Due Diligence Cases Scorecard 2021

Employers won on a due diligence defence in only 4 of 16 OHS cases in 2021.

EMPLOYER WINS ON DUE DILIGENCE (4 cases)

BC: Not Foreseeable that Experienced Workers Would Violate Lockout Rules

What Happened: WorkSafeBC imposes a $662,000 administrative monetary penalty (AMP) on an aluminum smelter for lockout violations after 2 workers servicing the reactor must be hospitalized as a result of exposure to aluminum dust.

Ruling: The BC Workers' Comp Appeals Tribunal (WCAT) rules that the employer used due diligence to comply and orders the AMP to be cut. The extra steps WorkSafeBC said the employer could have taken were 20/20 hindsight. The employer implemented elaborate group lockout procedures and it was totally unforeseeable that the victims would violate them, especially since they understood the potential safety consequences of noncompliance.

A2001267 (Re), 2021 CanLII 60123 (BC WCAT), June 30, 2021

Québec: Due Diligence Doesn't Require Compliance with ANSI Standard

What Happened: CNESST cites an employer for not providing required safe equipment, namely, a jack equipped with the anti-rotation rod and fall prevention device required by ANSI/ALCTV: 2011, even though the OHS regulation doesn't mention ANSI or any other voluntary standard.

Ruling: The Court of Québec tosses the charge due to lack of evidence that the ANSI standard is a best practice or that it even requires the rod and fall protection device. Besides, the ANSI standard isn't accessible to the public and is only in English.

CNESST c. S. Turcotte inc., 2021 QCCQ 5403 (CanLII), June 28, 2021

Québec: Roofing Contractor Used Due Diligence to Prevent Fall Protection Violation

What Happened: A CNESST inspector spots a worker descending a ladder without a harness and cites the contractor for a fall protection violation.

Ruling: The Court of Québec rules that the roofer took all reasonable steps to prevent the violation, including equipping its workers with a harness connected to a secure anchor line. But the worker, who was trained in fall hazards, chose to remove his harness before establishing his position on the ladder. And the contractor disciplined him for the violation.

CNESST v. Toiture Trois Étoiles, 2021 QCCQ 6059 (CanLII), July 19, 2021

Alberta: Employer Used Due Diligence to Prevent Worker's Machine Death

What Happened: When a dry mineral mixing hopper machine becomes clogged, the worker operating it climbs inside to try and fix it. The machine is turned on and the worker is killed. The employer, a livestock feed company, is charged with 24 OHS violations.

Ruling: The Alberta court dismisses all of the charges, concluding that even if the Crown had been able to prove the charge, the employer showed due diligence on each count, including regarding:

- **Training:** The employer did provide the victim proper training, including on the need to lockout before going inside the machine;
- **Competency:** The employer took adequate steps to ensure the victim was competent to operate the machine;
- **Supervision:** Having properly concluded that the victim was properly trained and competent, it was reasonable for the employer to determine he didn't need additional supervision;
- **Administrative Controls:** The employer's lockout procedure was 'perfect, but only if followed';
- **Confined Space:** The machine was a confined space but the employer had adequate rescue and communications procedures in place.

R v Taurus Natural Inc, 2021 ABPC 100 (CanLII), March 18, 2021

EMPLOYER LOSES ON DUE DILIGENCE (12 cases)

Ontario: Employer that Doesn't Have Right

Safety Gear Can’t Blame Violation on Worker

What Happened: A construction worker suffers partial paralysis after falling from a 10-foot ladder. The contractor and supervisor are convicted of not providing a scaffold based on evidence showing that workers using ladders must stand on at least the third highest rung to perform job tasks. The defendants claim the incident was unforeseeable and that the victim caused the fall by standing on the top rung.

Ruling: The Ontario court shoots down their due diligence defence. Workers conduct factors into due diligence only when all reasonable steps are taken to address a hazard and the worker undoes those careful safety measures. But the defendants didn’t do that. By furnishing 10-foot ladders instead of scaffolding, they exposed workers to fall hazards.

Ontario (Ministry of Labour) v. GMJ Electric Inc., 2021 ONCJ 102 (CanLII), February 22, 2021

BC: Employer Must Ensure Supervisors Enforce Safety Policies

What Happened: A contractor appeals a $15,600 AMP for a fall protection violation, citing the over $220,000 it’s spent on safety training and the fact that workers observed without fall protection deliberately went against that training.

Ruling: The employer could have done more to prevent the violation, especially since one of the offenders was a supervisor. ‘It’s the employer’s responsibility to ensure supervisors enforce compliance,’ notes WCAT. But while rejecting the employer’s due diligence defence, the tribunal acknowledges the employer’s OHS program and efforts to comply and cuts the AMP by 15%.

A2002337 (Re), 2021 CanLII 59963 (BC WCAT), June 28, 2021

BC: Foreseeable that Worker Who Worked Alone Without Supervision Before Would Do It Again

What Happened: A roofer working alone on the weekend without fall protection or any supervision falls to his death.

Ruling: WCAT upholds the $3,200 AMP, rejecting the employer's defence that it had no responsibility to protect a worker who took it upon himself to work alone in violation of company OHS rules. The employer could have reasonably foreseen that the worker might work alone without authorization or supervision violation having previously disciplined him for doing just that.

A2001043 (Re), 2021 CanLII 39534 (BC WCAT), April 23, 2021

BC: OHS Laws Protect Unpaid Volunteers

What Happened: A theater owner gets a $2,500 AMP after inspectors spot a worker on the roof without fall protection. The owner appeals, noting that the offender wasn't actually a worker but an unpaid volunteer.

Ruling: WCAT rejects the argument and upholds the AMP. OHS laws require employers to protect not just workers but others at the site, it reasons, including a volunteer doing painting work on the roof for an employer's benefit.

A2000902 (Re), 2021 CanLII 10760 (BC WCAT), January 18, 2021

Qu□bec: Court Upholds Stop Work Order for Construction Site Trenching Violations

What Happened: A CNESST inspector cites the project manager of a school construction for not having the required certificate from an engineer certifying the stability of the excavation walls at the site. There's still no certificate or trench

shoring when the inspector returns a month later.

Ruling: The Court of Québec upholds the stop work order. There was no due diligence defence for the missing engineer certificate because the inspector specifically told the project manager's president that it had to keep the certificate available at the site.

CNESST c. Construction Blenda inc., 2021 QCCQ 596 (CanLII), February 11, 2021

New Brunswick: No OHS Program, No Due Diligence

What Happened: A worker not wearing fall protection while repairing a ventilation system on the roof of a school takes a step backward and falls 5.16 metres to his death.

Ruling: The New Brunswick Provincial Court rejects the employer's due diligence defence and imposes a $125,000 fine for a fall protection violation. The absence of fall protection equipment and knowledge by workers and direct supervisors at the site was the direct result of the employer's failure to implement an OHS program.

District Scolaire Francophone Nord-Est, NB Provincial Court, unreported, December 4, 2021

Alberta: Employer Didn't Follow Scaffold Manufacturer's Instructions

What Happened: An OHS inspector spots window washers operating a swing stage scaffold on a windy day with forecasted gusts of up to 50 km. Upon discovering that the manufacturer's instructions advised against using the equipment in winds of 40 km or more, the inspector hits the employer with a $5,000 AMP for an 'egregious' violation.

Ruling: The Alberta Labour Relations Board refuses to second guess the inspector for not believing the employer's story that supervisors were monitoring wind conditions on their weather apps. So, it rejects the employer's due diligence defence and upholds both the penalty and penalty amount.

2298679 Ontario Inc. o/a Aurum Property Care, Board File No. OHS2020-4, March 11, 2021

BC: Relying on Report Finding No Asbestos Unreasonable When Previous Reports Say Otherwise

What Happened: An employer gets a $71,200 AMP for not having a qualified person conduct a hazardous material inspection to identify the presence of asbestos containing material (ACM) before carrying out renovation. The employer claims it relied on a previous inspection report finding no ACM in the area.

Ruling: WCAT rejects the employer's reasonable mistake of fact due diligence defence. The employer should have dug deeper and not simply relied on the report before starting work, especially since it had received previous reports suggesting that there actually was ACM in the area.

A2001234 (Re), 2021 CanLII 17947 (BC WCAT), February 16, 2021

BC: Relying on Supervisor's Opinion about Asbestos Is Not Due Diligence

What Happened: An employer gets a stop work order and $9,100 AMP for asbestos violations, including not wetting down potential ACM at a demolition site. The employer claims due diligence, noting that it has an extensive OHS program and that its supervisor, a man of 45-years experience, assured it that the site was safe

Ruling: Relying on a supervisor, no matter how experienced and

well-intentioned he may be, isn't due diligence, says WCAT, especially when that supervisor doesn't seek a professional opinion from an engineer before letting his crews start work.

A2001785 (Re), 2021 CanLII 85999 (BC WCAT), August 13, 2021

Québec: Strong OHS Program Not Enough to Prove Due Diligence When Risk Is Foreseeable

What Happened: Residual stored energy causes a machine that's supposedly locked out to start up unexpectedly and amputate a worker's thumbs. The employer argues that it exercised due diligence to comply, citing its OHS safety and prevention program and the lockout sheet workers must complete after performing a risk analysis to get team leader approval to carry out the work.

Ruling: Not good enough, says the Court of Québec. While acknowledging that the company takes safety very seriously and has an elaborate lockout program, it notes that the de-bolting of the screw that caused the residual energy to build up was a foreseeable risk that had happened on previous occasions.

CNESST v. Arbec, Bois d'oeuvre inc., 2021 QCCQ 7787 (CanLII), August 31, 2021

Saskatchewan: Subcontractor Should Have Sought Missing Safety Instructions

What Happened: A worker removes a pair of support pins from a cart used during concrete pouring operations to make it easier to move. As a result, the cart collapses and falls on another worker with fatal results. The employer is charged with failing to: i. ensure safe handling of the cart; and ii. provide adequate safety training and instruction.

Ruling: While acknowledging that the employer was a

subcontractor that received the cart from the general contractor without adequate safety instructions how to operate it, the Saskatchewan court rules that it should have tried to get the necessary safety instructions before letting its workers operate the equipment. Failing to do this was fatal to its due diligence defence.

R v Pilosio Canada Inc., 2021 SKPC 30 (CanLII), April 14, 2021

Saskatchewan: Employer Could and Should Have Installed a Machine Guard

What Happened: A loader operator seeking to unclog the chute of a conveyor at the bottom of a gravel pit gets his leg snagged in the tail pulley and bleeds to death. The employer is charged with 3 OHS violations and convicted of 2.

Ruling: The Saskatchewan court rejects the employer's due diligence defences. i. Safety Training: The employer provided safety training but it didn't cover safe removal of material on the chute above the tail pulley; and ii. Machine Guarding: None of the employer's other machine safety measures made up for its failure to guard the tail pulley, the court concludes, noting that:

- The other tail pulleys on site were guarded;
- The tail pulley at issue was manufactured with anchoring points to bolt a safeguard in place; and
- The employer could have installed a cover on the tail pulley at issue without investing 'new or complex resources.'

R v BLS Asphalt Inc., 2021 SKPC 25 (CanLII), March 30, 2021