

With position comes responsibility

Court recommends WorkCover ensure both executive and non-executive directors understand their exposure to prosecution

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A recent decision of the Industrial Court of New South Wales (the Court) is yet another reminder of the personal exposure of managers and directors to prosecution under the *Occupational Health and Safety Act 2000 (NSW)* (the Act), regardless of their involvement in the day to day running of a company.

The case follows the decisions of 'Ritchie' and 'Akerman Apache' which our October and December 2006 bulletins covered.

In sentencing, the Court recommended that the *"WorkCover Authority of New South Wales ... ensure that both executive and non-executive directors of corporations... understand their exposure to prosecution..."*

The Facts

On 6 November 2003, a crane being operated at a building site in Parramatta toppled over when its load exceeded the safe weight limit. No one was hurt, although a number of site workers only narrowly escaped injury.

WorkCover charged four defendants with breaches of the Act:

- » Anywhere Tower Cranes Pty Ltd (Anywhere Tower);

- » Ms Ghada Nouh, sole director of Anywhere Tower;
- » Mr Tom Gabris, a manager of Anywhere Tower with overall responsibility to implement the company's OHS systems; and
- » Mr Wayne Missingham, sole director of Cashbend NSW Pty Ltd (Cashbend).

Anywhere Tower leased the crane to the principal building contractor at the work site. It did not own the crane but was responsible for its costs, maintenance and repair. Cashbend provided the three man crew which operated the crane on the day of the incident.

All four defendants pleaded guilty.

The Findings

Ms Nouh was exposed to liability for prosecution under the Act by virtue of her status as the sole director of Anywhere Tower, regardless of the fact she performed work of a secretarial and administrative kind only, and had no involvement in the management or day to day running of Anywhere Tower.



This decision follows a number of recent decisions which demonstrate the stringent nature of safety obligations for directors and persons found to be 'concerned in the management' of a company under section 26(1) of the Act

Mr Gabris had a significant managerial role in the company and, in particular, its occupational health and safety obligations. His conduct was found to be lacking in that he failed to:

- » provide supervision for the crane crew on the day of the incident (he made a conscious decision not to attend the Parramatta work site);
- » conduct an adequate risk assessment as to the suitability of the area when the crane was set up;
- » conduct a job safety analysis on the day of the incident; and
- » act upon a report by the crane driver just prior to the incident about the defective operation of the computer installed in the crane to estimate load weight.

The company Cashbend, and by extension, Mr Missingham, failed to inspect the site of the incident prior to sending its employees to perform work there, did not undertake any risk assessments in relation to that work and did not provide its employees with any safe work procedures.

Anywhere Tower was fined \$100,000. Ms Nough and Mr Gabris were fined \$9,000. Mr Missingham was fined \$15,000.

Comment

This case follows a number of recent decisions which demonstrate the stringent nature of safety obligations for directors and persons found to be 'concerned in the management' of a company under section 26(1) of the Act.

Directors and persons concerned in the management of a company must actively inform themselves of their safety obligations under the Act. Employers should ensure directors and managers are educated about their obligations under the Act and their exposure to personal liability.

WorkCover Authority of NSW (Inspector Jones) v Anywhere Tower Cranes Pty Ltd; WorkCover Authority of NSW (Inspector Jones) v Ghada Nough; WorkCover Authority of NSW (Inspector Jones) v Tom Gabris; WorkCover Authority of NSW (Inspector Jones) v Wayne David Missingham [2007] NSWIRComm 44 (23 March 2007)

"I would recommend that the WorkCover Authority of New South Wales, as part of its educational role, ensure that both executive and non-executive directors of corporations... understand their exposure to prosecution by reason of the provisions of s26 of the Act in the event that any company of which they are a director commits a breach of the Act, save only for the defences available to them under s26. Such exposure to a criminal conviction is even more compelling where a director has no shareholding in, or any day-to-day involvement in the operations of, a corporation."

Marks J

Sparke Helmore conducts a range of OHS training for Directors, Executives and Managers.

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