SQUIRE PATTON BOGGS

To What Extent is a Labour Hire Company Liable for a Safety Incident?

Court Fines Company AU$400,000 for "Blindly Sending" Workers Into Hazardous Workplace

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The recent judgment of *Safework NSW v BI Australia Pty Ltd* in the District Court of NSW may rewrite the rules for labour hire companies and what is required for them to meet their work health and safety (WHS) obligations.

In the decision, a Sydney-based labour hire company was issued with a AU$400,000 fine, almost double the penalty imposed on the host company, for the same incident in which a labour hire worker was injured.

The company in question, BI Australia (BIA) was convicted of a Category 2 offence under the NSW *Work Health and Safety Act* for failing to adhere to its duty under s 19(1) to protect workers from being exposed to risks of serious injury.

The Incident

Safework NSW prosecuted BIA after one of its employees (a labour hire worker sent to a site managed by Galvatech, one of BIA's clients) was struck by a reversing forklift operated by another worker (also a BIA employee). Importantly, the forklift operator did not possess the required high risk work licence to legally operate the vehicle, nor were the vehicle's lights in operation, leading to serious harm. The injured employee was pinned under the forklift and suffered a broken leg among other injuries, requiring extensive surgery and active rehabilitation.

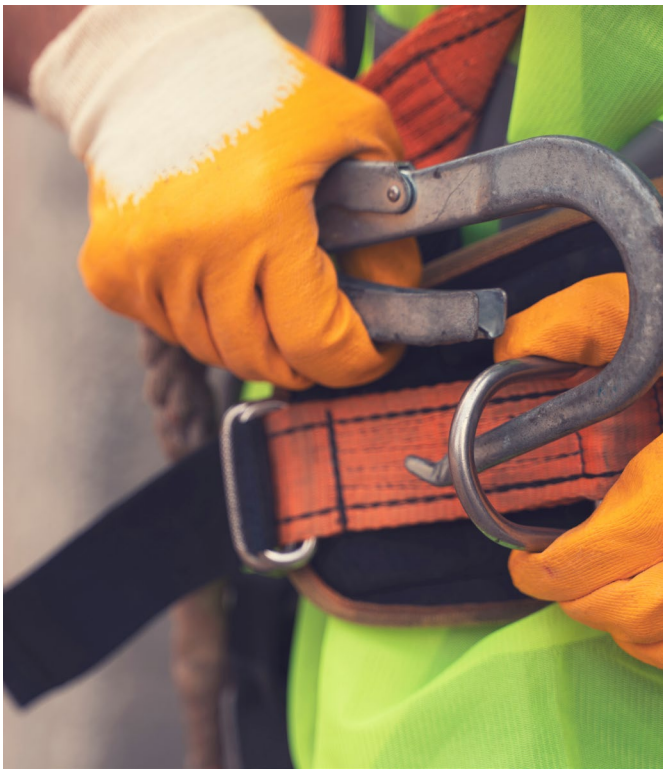
After investigating, it was found that not only did Galvatech have insufficient systems in place to ensure the provision of a safe work environment, but so did BIA itself.

The Court's Decision

Where Galvatech's noncompliance was dealt with in another trial, the judge pertinently noted that BIA also failed significantly in its lack of appraisal of the nature of the work to be carried out by its employees at Galvatech's site, including the risks to health and safety that existed. Even though BIA did not control the work at the site, it was found that BIA's failure to properly inquire as to the state of the machinery used, the relevant operating procedures, and the management plans in place, meant that BIA was in violation of its s 19(1) duty, thereby placing the employees at severe risk of harm.

The court found that BIA had not taken sufficient steps to eliminate or minimise the risks to its workers so far as is "reasonably practicable". Where this standard requires an employer to understand and proactively seek to eliminate the risks that may arise from its employees' work, BIA was found to have fallen a long way short in maintaining the safety and protection of its workers, which could have included measures such as site visits, conducting its own risk assessments and, at the very least, assessing its workers competencies to drive and work around forklifts. (Notably, the injured worker had worked at Galvatech's site for a month, and BIA had not at any point asked the worker what he was doing, or if he was qualified to do it. BIA was also unaware that another of its workers at the site was driving a forklift without the proper licence.)

Even though Galvatech failed to also ensure the safe performance of work, BIA's violations were more harshly judged, because it was "blindly sending" its workers to Galvatech's premises without making any effort to assess the potential risks they may be facing.



An Unprecedented Finding

There have been several previous cases where both a labour hire company and a host employer have been prosecuted in relation to the same safety incident involving a labour hire worker. However, the norm in such cases has been for the host employer to receive the heavier penalty, usually on the basis that, while the labour hire company has obligations under WHS legislation with regards to any worker it sends to a client's site, it has less capacity to control or influence the work being performed. The fact that the court has departed from that position in this case and has imposed a harsher penalty on BIA could be a wakeup call for labour hire companies who send their workers to clients' sites without taking any steps to assess the various hazards they may face, or whether their workers are properly qualified to carry out the work.

This decision sends an important warning to labour hire companies of the need to be proactive and inform themselves of the type of work their employees are performing at clients' sites and the systems in place to identify and manage hazards. The sentence also serves to deter other labour hire companies from cutting corners, not performing their due diligence and turning a blind eye to what their workers may be doing. In light of this decision, labour hire companies should make a pointed effort to revisit their safety policies and ensure they are meeting their obligations as provided for in the relevant WHS legislation.

If this case raises concerns within your business operations, or you would like more information on the potential impact of this decision, please contact our Labour & Employment team for assistance.

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