

2022 Due Diligence Cases Scorecard: Part 1



Employers claiming due diligence in OHS prosecutions have gone 0 for 8 so far this year.

EMPLOYER LOSES ON DUE DILIGENCE (8 cases)

Ontario: Employer that Doesn't Have Right Safety Gear Can't Blame Violation on Worker

What Happened: A construction worker cleaning de-energized switch gear cabinets inadvertently opens the wrong cabinet. His paintbrush with a metal band makes contact with energized parts at the rear of the cabinet resulting in arc flash causing him severe burns. Somebody had also wedged open the door to the high-voltage room where he was cleaning.

Ruling: The Ontario trial court rejects the employer's reasonable mistake of fact due diligence defence, namely, that it didn't know the paintbrush had a metal band. The appeals court rules that the prosecution didn't prove the employer committed an OHS violation and tosses the convictions without even discussing the due diligence defence. The Court of Appeal has the final word, restoring some of the convictions but requiring further trial on others, for which due diligence

will be a relevant issue.

[*R. v. Bondfield Construction Company Limited*](#), 2022 ONCA 302 (CanLII), April 14, 2022

Saskatchewan: Employer Didn't Provide PPE or Adequate Overhead Crane Safe Operating Procedures

What Happened: An employer is charged with 2 OHS violations after a 22-year-old assembler operating an overhead crane suffers serious head and shoulder injuries in a lifting incident. The Sask. court finds the employer not guilty of the first charge, failing to ensure that a crane with a load rating greater than or equal to 5 tonnes is operated by a competent operator, because the operator had the education and training credentials required to be considered 'competent.' But the second charge, failure to provide and require workers to wear industrial protective headwear, goes the Crown's way.

Ruling: The employer didn't furnish the victim any head protection even though she was at risk of head injury. And the employer's contention that its strict overhead lifting safety policies proved due diligence failed because the policies addressed head injuries from falling loads but not the shifting of the crane's beam, which caused the incident in this case

[*R v Brandt Industries Canada Ltd.*](#), 2022 SKPC 4 (CanLII), January 31, 2022

BC: Employer Didn't Do Enough to Supervise Its Supervisor

What Happened: WorkSafeBC inspector who happens to be driving by a condo construction site observes 2 workers standing at the edge of the second floor and a third standing on an

unsupported plywood ledge without fall protection, while the site supervisor just stands around. The employer is just as appalled as the inspector but insists it used due diligence.

Ruling: WCAT upholds the \$105,000 AMP. The workers were properly trained in fall protection and there was no reason to suspect that the supervisor, a veteran who should have known better than to let them work without fall protection, would fail to properly supervise. However, the employer still should have gone to the site and done its own review and not simply trusted that the supervisor would do his job.

[A2101109 \(Re\)](#), 2022 CanLII 35564 (BC WCAT), 2021 CanLII 39534 (BC WCAT), April 20, 2022

BC: Roofing Contractor with History of OHS Violations Didn't Implement Safety Program

What Happened: WorkSafeBC inspector spots 2 workers without fall protection while on a roof over 14 feet from the ground at residential construction site. The employer claims due diligence and blames the violation on the supervisor and the young worker at the site who observed the violation without reporting it.

Ruling: The WCAT upholds the \$20,000 AMP. This went beyond a training or supervision breakdown. There were no anchor points and the employer didn't even have an OHS program. What it did have was 6 previous OHS contravention orders and 3 penalties.

[A2100881 \(Re\)](#), 2022 CanLII 35614 (BC WCAT), April 1, 2022

BC: No Due Diligence to Prevent Remote Risk with Severe Consequences

What Happened: Worker operating a coil winding machine reaches into the unguarded process area of the running machine and

loses the skin on 3 fingers. Plant hit with \$32,218 AMP for 13 OHS violations, including failing to install machine guards.

Ruling: The WCAT finds the plant didn't exercise due diligence. Even though the victims and other workers were trained in machine safety and the risk of the injury's likelihood was low, the plant knew that its consequences would likely be severe or even fatal if it did occur. In addition, WorkSafeBC Operational Safety Officers had warned the plant of the hazards posed by the machine.

[A2100828 \(Re\)](#), 2022 CanLII 27353 (BC WCAT), March 18, 2022

Saskatchewan: No Supervisor on Site When Fatal Machine Injury Occurs

What Happened: A cement worker setting up a tow of a powered out truck loses his life when the loader he was operating rolls backward and crushes him. The cement manufacturer is convicted of 2 OHS violations'failure to ensure a safe work procedure and proper supervision'but insists it isn't guilty and that the \$560,000 fine was too high.

Ruling: The Saskatchewan court rejects the appeal. The employer didn't show due diligence as to the safe work procedure because the procedure banning the operator from leaving the loader while setting up a tow was unwritten and there was no evidence showing it was adequately communicated to the victim; nor was due diligence shown with regard to supervision because the employer had initially assigned a safety supervisor to the site but then reassigned him leaving the site unsupervised on the day the incident occurred.

[R v Langenburg Redi-Mix Ltd.](#), 2022 SKQB 40 (CanLII), February 8, 2022

BC: Asbestos Abatement Contractor Can't Blame Subcontractor for Violating Stop Work Order

What Happened: WorkSafeBC inspector observes asbestos containing material (ACM) on a residential construction site and issues a stop work order to the asbestos abatement contractor. During a follow-up inspection 3 months later, the inspector finds that work has been carried out at the site and fines the contractor \$2,500 for defying the stop work order.

Ruling: The WCAT upholds the AMP. There was no evidence that the excavator that dug on the property while the stop work order was in effect acted on its own in defiance of the contractor's orders; and even if there was, it wouldn't prove that the contractor exercised due diligence to avoid violating the stop work order.

[A2002774 \(Re\)](#), 2022 CanLII 20700 (BC WCAT), February 9, 2022

BC: Lack of Actual Injury Is No Defense for OHS Violations

What Happened: WorkSafeBC fines a concrete operator \$2,640 after an inspector observes a concrete pump truck parked on a hill across an oncoming traffic lane partially blocking the road with its left outrigger and rear tires not on the ground and the boom fully extended over the front right outrigger. In addition, the worker directing traffic doesn't have traffic control equipment and none of the workers are wearing the required hardhats and safety glasses.

Ruling: The employer didn't have an OHS program and allowed a lax safety culture. The fact that nobody actually got hurt as a result of the violations was more luck than legal defence.

[A2100216 \(Re\)](#), 2022 CanLII 8488 (BC WCAT), January 21, 2022