

# Occupational Health and Safety Council

Appeal from an Order of an OHS officer

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**Epic Roofing and Exteriors Ltd.**

Appellant

and

**Her Majesty the Queen in Right of Alberta**

Respondent

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## **ORDER**

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**Panel:** Rob Munro (Chair), Peter Bowal and Nina Novak

**Appeal Decision:** February 14, 2017

## **I. Nature of this Appeal**

[1] On October 12, 2016, an officer representing the Respondent (“OHS”), pursuant to its regulatory responsibility under legislative authority, issued three orders against the Appellant, Epic Roofing and Exteriors Ltd. (“Epic”).

[2] On November 11, 2016, Epic appealed the orders to the Occupational Health and Safety Council (“Council”) on the grounds that it was compliant with the Occupational Health and Safety *Code* (“Code”). Epic has asked Council to revoke the orders.

## **II. Summary of Decision**

[3] For the reasons which follow, Council confirms all three orders under section 16(3)(a) of the *Occupational Health and Safety Act* (“the Act”).<sup>1</sup>

## **III. Documents Reviewed**

[4] Council reviewed and considered the following written submissions received from the Appellant and Respondent:

- (a) The Notice of Appeal submitted by Epic on Nov 11, 2016 including Contact Report dated Oct 12, 2016;
- (b) Submission of the Respondent dated December 6, 2016 including
  - i. Contact Report OHS-111292-2A61C-CCR-01A dated October 12, 2016
  - ii. Photographs of Worker #1 dated October 12, 2016
  - iii. Photographs of Worker #2 dated October 12, 2016
  - iv. Contact Report OHS-111292-2A61C-CCR-01B dated October 12, 2016
  - v. Alberta Corporation/Non-Profit Search for Epic Roofing & Exteriors Ltd dated November 29, 2016
  - vi. Officer’s Notes date October 12-13, 2016
  - vii. Officer’s Supplemental Notes dated November 29, 2016

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<sup>1</sup> RSA 2000, c O-2

- (c) Contact Report OHS-036802-C9699-CCR-01A dated February 11, 2013
- (d) Appeal of Orders submitted by Epic on December 21, 2016
- (e) An undated copy of Epic's procedural fall protection.

#### **IV. OHS Officer's Investigation and Facts**

[5] On October 12, 2016, an OHS officer arrived at a residential work site and observed a worker on the roof above the front door measuring an eaves trough. The worker was not wearing fall protection. The officer documented the conditions with a photograph of the worker standing on the roof. The officer later measured the fall hazard to be between 3.76 to 4.96 metres. As a result of these observations the officer issued order #1. The requirement for this order reads "[w]ork that exposes workers to a fall hazard greater than 3 metres may not resume until appropriate fall protection systems are in use, as required by section 130 of the *OHS Code*."

[6] A short time later the OHS officer observed a second worker on a ladder at a height of approximately 3 metres. The officer noted that the worker was working above a stone wall and step hand rail and as such was at an unusual risk of injury. The officer documented the conditions with a photograph of the worker on the ladder. The officer noted that the worker was leaning to the side of the ladder and was not maintaining 3 points of contact. As a result of these observations the officer issued order #2. The requirements for this order reads "As required by section 137(1) of the *OHS Code*, the employer must ensure that a worker on a ladder, exposed to a fall hazard of 3 metres of [sic] more uses a personal fall arrest system unless the worker complies with requires outlined in Section 137(3) which includes the requirement to maintain three-point contact."

[7] During the inspection on October 12, 2016, the employer representative stated that the worker observed to be on the roof may have been using procedures in place of fall protection. The officer asked for a hazard assessment and was told that a worker was completing the document. The officer stated that the work being performed was not within the activities for which procedural fall protection applied and that a hazard assessment had not been completed and the required procedures were not in writing. Order #3 was written and the requirement of this order states "[w]here workers are using 'procedures in place of fall protection equipment' the employer must ensure that the requirements of Section 159(1) and 159(2) are fully met.

[8] Epic complied with all of the orders on October 12, 2016.

## **V. Case on Appeal to this Council**

[9] Epic appealed all three written orders stating that it was in compliance with the applicable sections of the OHS *Code*. Epic's arguments are summarized as follows:

- (a) The worker on the roof was operating under procedures in place of fall protection equipment as outlined in section 159 of the *Code*. That it was not reasonable to use fall protection as setting up any type of fall protection system would have exposed the worker to greater hazards or the time taken to set up the fall protection would have exposed the worker for a longer period of time to a fall hazard than it would take to complete the work on the roof;
- (b) That the measurements taken of the eaves trough fits within the activities typically performed as part of a roof inspection as mentioned in section 159 (1) (b) (ii);
- (c) That a hazard assessment was available as required in section 159 (2) (a) but was not provided to the Officer as a result of a miscommunication between the Officer and the workers. Epic states that the hazard assessment was being modified at the time the officer requested the document but it had been completed before work started. Epic also states that a written procedure was available as required in section 159 (2) (b) before the work began on the worksite; and
- (d) That the worker on the portable ladder was meeting the requirement of 137 (3) (a), (b) and (c). That the worker maintained his centre of balance at the centre of the ladder by extending his leg in the opposite direction from his arms and that three points of contact were maintained even if it was not through a combination of either two hands and one foot or two feet and one hand.

## **VI. Standard of Review**

[10] The standard of review is reasonableness. In *MacDougall v Occupational Health and Safety Council*, 2015 ABQB 591, the reviewing judge wrote at paragraph 14:

. . . the Council was not engaged in anything more than I am engaged in. They were assessing the reasonableness of the officer's

decision and the fairness of the process by which she arrived at that decision.

[11] A recent decision of the Court of Queen's Bench, *Procrane Inc (Sterling Crane) v. Thompson and Occupational Health and Safety Council*, 2016 ABQB 646, thoroughly canvassed this issue and confirmed the same standard of review at that level with regard to this legislation.

## **VII. The Law**

[12] An OHS officer is granted specific power in the *Act*. Section 8 (Inspection) of the *Act* states:

8 (1) For the purposes of this Act an officer may

- (a) at any reasonable hour enter into or on any work site and inspect that work site;
- (b) subject to subsection (2) require the production of any records, books, plans or other documents that relate to the health or safety of workers and may examine them, make copies of them or remove them temporarily for the purposes of making copies;
- (c) inspect, seize or take samples of any material, product, tool, appliance or equipment being produced, used or found in or on the work site that is being inspected;
- (d) make tests and take photographic or recordings in respect of any work site;
- (e) interview and obtain statements from persons at the work site.

[13] An OHS officer can write an order as outlined in section 9 (Order to remedy unhealthy or unsafe conditions) of the *Act*:

9 (1) When an officer is of the opinion that work is being carried out in a manner that is unhealthy or unsafe to the workers engaged in the work or present where the work is being carried out, the officer may in writing order the person responsible for the work being carried out.

- (a) to stop the work that is specified in the order, and
- (b) to take measures as specified in the order that are, in the

opinion of the officer, necessary to ensure the work will be carried out in a healthy and safe manner,

or either of them, within the time limits specified in the order,

(2) When an officer is of the opinion that a person is not complying with the Act, the regulations or the adopted code, the officer may in writing order that person to take such measures, within the time limits specified in the order, as the officer considers necessary to ensure such compliance and specifies in the order.

[14] The power of Council is outlined in Section 7 (Duties of Council) of the *Act*.

(7) The Council shall . . . (b) hear appeals in accordance with this Act and the regulations

[15] Appeal processes are set out in section 16 (Appeal) of the *Act*:

16 (1) A person

(a) to whom an order is issued under section 9, 10, 11, 12, 14, 25 or 33 . . . may appeal the order, administrative penalty, cancellation or suspension to the Council . . .

(3) After considering the matter being appealed, the Council may by order

(a) in the case of an appeal from an order referred to in subsection (1) (a) confirm, revoke or vary the order

[16] In this case, various requirements of the *Code* are in play, such as Part 8 (Entrances, Walkways, Stairways and Ladders Section Fall Protection):

137 (1) An employer must ensure that a worker working from a portable ladder from which the worker may fall 3 metres or more uses a personal fall arrest system.

137 (3) Despite subsection (1) if it is not reasonably practical to use a personal fall arrest system, a worker may work from a portable ladder without fall protection if

(a) the worker's centre of balance is at the centre of the ladder at all times even with an arm extended beyond the side rails of the ladder, and

(b) the worker maintains three-point contact whenever the

worker extends an arm beyond the side rail

[17] Part 9 (Fall Protection) also applies:

139 (1) Subject to subsections (3) through (8), an employer must ensure that a worker is protected from falling at a temporary or permanent work area if a worker may fall

- (a) a vertical distance of 3 metres or more,
- (b) a vertical distance of less than 3 metres if there is an unusual possibility of injury, or

139 (2) For the purposes of this section, there is an unusual possibility of injury if the injury may be worse than an injury from landing on a solid, flat surface. . . .

139 (6) Despite subsection (5), if the use of a travel restraint system is not reasonably practicable, an employer must ensure that a worker uses a personal fall arrest system that meets the requirements of this part. . . .

159 (1) An employer may develop and use procedures in place of fall protection equipment in accordance with subsection (2), if

- (a) it is not reasonably practicable to use one of the fall protection systems described in this Part, and
- (b) use of procedures in place of fall protection equipment is restricted to the following situations: . . .

(ii) roof inspection

159 (2) An employer using procedures in place of fall protection equipment must ensure that

- (a) a hazard assessment in accordance with the requirements of Part 2 is completed before work at heights begins,
- (b) the procedures to be followed while performing the work must be in writing and available to workers before the work begins . . .
- (d) the work is limited to light duty tasks of limited duration

### **VIII. Analysis and Reasons for Decision**

[18] Orders 1 and 3 are reviewed together. The orders together essentially require Epic to protect workers from fall hazards by either the use of a fall protection system and / or by meeting all of the requirements of using procedures

in place of fall protection.

[19] The photographic evidence is proof of violations of *Code* requirements. The worker on the roof is clearly working a vertical distance greater than 3 meters. The photographic evidence also clearly shows that the worker is not using a personal fall protection system.

[20] It is possible that there was a miscommunication between the officer and workers on whether the required documentation was in place for procedural fall protection prior to work starting at the worksite. However, there was a demand for the Hazard Assessment and the strong implication was that it was presently being written up. Epic concedes that a reasonable interpretation to the answer given by its representative was that the Hazard Assessment was not in place before the work commenced. To assert later in an appeal that the Hazard Assessment was actually done by then, but was being merely revised, and the OHS officer should have pressed further with more deliberate language in the circumstances is disingenuous.

[21] For these reason Orders 1 and 3 are confirmed

[22] As for Order 2, work performed from a ladder without a personal fall arrest system must meet the requirements listed in *Code* section 137 (3). The *Code* states that the worker's centre of balance is to be maintained at the centre of the ladder even with an arm extended beyond the side rail. The *Code* speaks of "an arm" – singular – and does not contemplate "arms" (plural) extended past the side rail. The intent of this part of the *Code* is to ensure the worker is in a stable position while working on a portable ladder. The photographic evidence clearly shows that the worker was not in a stable position and as such Order 2 is also confirmed.

## **IX. Order**

[23] Council confirms all three orders under section 16(3)(a) of the *Act* and dismisses this appeal.