Are Employers Liable for a Worker's Failure to Follow Lockout Tagout Procedures?

Machine accidents cost dozens of Canadian workers their lives or limbs each year. Many of these accidents occur because a machine that's supposed to be turned off unexpectedly starts up while workers are servicing it. OHS laws require employers to implement lockout and tagout (LOTO) procedures to isolate and de-energize machinery before work is performed on it. The problem is that workers don't always obey those procedures.

Question: Are employers liable for the injuries these worker violations cause? **Answer:** It depends on whether the employer exercised due diligence to prevent the worker from committing the violation. Here are 2 cases illustrating the factors courts consider in determining an employer's responsibility for a worker's deliberate failure to follow company LOTO protocols.

Employer Is Liable

Although each case is unique, employers usually lose when they seek to blame a worker for LOTO or any other kinds of OHS violations. The following BC ruling is pretty typical.

Situation

A concrete plant worker seeking to make minor repairs to an

“off-bearer” machine while it’s still running suffers serious injuries after getting pinned between the machine and conveyor. The company blames the victim noting that in addition to not de-energizing the machine, he deliberately disabled an electronic gate and ignored warning signs not to enter the danger area.

Ruling

The BC Workers’ Comp Appeals Tribunal (WCAT) rejects the company’s due diligence defence and upholds the $59,818 administrative monetary penalty for lockout and other OHS violations.

Reasoning

The victim violated the plant’s lockout rules, the WCAT acknowledged; but the company was far from blameless. It was well-aware of the hazards posed by the off-bearer machine and why it needed lockout procedures, safety gates, warning signs, and other safety measures to control them. But it was also well-aware that workers were routinely ignoring the lockout rules and disabling the safety gates. And it allowed the situation to continue. As a result, it didn’t take the reasonable steps necessary to meet the standard of due diligence.

A1902764 (Re), 2020 CanLII 48060 (BC WCAT).

Employer Is Not Liable

While proving due diligence by blaming a worker is extremely difficult, it’s not impossible. Here’s a unicorn case where the strategy actually worked.

Situation

A maintenance supervisor and 2 workers decide to repair the

blower fans in a grain dryer without prior management approval. The workers ask the supervisor if they should lock the fans out. Do what you think is necessary, the supervisor replies. The worker repairing the upper fan nixes the lockout option; the worker on the lower fan goes the other way. After the lower fan is repaired, the supervisor turns on both fans not realizing that the other worker is still working on the upper fan. That worker gets his arm caught in the fan blades and suffers injuries requiring amputation above the elbow. The company is convicted of 2 OHS violations for failure to comply with lockout requirements. The company appeals.

Ruling

The Saskatchewan Court of King's Bench finds that the company exercised due diligence and overturns the convictions.

Reasoning

The Court reasoned that the company took reasonable steps to comply with the lockout rules and prevent the violations, noting that:

- The system that controlled the fans could be locked out in the master control room using a padlock expressly provided for that purpose.
- The company's safety manual included procedures for locking out the system.
- The supervisor and workers involved in the incident were all aware of the lockout procedure and the requirement to use it when working on electrical equipment.

Nor was there any evidence that the company failed to provide the workers and supervisor adequate training, information and resources to safely repair the fans. "It was their neglect of those instructions and procedures that led to the serious injury," the Court concluded.

1998. *v. Saskatchewan Wheat Pool*, [1998] CanLII 12942 (SK Q.B.), July 15, 1998.

Takeaway

It’s important to stress how reluctant courts are to allow employers to blame workers for OHS violations and that the BC case represents the mainstream and *Wheat Pool* very much the outlier. Why the *Wheat Pool* court ruled in favour of a defence that almost every other court has rejected isn’t apparent. One possibility is that *Wheat Pool* involved a deliberate violation by not only a worker but also a supervisor. Even so, the indifferent supervisor with a lax attitude toward safety rules is a recurring character in OHS due diligence cases. Also recurring is the ending finding the employer responsible for the supervisor’s willingness to tolerate worker safety violations.