The Insider's 12th Annual Due Diligence Scorecard, Part 2: 13 Lessons You Can Learn from Recent Due Diligence Cases

In Part 1 of the *Insider*'s 12th annual Due Diligence Scorecard, we summarized nine safety prosecutions decided since Sept. 2015 in which a company argued due diligence. Why should safety professionals care about these cases' Because these court, board and tribunal decisions contain real-life examples of what it takes to successfully prove due diligence and what errors can undermine this defence. So in Part 2 of the Scorecard, we've pulled 13 lessons from these cases, which you can apply to your OHS program and workplace.

13 DUE DILIGENCE LESSONS

Lesson #1: Compliance Is a Proactive Duty

A company can't sit back and rely on others, such as OHS inspectors, to identify hazards for it or tell it when it's not in compliance with OHS requirements. Your OHS program must be *proactive*'that is, you must be familiar with the OHS laws that apply to your workplace, activities and equipment, and ensure that you're in compliance with the applicable requirements. And if you're not, you must take appropriate steps to get compliant.

Example: During an inspection of a retail store, an OHS inspector saw that a conveyor lacked guarding at three pinch points. He issued the store a compliance order and imposed a $500 administrative penalty, which the store appealed. But the Nova Scotia Labour Board upheld the penalty, finding that the store hadn't exercised due diligence.

The store argued that it had never been brought to its attention that the conveyor, which had been in use in the store for 18 years, wasn't in compliance with the OHS laws. However, 'ignorance of the law is no excuse,' said the Board. If you own or operate a conveyor, you have a legal duty to know the law that applies to such devices and to comply with it. The guarding requirement for pinch points wasn't new'it had been in effect since 2000. So over the 15 years since that requirement had been in place, the store should've asked itself what regulations cover the conveyor and is the equipment in compliance with those regulations. But apparently, it never asked these questions or took any steps to update the conveyor, address the entanglement hazard and ensure compliance with all applicable OHS requirements. And, the Board added, in this day and age, it should come as no surprise that an older'arguably ancient'piece of equipment may

not meet current standards [*Red Apple Stores Inc. (Re)*].

Lesson #2: Having a Good General OHS Program Isn't Enough

Due diligence requires having a formal OHS program that spells out general safety rules and procedures, and defines the roles and responsibilities of the employer, contractors, supervisors and workers. An OHS program should also have specific safety procedures and rules for the company's operations, equipment, worksites and the jobs or activities that workers perform. But having a program that's generally effective won't support a due diligence defence if that program fails under specific circumstances or to address specific hazards or safety issues.

Example: A worker who was operating a backhoe at a construction site was fatally crushed when a drill rig on a platform collapsed. The subcontractor that owned the drill rig was charged with OHS violations related to its failure to provide a stable platform for the drill rig given the bearing capacity of the soil underneath it.

The Ontario Court of Justice convicted the subcontractor, finding that it hadn't exercised due diligence. The court noted that the subcontractor did have a good safety record, a thorough written safety policy and documented daily safety meetings, and it met the union's standards. But the due diligence defence is about the violation at issue'not an employer's general safety policy. 'A safe company with thorough safety procedures can err in one regard, and the issue will be whether its system was directed to avoiding that mistake,' explained the court. Here, proof of the subcontractor's general safety policy and methods didn't establish that it exercised due diligence as to the design of the drill rig platform and the soil's bearing capacity [*Ontario (Ministry of Labour) v. Advanced Construction Techniques Ltd.*].

Lesson #3: Lack of Incidents ' Due Diligence

A lack of safety incidents or injuries isn't the equivalent of due diligence. To prove due diligence, employers must show that they took all reasonable steps to protect workers and ensure compliance with the OHS laws, such as by regularly assessing the workplace for potential hazards and providing safeguards for those hazards identified. In analyzing an employer's due diligence defence, a board or court may consider the lack of safety incidents. But the fact that no one was ever injured by a piece of equipment doesn't *by itself* prove that the employer exercised due diligence as to that equipment. After all, the fact the equipment wasn't involved in any incidents could be sheer luck.

Example: In *Red Apple* discussed above, photos of the conveyor made it clear that a worker's hair or clothing could become entangled in the equipment, with potentially very serious consequences. The fact that there'd been no safety incidents or near misses involving the conveyor doesn't amount to due diligence, said the Board. The store never even considered the possibility that the equipment was potentially unsafe, which it should've given the conveyor's age.

Lesson #4: The Buck Stops with the Prime Contractor

The OHS laws spell out who has a duty to protect the health and safety of workers in the workplace. The employer is usually the one required to take the steps necessary to fulfill that duty. But in some circumstances, typically at

workplaces involving more than one employer, such as a construction site, an employer or the owner of a workplace can delegate some aspects of that duty to someone else, such as a prime contractor or constructor. In that case, the prime contractor has essentially the same duties as an employer. In other words, when a prime contractor is designated for a project, the buck stops with it when it comes to overall safety for that project.

Example: During an inspection of a large residential construction project, an OHS inspector saw an opening in a floor that didn't have guardrails. A carpenter who was working within feet of this opening did have on a fall restraint harness. But his rope was too slack to provide adequate protection if he fell through the opening. So the prime contractor for the project was issued administrative penalties relating to guardrail and fall protection violations, which it appealed.

The Nova Scotia Labour Board upheld the penalty, ruling that the prime contractor hadn't exercised due diligence. Given the large number of subtrades on the project, the prime contractor argued that it would be unrealistic to impose sole responsibility over all the trades to it. For example, it was a subcontractor's job to identify the need for guardrails and install them, which it failed to do as to this opening.

But the Board noted that the prime contractor had a comprehensive safety manual for the project and hired a full-time on-site safety officer, whose role extended to the whole project'including the trades. His twice daily site inspections reinforce the fact that it was the prime contractor that was in overall charge of safety on the project. For example, the safety officer would identify problems and would often deal directly with the tradesperson to have such problems immediately corrected, observed the Board. In fact, the prime contractor had authority to order the subcontractor to put up a guardrail at this opening. Thus, the evidence supported the conclusion that the prime contractor was in a position of overall control of the project and so it should assume responsibility for these violations, concluded the Board [*Southwest Construction Management Limited (Re)*].

Lesson #5: You Can't Completely Delegate OHS Duties

As discussed above, an employer may be able to delegate *some* OHS duties to another party. But when it does so, it still has a responsibility to follow-up and ensure that this party has complied with these duties.

Example: In *Advanced Construction*, the Crown argued that the platform the subcontractor provided wasn't adequate because the soil base couldn't withstand the weight and pressure of the drill rig. The subcontractor said it was reasonable for it to provide the drill rig manufacturer's specifications to another company and rely on that company to identify the soil's bearing capacity and confirm that the soil met those specifications. But the court found that sending the specifications to that company was only a reasonable *first* step to ensuring that the platform was adequate. To exercise due diligence, the subcontractor had to follow up and confirm that the soil's bearing capacity had been identified and was adequate for the drill rig, which it didn't do. In fact, there was no evidence that the subcontractor took any additional steps to confirm that the platform could support the drill rig.

Lesson #6: Inspections Must Effectively Identify Hazards

A crucial element of an OHS program is regular inspections of the workplace to identify safety hazards and potential hazards. But you must ensure that these inspections are effective and actually identify hazards (and that you then take steps to address any hazards found). If you conduct inspections but miss hazards that should've been easy to spot, a court is unlikely to consider such inspections to be proof of due diligence.

Example: During an inspection of an employer's plant, an occupational safety officer found dangerous accumulations of wood dust in the packaging room, which was 4-6 inches deep in some areas. The dust accumulations were in contact with potential ignition sources and thus posed the risk of serious injury or death to workers. And the dust accumulations had been present for two to three days. The employer was issued an administrative penalty for a high risk violation. It appealed.

The BC Workers' Compensation Appeals Tribunal upheld the penalty, ruling that the employer hadn't exercised due diligence. The employer argued that it had an effective wood dust control program that included regularly scheduled daily combustible dust inspections and that these dust accumulations were unforeseeable. The Tribunal found that these accumulations should've been identified in the employer's daily inspections and rectified immediately. However, the inspections either didn't identify this hazard or the hazard was identified but no action was taken to correct it and mitigate the risk to workers. Either way, these inspections were ineffective, concluded the Tribunal, and thus not proof of due diligence [*WCAT-2015-03747 (Re)*].

Lesson #7: You Must Have a Formal Training Program

Having a formal OHS program is a necessary step toward due diligence'but it's just the first step. You must also have a formal training program that trains workers (and supervisors) on your safety rules and procedures, the relevant requirements in the OHS laws and the safe use of the equipment that they operate. Informal training is unlikely to ensure that workers know what they need to know to work safely'and is unlikely to establish due diligence.

Example: Occupational safety officers saw a roofing company's worker on the sloped roof of a house about 18 feet above the ground. The worker was wearing a fall protection harness, but it wasn't attached to an available lifeline. The roofing company was hit with an administrative penalty for violations related to fall protection, training and supervision, which it appealed.

The BC Workers' Compensation Appeals Tribunal upheld the penalty, ruling that the roofing company hadn't exercised due diligence. Although the roofing company had taken some steps to ensure compliance with the fall protection requirements, it hadn't taken all reasonable steps. For example, when the workers were asked about the training they received, they said they only received 'informal training.' And although the company may have made good efforts to provide training on an informal basis, that training appeared to have missed important elements, such as how to prevent harness lines from getting entangled [*WCAT-2016-00094 (Re)*].

Lesson #8: Proper Training ' Simply Handing Workers a Safety Manual

You should give workers written safety training materials as part of your formal training program. But simply giving workers your safety manual and telling them

to read it isn't actually providing adequate training.

Example: A foreman at a coal-fired power plant was very concerned about a buildup of ice in a culvert near the utility shop. His superiors didn't believe the ice was a serious problem and specifically instructed him to leave it alone. But he decided to address the issue himself by placing a 'tiger torch' in the culvert to melt the ice. And when he asked a worker to check on the torch, that worker ended up suffering substantial burns. The plant was charged with four safety violations, including providing inadequate training to the injured worker as to the use of the tiger torch.

The Provincial Court of Saskatchewan acquitted the power company, ruling that it had exercised due diligence'despite the fact that it hadn't trained the injured worker on how to use the tiger torch. This piece of equipment wasn't regularly used by the injured worker or, in fact, by any of the workers. Because the worker was on a utility crew that typically performed basic maintenance and cleaning tasks that didn't require the use of such specialized equipment, it wasn't foreseeable that this worker would use the tiger torch and thus require training on it.

However, the court was critical of one aspect of the company's training program. The injured worker had been given a large amount of written safety material and was expected to read it. But he testified that he hadn't read most of it. And given the amount of material, the company should've expected that some workers wouldn't read it all or fully understand what they read. So the company should've evaluated workers on these materials, but little evaluation took place, noted the court [*R. v. Saskatchewan Power Corp.*].

Lesson #9: If You Provide Proper Training & Supervision, You Won't Be Liable for a Rogue Worker's Acts

If you provide adequate safety training to all employees and ensure workers get proper supervision, you're unlikely to be held liable if a worker goes 'rogue' and disregards his training.

Example: In *Saskatchewan Power Corp.*, the trial court found that the company 'made significant attempts to impress on its employees that safety was a critical part of their work.' For example:

- New workers got a safety orientation that stressed the importance of safety;
- The company had detailed safe work procedures, including one for 'hot work,' such as work involving use of a tiger torch'and these procedures were routinely followed;
- The foreman had completed 10 training modules on safety and attended a four-day course for supervisors; and
- He'd also been properly trained on all safety procedures, including those for hot work, and had followed them in the past.

In short, the court concluded that the company had exercised due diligence because it had provided the foreman 'with everything he needed to know to avoid the incident' and had taken all reasonable care to train him to be an effective supervisor. But the foreman didn't follow the hot work procedures when using the tiger torch. And he specifically defied instructions *not* to address the culvert issue.

However, courts won't always buy the argument that you took all reasonable steps and the workers simply disregarded safety protocol. Workplace safety in Canada is based on the Internal Responsibility System (IRS), in which *all* workplace stakeholders'including employers, supervisors *and* workers'have a duty to ensure the safety of the workplace. So even if a worker or supervisor commits a safety offence, a court may still find that you bear some responsibility for their misconduct.

Example: While a store worker was unloading a full pallet from a truck onto a pallet jack, he tripped on an empty pallet, fell and hit his head on stacks of items. He died two weeks later. The store was charged with failing to ensure the floor was kept free of obstructions, hazards and accumulations of refuse, snow or ice. It argued that the worker was at fault for not 'exercising ordinary prudence.'

But the Ontario Court of Justice convicted the store, rejecting the store's attempt to blame the worker. 'If it were a perfect world and all employees were always prudent and careful,' there would be no need for the OHS laws, explained the court. And this worker didn't have a history of failing to work safely [*Ontario (Ministry of Labour) v. Wal-Mart Canada Corp.*]

Lesson #10: Infractions by Supervisors Are Especially Damning

Because supervisors are responsible for ensuring that workers follow safety rules and comply with the OHS law, they will be held to a higher standard when it comes to safety compliance. So a court will be particularly skeptical of a company's due diligence efforts when a supervisor violates a safety rule or OHS requirement, or ignores unsafe behaviour by workers.

Example: An occupational safety officer saw workers and a supervisor on a 3.12 pitch roof without any fall protection. They were about six feet from the roof's edge, with no barriers in place to prevent them from falling. The company was issued an administrative penalty for fall protection violations, which it appealed.

The BC Workers' Compensation Appeals Tribunal upheld the penalty, ruling that the company hadn't exercised due diligence. The Tribunal found it 'most significant' that a *supervisor* was on the roof and aware that workers near the edge weren't wearing fall protection. The supervisor, who is considered an agent or extension of the company and thus responsible for worker safety, was condoning'not curtailing'the high-risk behaviour. His actions exhibited a lack of due diligence, concluded the Tribunal [*WCAT-2016-00528 (Re)*].

Lesson #11: Repeat Infractions Require Extra Attention

If a worker or a contractor violates the same safety rule or policy repeatedly, you need to take additional steps to ensure compliance and stop the infractions. Repeat safety infractions that you allowed to continue to occur will undermine your due diligence defence.

Example #1: In *WCAT-2016-00094*, the worker whose conduct was the basis for the violations had previously failed to wear fall protection. So 'it was incumbent' on the company to more closely supervise him, observed the Tribunal.

Example #2: In *Southern Construction*, the prime contractor's onsite safety

officer had noted several concerns regarding fall protection involving the subcontractor responsible for putting guardrails around the floor opening. And in his monthly summary of safety performance for this subcontractor, he'd listed problems regarding fall protection and missing guardrails. But although there had been guardrails in place around the floor opening, they were taken down'and there was no evidence as to why or when that happened. So the Board criticized the prime contractor for 'repeated safety concerns of the same type, which were recurring and not being consistently corrected.' As a result, it concluded that the prime contractor didn't exercise due diligence to prevent the violations for which the administrative penalties were imposed.

In addition, when evaluating a company's due diligence defence, the court will consider any prior safety violations, especially if they were for the same or similar offences. If you've been repeatedly cited for violating, say, the machine guarding requirements and yet still don't have adequate safety measures in place to ensure compliance with those requirements, your due diligence defence is likely to fail.

Example #1: In *WCAT-2016-00528*, the company had received numerous inspection reports, education attempts by occupational safety officers, a warning letter and prior administrative penalties, but 'there was no appreciable change in its conduct.' The Tribunal said that a company that had received numerous orders and prior administrative penalties in a two-year period and yet still doesn't have a documented safety program is 'exhibiting a gross lack of commitment to compliance and reckless disregard for its responsibilities' under the OHS law.

Example #2: In *WCAT-2015-03747*, the Tribunal noted that the employer had been issued administrative penalties for the same high risk violation three other times within the prior two years. Thus, it wasn't persuaded that the employer had taken all reasonable steps to avoid dangerous dust accumulations.

Lesson #12: Documentation Is Critical to Proving Due Diligence

Taking steps such as providing adequate training to workers, disciplining them for safety infractions and conducting workplace inspections won't help you establish due diligence if you can't provide evidence that you took such steps. So it's important to formally document all of your safety efforts and measures. (Go to the OHS Insider's Toolbox for model documents to help you do so.) Without such documentation, you may not have proof that you exercised due diligence.

Example #1: In the *Wal-Mart Canada* case, the store argued that it had exercised due diligence to prevent tripping hazards such as the empty pallet by developing and implementing a safety sweep program and clean-as-you-go policy, which were intended to keep work areas clean and free from slip, trip and fall hazards. The empty pallet on the floor of the receiving area and in an aisle leading to an emergency exit was clearly a hazard that should've been removed as part of this program and policy, said the court.

The safety sweep program required employees to sweep every three hours and document the results. The store had 'sweep logs' for the receiving area. But these logs weren't turned over to the MOL inspector or produced at trial. The court asked why the store bothered to keep such logs if they weren't readily found and produced. The logs would show either the diligent sweep of this area or the failure to do so. It's reasonable to assume that the receiving area logs would've been produced if they were 'favourably disposed' to the store. The

failure to produce the logs for the receiving area meant there was ‘no direct evidence’ on which the court could conclude that that program and policy were actually implemented in that particular area. Thus, the absence of the safety sweep logs for the area where the incident occurred resulted in a ‘failure of reliable proof’ that the store had taken every precaution reasonably available, concluded the court.

Example #2: In *WCAT-2016-00094*, the company couldn’t provide any documentary evidence of what training was provided, when it was provided and which workers received it. For example, the company didn’t have a ‘documented system’ of fall protection training or supervision, such as a safety manual, work procedures or disciplinary records.

Example #3: In *WCAT-2016-00528*, the company claimed that it provided adequate training and supervision as to fall protection, but couldn’t provide sufficient evidence of its efforts. For example, it didn’t provide documentary evidence of its training plans or schedules, fall protection plans, monitoring of workers, toolbox talks or other attempts to exercise due diligence.

Lesson #13: Safety-Sensitive Workplaces Must Address Worker Impairment

All employers’whether they run a manufacturing plant or an accounting firm’have workplace safety duties. But safety-sensitive workplaces that are especially hazardous may have heightened duties. For example, if an accountant is impaired by drugs or alcohol on the job, he’s unlikely to pose a safety threat to anyone (although his work will probably suffer). Now consider the possible consequences of a truck driver, crane operator or miner being drunk or high on the job. Because worker impairment in a safety-sensitive workplace can endanger the impaired worker, his co-workers and even the general public, such workplaces must take all reasonable steps to address drug and alcohol use by workers on the job.

Example: A truck driver was trying to unstick the gate on his trailer when the load of rock inside released unexpectedly. He was buried up to his chest and suffered fatal injuries. An investigation found that the driver was likely impaired by morphine or heroin at the time of the incident. His impairment contributed to two errors in judgment, which caused the tragic incident. The Workers’ Compensation Board concluded that among other things, the trucking company had inadequate procedures for ensuring that workers weren’t under the influence of drugs or alcohol and issued the company an administrative penalty, which it appealed.

The BC Workers’ Compensation Appeals Tribunal upheld the penalty, ruling that the trucking company hadn’t exercised due diligence. The company argued that because the driver was clearly impaired, the incident was his fault. But the Tribunal said it was difficult to understand how an effectively supervised worker could be permitted to operate a truck in that condition in the first place. Trucking is a safety-sensitive business. ‘Drug impairment in the context of commercial trucking is a serious hazard both to the general public and to workers present at worksites where an impaired truck driver is present,’ explained the Tribunal.

But given the obvious importance of supervising drivers to ensure they aren’t impaired, the company offered virtually no evidence of due diligence. Other than a statement in its safety manual that impairment was prohibited and could result

in termination, the company appeared to have left the issue up to its drivers. For example, there was no evidence the company regularly ‘spot checked’ drivers for impairment or conducted random alcohol and drug testing. And although the company claimed that it had fired some workers in the past for drinking, ‘that falls well short of taking the kind of proactive and effective supervisory approach essential for ensuring that alcohol or drug-impaired commercial truck drivers are prevented from placing the safety of the general public and other workers in peril,’ concluded the Tribunal [*WCAT-2016-00178 (Re)*].

BOTTOM LINE

Applying these lessons to your workplace and OHS program can help you ensure compliance with the OHS laws and provide proof, if necessary, that you exercised due diligence. For example, if a worker violates that same safety rule over and over, retrain him on that rule and provide extra supervision of that worker to ensure his compliance. And document all aspects of your OHS program so you can demonstrate exactly what steps you took to fulfill the OHS requirements. But don’t forget that the priority is protecting workers from injuries and preventing safety violations and incidents from ever happening. If you do so by exercising due diligence, you’ll also be protecting the company from liability and fines.

SHOW YOUR LAWYER

Ontario (Ministry of Labour) v. Advanced Construction Techniques Ltd., [2016] ONCJ 482 (CanLII), Aug. 3, 2016

Ontario (Ministry of Labour) v. Wal-Mart Canada Corp., [2016] ONCJ 267 (CanLII), May 6, 2016

Red Apple Stores Inc. (Re), [2016] NSLB 138 (CanLII), April 21, 2016

R. v.. Saskatchewan Power Corp., [2016] SKPC 2 (CanLII), Jan. 29, 2016

Southwest Construction Management Limited (Re), [2016] NSLB 129 (CanLII), April 14, 2016

WCAT-2015-03747 (Re), [2015] CanLII 95187 (BC WCAT), Dec. 11, 2015

WCAT-2016-00094 (Re), [2016] CanLII 17383 (BC WCAT), Jan. 12, 2016

WCAT-2016-00178 (Re), [2016] CanLII 18124 (BC WCAT), Jan. 21, 2016

WCAT-2016-00528 (Re), [2016] CanLII 17767 (BC WCAT), Feb. 22, 2016