Did Employer Commit OHS Violation by Failing to Use Engineered Solution?



SITUATION

A worker at a well site is working with a team of co-workers to remove a drilling pipe from a well and disconnect the pipe piece by piece. During the removal process, the rapidly releasing torque of the equipment causes rotating parts to move uncontrollably and the worker's hit in the head, suffering fatal injuries. As a result, his employer is charged with two OHS violations. The Crown argues that the evidence suggests a co-worker lifted the drill clear of slips that were meant to wedge against the drill and prevent such torque. The Crown's position is that the appropriate standard of care required the use of an engineered solution, i.e., a safety interlock device, to eliminate the problem of table torque. This device is used by the employer's competitors and is inexpensive, effective and easy to install. The employer argued that industry practice at the time didn't mandate nor was it reasonable to require an engineered solution given the safety procedures it had in place to protect workers, which the co-worker didn't correctly follow. (Note that the applicable OHS laws don't specify how employers are required to protect workers from torque under these circumstances.)

QUESTION

Did the employer commit a safety offence’

A. Yes, because the incident happened while the worker was performing his duties and arose out of the course of employment.

B. Yes, because the industry standard was to use a safety interlock device.

C. No, because the incident was the result of human error.

D. No, because using a safety interlock device would’ve been an undue hardship.

ANSWER

B. Industry standards required use of a safety interlock device that the employer failed to implement, so the employer committed an OHS violation.

EXPLANATION

This hypothetical is based on an Alberta decision in which the court addressed charges that the employer violated OHS law by failing to ensure the safety of its workers and to take reasonable and practicable measures to avoid or control an identified safety hazard. The Crown argued that the employer should’ve had safety bulletins and written procedures clearly explaining how the drill removal process should be safely conducted and implemented a safety lock system used in the industry. Following industry standards may help employers demonstrate their due diligence in eliminating or controlling safety hazards. The court explained that the goal of using engineered solutions is to avoid the sort of human error that occurred in this incident. Here, the evidence was clear that a safety interlock device used by industry competitors would’ve prevented the torque that killed the worker. And the employer itself engineered the same or a similar solution when specifically ordered to do so. Moreover, the solution was

cheap, quick and easy'and it was effective. So the court convicted the employer, ruling that the appropriate standard of care required 'nothing more than applying a small bit of common-sense engineering to a known problem.'

***Insider* Says:** For more information about industry standards and their role in proving an employer's due diligence, see 'Is Following an Industry Standard the Same Thing as Due Diligence'

WHY THE WRONG ANSWERS ARE WRONG

A is wrong because this standard is used for determining eligibility for workers' comp coverage for a worker's injury'not for determining if the employer failed to protect its workers in violation of OHS law. Although both standards involve safety, they're not interchangeable. The workers' comp standard focuses on whether an injury is compensable because it was work-related. The general standard for determining if an employer committed a safety violation essentially focuses on whether an employer took all reasonable steps to protect its workers from foreseeable hazards and to comply with the requirements in the OHS laws. In this case, the question is whether the employer had adequate measures and procedures in place to ensure the safety of workers when removing a drill pipe and thus the latter standard applies.

***Insider Says*:** For more information about compensable injuries, go to the Workers' Compensation Compliance Centre.

C is wrong because human error doesn't absolve an employer of OHS liability. In fact, an employer should anticipate human error and take that potential for mistakes into account in devising its OHS program and in determining the types of protective measures necessary. In addition, the preference is to address a hazard when possible through a physical or engineered solution such as a machine guard rather than through safety procedures that workers may not always follow.

Here, although the employer had safety procedures in place for the drill pipe removal process, the co-worker's error in following those procedures led to the worker's death. Because an engineered solution existed that would've prevented such an error and eliminated or minimized the potential for injury, the employer should've relied on the safety interlock device to protect workers rather than just safety procedures.

D is wrong because 'undue hardship' isn't the appropriate standard for determining whether an employer must implement a particular safety measure. Undue hardship is the standard used when reviewing an employer's efforts or ability to accommodate a worker's limitations due to illness, injury or disability. In this case, we are dealing with the standard imposed for *avoiding* injury, not accommodating it. In some circumstances, it may be 'impracticable' to implement a safety measure because there's a gross disproportion between the measure's benefit and the cost in time, trouble and money of implementing it. Here, the interlock safety device isn't impracticable because it's cheap, easy to install and effective.

SHOW YOUR LAWYER

R. v. Precision Drilling Canada Ltd., [2015] ABPC 115 (CanLII), June 1, 2015