PENAL LAW PROTECTION OF A PRODUCTION ENTERPRISE EMPLOYEE IN THE LIGHT OF OBLIGATIONS ON THE OCCUPATIONAL SAFETY AND HEALTH

doi:10.2478/mape-2018-0090
Date of submission of the article to the Editor: 04/2018
Date of acceptance of the article by the Editor: 07/2018
MAPE 2018, volume 1, issue 1, pp. 711-717

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Abstract: The article discusses criminal law regulations whose task is to protect employees from imminent dangers to life and health and resulting from the violation of health and safety at work. Therefore, the key offenses of art. 220 (Act - Penal Code, 1997) from the point of view of criminal responsibility were subject to analysis, as well as the premises that determine it. In this way, an attempt was made to define the protection and responsibility framework both in the subjective and objective dimension. In the further part of the study, the regulations protecting the life and health of employees with other penal regulations of a general nature were discussed, also in the context of criminal threat dimensions, as well as the premises for not being punished by the perpetrator.

Keywords: occupational safety and health, employee, crime, protection

INTRODUCTION

In every production enterprise, irrespective of whether it is of mining or processing nature, its employees are exposed to various dangers to health and life. Risk factors in the field of health and safety at work here depend to a large extent on the model of the production process and the organizational safety culture functioning in a particular company. The issue of protecting an employee of a production enterprise in the context of occupational safety and health requirements is of a universal and international nature. The problem is of interest to various fields of science and is illuminated by representatives of world science from various perspectives (Caraballo – Arias, 2015, Cempel et al., 2016, Gerkin et al., 2017, Levin, 1977). One of the areas of legal protection of employees against these threats is created by criminal law. Therefore, the article deals with the issues of criminal-law protection of an employee of a production enterprise aimed at showing the sources of rights and obligations in the field of occupational health and safety and liability criteria in this area, as well as analysis of behaviours criminalized by art. 220 (Act - Penal Code, 1997) and other criminal provisions protecting human life and health.

SCOPE OF OCCUPATIONAL SAFETY AND HEALTH PROTECTION

At the outset, it is worth considering the scale of offenses under art. 220 (Act - Penal Code, 1997) with reference to the so-called convicted crime. In the light of the statistics of the Ministry of Justice, it should be assumed that in recent years, against the background of the total number of convictions, crimes under art. 220 (Act - Penal Code, 1997) constitute a very small percentage of all convictions. It is presented in the table 1.

Table 1
Total number of convictions for offenses under art. 220 (Act - Penal Code, 1997) in the years 2008 – 2016

	2008	2009	2010	2011	2012	2013	2014	2015	2016
art. 220 § 1 (Act – Penal Code, 1997)	129	109	115	122	73	84	51	64	66
art. 220 § 2 (Act – Penal Code, 1997)	12	22	15	9	8	13	6	14	15
Total number of valid convictions (main act)	420729	415272	432891	423464	408107	353208	295353	260034	289512

Source: Ministry of Justice (https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/)

However, it does not give a full picture of the number of events that should be qualified as so-called accidents at work with art. 220 (Act - Penal Code, 1997), then at least two conclusions can be drawn based on the presented data. First of all, Polish courts usually assume that the perpetrator's behaviour was intentional. Secondly, between 2008 and 2016, the fall of convictions is clearly visible, but it refers exactly to deliberate acts. Providing that these comments are only contributory and demonstrative, it is possible to argue that in the light of the above-mentioned data, breaches in the field of health and safety at work, resulting in a threat to employees, are becoming less and less of a criminal nature.

The fact that the issue of occupational health and safety has a constitutional dimension proves its significance from the point of view of the state. According to art. 66 par. 1 (Constitution of the Republic of Poland, 1997), everyone has the right to safe and healthy working conditions. The manner of implementation of this right and employer's obligations are set out, among others by labour code (Act – Labour Code, 1974), in particular its tenth part "Occupational health and safety", e.g. art. 207 (Act - Labour Code, 1974), which explicitly states that the employer is responsible for the health and safety in the workplace. Moreover, the employer is obliged to protect the health and lives of employees by providing safe and hygienic working conditions with appropriate use of science and technology achievements. Another important legal act in the analysed scope is the regulation on general health and safety at work rules (Minister of Labour and Social Policy, 1997). In the legal system, there is also a number of other regulations defining health and safety at work rules concerning various industries. For instance, the regulation on occupational safety and health for work related to exposure to electromagnetic fields (Minister of Family, Labour and Social Policy, 2016) or the regulation on occupational safety and health in metal foundries (Minister of Development and Finance, 2017).

The right to safe and healthy working conditions is a direct object of protection of the provisions set out in art. 220 (Act - Penal Code, 1997). A worker's life and health is a side-effect of the protection (Supreme Court, 2005).

Being an element of art. 220 § 1 (Act - Penal Code, 1997) i.e. the term "occupational safety and health" has not been explicitly defined in any legal act, therefore it is assumed that it covers, as a typical interdisciplinary field, various issues in the field of law, ergonomics, psychology, physics, chemistry, machine building and other science (Widzisz, 2005). The requirements in this respect may result not only from specific legal provisions, which define, for example, the scope of activities, job instructions or regulations, but also from the nature of the activities performed at a given position in an enterprise (Supreme Court, 1999).

It is difficult to present a comprehensive catalogue of duties in the field of occupational health and safety, which may be the object of behaviour of the perpetrator of art. 220 (Act - Penal Code, 1997). These duties are of a different nature, they depend on the type of work (Siwik et al., 2008, Wróbel et al., 2006). From the point of view of criminal responsibility, it is very

important to determine the circle of persons who are subject to legal protection as provided for in art. 220 of P.C. The subject of protection is an employee. The conceptual scope of this notion is much narrower than in the colloquial language. Not every natural person who performs certain activities for another entity is an employee in the light of the indicated provision. It is necessary to refer here primarily to the content of art. 2 (Act - Labour Code, 1974), which states that the employees are persons employed on the basis of an employment contract, appointment, election, nomination or a cooperative employment contract (Radecki et al., 2010, Ziółkowska et al., 2016). Beyond the scope of the notion, an employee of art. 220 (Act - Penal Code, 1997) remain students and apprentices (Łabuda et al., 2014).

PENALIZED FORMS OF PERPETRATOR'S BEHAVIOUR

Acting offense under art. 220 (Act - Penal Code, 1997) consists in the failure of the perpetrator to fulfil his/her duty resulting from health and safety at work. It seems that the main form of the perpetrator's behaviour is to give up a given duty. The construction of the aforementioned vice allows for failure to fulfil obligations also through action, which will take place, for example, when the perpetrator in a faulty manner implements the duty imposed on him/her.

It should be clearly stressed that the offense under art. 220 (Act - Penal Code, 1997) is no longer exhausted as a result of formal failure to fulfil the obligation. Such behaviour, if it is not accompanied by a real life threat or serious health impairment, is not a crime, but can be considered as, at most, an offense under art. 283 § 1 (Act - Labour Code, 1974). This offense consists in the fact that the perpetrator, being responsible for the state of health and safety at work or managing employees or other natural persons, does not comply with the provisions or rules of occupational safety and health. It is accompanied by a penalty in the form of a fine from PLN 1.000 to PLN 30.000.

In each case of the offense under art. 220 (Act - Penal Code, 1997) it becomes necessary to determine the person who was responsible for health and safety at work with regard to the injured employee. As a rule, such responsibility rests, as already indicated, on the employer (art. 207 § 1 and 2) (Act - Labour Code, 1974). However, other persons should also be included in the circle of the responsible who, as a result of their function or tasks, manage the work of other employees – see: art. 212 (Act - Labour Code, 1974). The judgment (Supreme Court, 2013) states that "(...) for taking over the manager, foreman or other person managing employees, duties in the sphere of health and safety, within the meaning of art. 212 (Act - Labour Code, 1974), no special form is necessary, in particular, these duties do not have to be the content of a contract of employment or other source of employment, under which the person managing the employees is employed, they also need not be included in the scope of operations. The mere fact of executing managerial functions in relation to employees makes those persons as the persons managing the employees, the subjects of duties listed in art. 212 (Act - Labour Code, 1974). Therefore, an employee who was entrusted with managing other people, with the very essence of this function, is obliged to constantly ensure that the work of subordinate employees is carried out in accordance with the provisions or rules of health and safety (...)" (Widzisz, 2005).

Article 220 (Act - Penal Code, 1997) does not exclude criminal liability of several persons whose conduct contributed to the employee being exposed to imminent danger of loss of life or serious health impairment (Siwik et al., 2008).

In the vertical organizational structure of a particular employer, the perpetrator(s) of offenses under art. 220 (Act - Penal Code, 1997) should be looked for "from below", not as it might seem "from above". Responsibility for exposure of an employee will always be borne by his/her immediate supervisor (when all the attributes described in art. 220 are met) (Act - Penal Code, 1997), but moving up the organizational structure of the employer, responsibility may be suffered additionally by other people (Widzisz, 2005).

From the point of view of the analysed crime, the danger cannot be hypothetical or potential. As the provision of art. 220 § 1 (Act - Penal Code, 1997) uses the term "direct", in reference

to the degree and severity of the danger, it is necessary to state that it must be real and therefore likely to happen.

The offence of art. 220 (Act - Penal Code, 1997) belongs to the so-called crime of a particular exposure to danger. With such crimes, evidence is required that as a result of the behaviour of the perpetrator, there has been such a situational change in reality that presents a particular, specific danger for the legal good (Bojarski et al. 2002, Hanausek, 1964). In practice, this means a situation in which an employee did not suffer any real damage to health, such as breaking a limb or other injuries, or did not suffer death, but was for a short period of time, indeed endangered by such an effect. In this way, the legislator protects the employee in the foreground of real and negative consequences for his/her life and health.

As the previous considerations prove, the analysed vice consists of two elements, one of which is of a prior nature (failure to comply with the obligation), and the other one is consequential, i.e. effective (immediate danger). To assign responsibility for the creation of the abovementioned effect, a causal link should be demonstrated between these elements. Such a relationship takes place when performance of a given obligation significantly reduced the degree of danger (Radecki et al. 2010, Siwik et al., 2008). This is an element *sine qua non*, because failure to disclose it by law enforcement authorities excludes criminal liability for the misdemeanour in question (Siwik et al., 2008). Danger must be related to "loss of life" or "serious damage to health". The term "loss of life" is the same as the term "death". In turn, the notion in the form of "severe damage to health" is characteristic of the offense under art. 156 § 1 (Act - Penal Code, 1997). This provision includes an exemplification in the form of personal injury, which are defined by criminal law as so-called severe injuries of body. They include:

1) depriving man of sight, hearing, speech, and procreation ability,

2) other severe disability, severe or long-term illness, life-threatening disease, permanent mental illness, total or significant permanent incapacity for work or permanent, significant disfigurement or deformation of the body.

This means that the criminal law protection referred to in art. 220 (Act - Penal Code, 1997), is reserved exclusively for the most dangerous events with the participation of employees.

Analysed crimes can be implemented deliberately (art. 220 § 1) (Act – Penal Code, 1997) or unintentional (art. 220 § 2) (Act – Penal Code, 1997). In accordance with art. 9 § 1 (Act - Penal Code, 1997), we are dealing with deliberation when the perpetrator intends to commit it, that is, he/she wants to commit it (direct intention) or by anticipating the possibility of committing it, he/she agrees (possible intention). Offense under art. 220 § 1 (Act - Penal Code, 1997) can be committed in both forms of intent. Unintentionality occurs, pursuant to art. 9 § 2 (Act - Penal Code, 1997), if the perpetrator, having no intention of committing it, commits it, however, due to failure to observe the caution required under the circumstances, despite the fact that he/she could predict or anticipate the possibility of committing the act.

Intentionality refers not to the effect of an accident at work, but to an earlier state of danger of health and safety at work. Consent to this threat, while not consenting due to the effect of this threat, means intentionality related to the state of emergency, because this state is a statutory hallmark of the offense under art. 220 § 1 (Act - Penal Code, 1997). However, inadvertent implementation of the statutory features of the offense under art. 220 § 2 (Act - Penal Code, 1997) occurs when the perpetrator, being aware of his/her failure to perform the duties in the field of occupational health and safety, does not anticipate that it will be connected with causing a direct danger of loss of life or serious injury to the health of a particular employee. Consequently, exposure to imminent danger may be intentional or unintentional, and further consequences may be covered only by unintentionality, which results from the nature of the crime exposure to danger (Siwik et al. 2008). At this point, the judgment (Supreme Court, 1997) deserves attention, in which it was assumed that "(...) the statement of having certain skills and qualifications by the subordinate employees obviously belongs to the superior, and hence the work organizer, and is at all a basic activity that must precede the distribution of workstations if the requirements for occupational safety are to be met. (...) Consciously

disregarding the obligation to check the actual qualifications of employees is an obvious and deliberate violation of the duties of the superior (...) ".

CRIME OF ART. 220 (ACT – PENAL CODE, 1997) AND OTHER CRIMINAL PROVISIONS

The provisions of art. 220 (Act - Penal Code, 1997) constitute *leges speciales* against the provisions of art. 160 § 1 (Act - Penal Code, 1997), which typify general forms of crime of human exposure to the immediate danger of loss of life or serious health impairment. If, therefore, under the conditions of a production company, the above-mentioned effect will be met by a person (e.g. another serial employee) who is not in the circle of entities referred to in art. 220 (Act - Penal Code, 1997), then this person may be subject to criminal liability under art. 160 (Act - Penal Code, 1997) (Supreme Court, 2012) (Piórkowska - Flieger et al., 2016, Wróbel et al, 2006).

In the current legal order, the statutory threat for an offense under art. 160 (Act - Penal Code, 1997) and for an offense under art. 220 (Act - Penal Code, 1997) is identical, in the form of intentional (imprisonment under 3 years) and unintentional (fine, restriction of liberty or imprisonment for up to one year). The formula of active grief is also identical. Two conclusions can be drawn from this. First of all, the legislator does not attach particular importance to the protection of an employee under art. 220 (Act - Penal Code, 1997), since the threat for this act is equal to the threat for the basic type of exposure to the danger of human life and health. Secondly, the commented type of a prohibited act is in this system an ordinary normative *superfluum* (Łabuda et al., 2014).

Observation of behaviours exhausting the features of the offense of art. 220 (Act - Penal Code, 1997) allows to formulate the view that in a lot of cases criminal behaviour is not limited to creating by the perpetrator only a specific dangerous situation, such as the employee performing work with an unsecured machine or without the required job training, or conducting by him/her a company vehicle with inefficient brakes. Often, the situation of a particular danger is transformed into a far-fetched result, which is the death of an employee or causing injury. Depending on the type of injury, the perpetrator's criminal liability may then be extended to a specific extent. In this situation, the law enforcement agency, and thus also the court, should consider adopting the so-called cumulative legal qualification of the act of art. 11 § 2 (Act - Penal Code, 1997). This may put the perpetrator in a more disadvantageous situation, mainly in terms of the criminal threat. In the light of art. 11 § 3 (Act - Penal Code, 1997), when the act exhausts the marks specified in two or more provisions of the criminal law, the court condemns for one offense on the basis of all concurrent provisions. In this case, the court imposes a penalty on the basis of a provision providing for the most severe penalty. For example, in the event of the death of an injured employee, the perpetrator's liability may also include liability for an unintentional death (art. 155) (Act - Penal Code, 1997), which is punishable by imprisonment from 3 months to 5 years.

Regardless of whether *in concreto* it is necessary to qualify the behaviour of the perpetrator from one or more criminal provisions, the perpetrator's liability should be influenced by the assessment of the degree of contribution of the injured employee, e.g. his/her gross negligence regarding compliance with OSH rules (Marek, 2005).

Criminal liability, the principles of which have been described above, is not exhausted in the judgment provided for in the penal sanction. An additional ailment may result in a court decision in, e.g. a criminal measure under art. 39 point 2 (Act - Penal Code, 1997) in conjunction with art. 41 (Act - Penal Code, 1997) in the form of a prohibition to occupy a specific position, perform a specific profession or conduct a specific business activity.

The court may decide a prohibition on a particular position (e.g. chief engineer) to be taken or a specific profession (e.g. engineer) to be exercised if the entirety of the evidence collected leads to the conviction that the perpetrator has abused his/her position or occupation or proved that further position or occupation threatens important goods protected by law (art. 41 § 1) (Law - Penal Code, 1997). On the other hand, in the event of conviction for an offense related

to running a business (e.g. the perpetrator of the offense under art. 220 is an entrepreneur) (Act - Penal Code, 1997), the court may order a ban on conducting a specific business activity if it believes that its further conduct threatens important goods protected by law (art. 41 § 2) (Act – Penal Code, 1997). Regardless of the type of prohibition applied, it is decided for a definite period, in the years, from 1 to 15 years (art. 43 § 1) (Act - Penal Code, 1997). What is important, the violation by the validly condemned of final convicted ban is an offense under art. 244 (Act - Penal Code, 1997).

The legislator provided for the possibility of avoiding punishment by a person who exposed the employee to danger. It is about the regulation contained in art. 220 § 3 (Act - Penal Code, 1997), which is referred to as the no-criminal record clause. It is an institution that due to the so-called active grievance of the perpetrator can lead to the fact that he/she will not bear any criminal liability, and the criminal proceedings against him/her will have to be discontinued on the basis of art. 17 § 1 point 4 (Act - Code of Criminal Procedure, 1997). The only reason for this is to abolish the imminent danger of losing one's life or serious health damage (e.g. turning off a dangerous machine, providing necessary personal protection equipment). The repeal should be caused by the perpetrator who previously created this danger, and not, for example, by entities responded to various spheres of public safety (Police, Fire Brigade, doctor, etc.). The action of the perpetrator must be voluntary in this respect, and not forced e.g. by other people or circumstances, that is external factors. It must also be effective (Radecki et al., 2010).

CONCLUSION

In the light of the above considerations, it should be stated that the position of employees seems special at the criminal level. The legislator protects the rights of these people, recognizing that this group is extremely vulnerable to certain dangers for life and health. Criminalization of the behaviours of the employer and other persons against the rights of employees is also justified by the asymmetrical position of both these groups and the employer's "advantage" over the employee.

Undoubtedly, the problem of crimes against the rights of people performing paid work is of great social significance and is an expression of the legislator's care for their safety. It is also important that the protection resulting from art. 220 (Act - Penal Code, 1997) has a general dimension and is independent of the place, time and manner of work, as well as the position of the employee in the organizational structure of the production enterprise.

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