# 2022 Due Diligence Cases Scorecard

Due diligence defences worked in only 3 of 18 OHS cases in 2022.

## EMPLOYER WINS ON DUE DILIGENCE (3 cases)

### Ontario: Failure to Furnish Cold Water Protective Devices Not Unreasonable

**What Happened:** It’s a cold but not freezing March night on Lake Erie when a lead deck hand of a 68-foot trawler fishing boat falls overboard. The crew can’t rescue him, and his body is later pulled out of the lake. The boat owner is charged with not taking ‘every precaution reasonable in the circumstances’ to protect a worker. Specifically, the Crown claims the owner failed to furnish and ensure the proper use of cold water protective equipment.

**Ruling:** The Ontario court dismisses the charge. It’s not enough for precautions to be ‘reasonable in some abstract sense.’ Reasonableness depends on the actual circumstances. Here, the temperatures were above freezing (6ø C), sailing conditions were perfect and the deck was dry. Nor was there any evidence that industry standards required cold weather protective equipment in conditions like these.

*Ontario (Ministry of Labour) v. Great Lakes Food Company Ltd.,* 2022 ONCJ 447 (CanLII), September 29, 2022

## BC: Due Diligence Results in Reducing Fall Protection Fine by $230,000

**What Happened:** WorkSafeBC fines a sawmill operator nearly $320,000 after a worker suffers serious injuries in a 17-foot fall from a platform. The operator admits committing a fall protection violation but argues that the penalty is too high.

**Ruling:** In BC, exercise of due diligence is a factor in determining the size of an administrative monetary penalty (AMP) for an OHS violation. The Workers Comp Appeals Tribunal (WCAT) found that the operator did exercise due diligence, citing its extensive safety measures including 'stand down meetings' with all workers site-wide to re-emphasize safety, minutes of meetings showing management stressed safety, annual review of safe work procedures, extra fall protection for workers working at heights and leadership safety inspections. **Result:** It cut the AMP to $89,100.

*A2101247 (Re)*, 2022 CanLII 83253 (BC WCAT), August 4, 2022

## Saskatchewan: Fatal Gas Leak Wasn't Reasonably Foreseeable

**What Happened:** A ball valve failure causes the release of deadly hydrogen sulfide gas killing an experienced oilfield worker who was working alone. The employer is charged with not taking all reasonable steps to protect him, including ensuring he was equipped with a proper respirator.

**Ruling:** The Saskatchewan appeals court upholds the lower court's ruling that the employer exercised due diligence. 'Hindsight is 20/20,' the court explains. The victim in this case had performed the task over 100 times without incident and the gas release that killed him was a 'distinct' incident

that wasn't reasonable to foresee. Moreover, the company had an extensive OHS management system, which it constantly monitored, to identify, assess and train workers in hazards.

*R v Champion*, 2022 SKQB 145 (CanLII), June 14, 2022

# EMPLOYER LOSES ON DUE DILIGENCE (15 cases)

## BC: Lack of OHS Program & Fall Protection Plan Kills Due Diligence Defence

**What Happened:** A siding installation worker working on a roof is killed in a ladder fall. WorkSafeBC inspectors fine the company for failing to implement a fall protection system for workers at risk of falling 3 metres/10 feet or more. The company claims that the victim carried out the work without authorization and was impaired by illegal drugs when the fall occurred.

**Ruling:** WCAT rejects the due diligence defence and upholds the $2,500 AMP for a high-risk violation. The lack of a 'robust safety program' and fall protection plan at the site cut the legs out from the company's contention that it took all reasonable steps to comply with OHS requirements.

*A2101332 (Re)*, 2022 CanLII 105140 (BC WCAT), October 4, 2022

# Qu□bec: Store Owner Didn't Use Due Diligence to Prevent COVID-19 Infection Risks

**What Happened:** After spotting retail workers wearing noncompliant cloth face masks, or no masks at all, while standing within 2 meters of customers and customers, a CNESST

inspector gives the store owner a warning and one week to correct the violation. Upon returning to the site, the inspector finds that workers are wearing medical masks but not required eye protection but still decides to give the store an extra week since management was confused about the PPE rules. But, when the third visit didn't prove to be the charm, the inspector hits the owner with an OHS violation.

**Ruling:** The owner claims it exercised due diligence to comply, but the Qu□bec court disagrees, finding that its 'passive' attitude and efforts weren't enough to prevent COVID risks in the workplace.

*CNESST c. 9023-4436 Qu□bec inc.*, 2022 QCCQ 5845 (CanLII), September 7, 2022

## BC: Hiring a Safety Consultant After the Fact Is Not Due Diligence

**What Happened:** A poultry plant worker suffers serious injuries after putting her hand into an unguarded machine. WorkSafeBC fines the employer $38,930 for machine guarding and lockout violations. While not denying the violations, the employer claims it exercised due diligence and doesn't deserve to be fined because it hired a safety consultant to identify gaps in its OHS program after the incident occurred.

**Ruling:** WCAT nixes the defence. As even the employer admitted, there were no safety procedures in place for the segment chiller in particular or lockout procedures for the site in general, even though the employer had been warned about the latter. Hiring a safety consultant after the fact doesn't amount to the due diligence, WCAT noted in upholding the AMP.

*A2100556 (Re)*, 2022 CanLII 83132 (BC WCAT), August 24, 2022

# Nova Scotia: No Enforcement of OHS Rules, No Due Diligence

**What Happened:** An OHS inspector issues a warning order and $1,000 AMP to a traffic control services contractor for not placing traffic cones, delivering the daily toolbox talk, having the traffic control plan available and other ‘very bad’ and ‘negligent’ infractions at a temporary worksite. The contractor claims it exercised due diligence, noting that it has an extensive OHS program and that traffic controllers must complete extensive safety certification training to work at the site.

**Ruling:** The Nova Scotia Labour Board is unimpressed. While acknowledging the contractor’s ‘meaningful investment in its internal safety program,’ the Board notes that it also knew from internal audits that some workers were cutting corners and didn’t use its progressive discipline authority to enforce the rules. **Result:** The due diligence defence fails and the AMP stands

*Safety First Contracting Limited (Re*), 2022 CanLII 69837 (NS LB), August 4, 2022

# Qu□bec: Unguarded Machine Is a Hazard Even If It’s Not in Use

**What Happened:** A CNESST inspector sees a bread mixer without a protective safety plate or grille, the same machine that CNESST had warned the bakery to guard 7 years earlier. The bakery claims due diligence, noting that there **was** a grille on the machine, but it was being repaired and that the machine wasn’t actually in use at the time the inspector saw it.

**Ruling:** The Qu□bec court pooh-poohs the due diligence defence. The bakery’s ‘you can’t use the machine without the grille’

argument didn't add up because, technically, it was possible to operate the machine without the grille. And simply ordering workers not to do so wasn't enough to protect them from risk of machine injury.

*9099-5507 Québec inc. c. Commission des normes, de l'équité, de la santé et de la sécurité du travail*, 2022 QCCS 2273 (CanLII), June 21, 2022

## BC: Relying on Experienced Supervisor Isn't Enough

**What Happened:** A faller cuts a tree which falls perpendicularly to its intended direction and strikes a supervisor standing within the 2-tree-length danger zone that must be kept clear when a tree is taken down. The employer is cited for multiple OHS violations but claims due diligence. The real cause of the incident wasn't lack of training, supervision or instructions but the supervisor's 'personal lapse in judgment' in venturing into the danger zone, it argues.

**Ruling:** True, the employer had safe work procedures for tree felling. However, relying on the supervisor's training and experience to ensure that safety rules are carried out isn't enough, WCAT reasoned in upholding the $18,275 AMP. And while the supervisor was aware of the 2-tree-length rule, there was evidence that the faller wasn't, including the fact that for some reason the supervisor didn't advise the crew about the rule during the morning tailgate safety meeting that took place the day the incident occurred.

*A2101892 (Re)*, 2022 CanLII 62221 (BC WCAT), June 20, 2022

## BC: Worker's Cell Phone Faux Pas No

## Excuse for Lockout Violation

**What Happened:** A sawmill worker performing maintenance on a ring barker machine notices that he's left his cell phone on a beam and steps into the path of activated log kickers to retrieve it, snaring his foot between one of the kickers and the side of the outfeed belt. WorkSafeBC hits the employer with a $254,000 AMP for a lockout violation.

**Ruling:** WCAT holds that the employer didn't exercise due diligence to comply with OHS lockout rules, citing evidence suggesting that the employer didn't provide adequate training to supervisors. WCAT did acknowledges that the employer had and enforced a policy banning workers from **using** personal cell phones during work hours but notes that the policy doesn't ban them from actually **possessing** them. As a result, it reduced the AMP by only 10%.

*A2101304 (Re)*, 2022 CanLII 62223 (BC WCAT), June 20, 2022

## 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 Defence 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