendant was approved as being competent to operate the loader. It was accepted that the defendant would have been driving less than 45 days post being found competent because of his scheduled roster. **It was accepted that the defendant was fairly inexperienced.**

Decision

The Townsville Industrial Magistrates Court found the defendant guilty of breaching his safety obligations under section 31 of the Act, resulting in the death of the deceased.

The defendant was sentenced to eight months imprisonment, the term wholly suspended for a period of 15 months on the condition that the defendant not commit any offence punishable by imprisonment during that time. In determining the appropriate penalty, the Magistrate took into account mitigating factors including the defendant's remorse, lack of significant history, particular circumstances of the matter and personal circumstances.

The defendant was also ordered to pay the Court \$6,625 for professional costs of the Department and \$6,812.70 for investigation costs. The imprisonment order was taken into consideration and determined that an award of significant costs may result in an order outside the proper exercise of the Court's discretion. Thus the awards of costs against the defendant were low.

Key messages for employers

Queensland Courts have demonstrated a willingness, where appropriate, to impose terms of imprisonment.

Queensland is the only Australian jurisdiction in which people have been sentenced to jail for safety breaches, this case being the third time such a sentence has been handed down.

This case sends three key messages to employers:

Ensure you have a robust health and safety management system, regardless of your industry. It needs to be documented and it needs to be followed through, so the reality of what you do matches what's contained in the documents.

Employers need to be able to demonstrate that employees are trained in and understand the system. If employers can show that and something goes wrong, they are in a defensible position. It also minimises the possibility of things going wrong.

Take swift action when employees do the wrong thing. If an employee breaches the safety system, do not hesitate to take severe action against them. In other words, employers should be considering discipline and termination. Courts view such breaches very seriously, and so should employers.

If you have any queries in relation to the above, please contact [Matthew Smith](mailto:matthew.smith@sparke.com.au), Partner, on matthew.smith@sparke.com.au.

Regards,

David Reece

M: +61 448 804 406

O: +61 7 3211 2126

F: +61 7 3855 5217

Mail: PO Box 15533 City East 4002

Email: David@TheSafetyManagers.com.au



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