Is the Lack of Safety Incidents the Equivalent of Due Diligence?



SITUATION

A two-level retail store in Nova Scotia uses a conveyor to move inventory from one level to the other. The conveyor has been in use at the facility for decades and was installed by a prior owner. The current store owner, who has owned the store for 18 years, never upgraded the conveyor. An OHS inspector finds that a worker with long hair or loose clothing could become entangled in a pinch point in the conveyor with potentially serious consequences. The inspector cites an OHS requirement enacted 15 years ago that requires pinch points be guarded. There are no exceptions in the OHS regulations to this requirement for older equipment. The owner says it wasn't aware of any safety issue or requirements concerning pinch points on the conveyor. The inspector imposes a $500 administrative penalty and orders the store to ensure all pinch points on the conveyor are guarded. The owner challenges the penalty, arguing that it exercised due diligence because the store has never experienced any safety incidents involving the conveyor.

QUESTION

Must the store comply with the order and pay the penalty'

A. Yes, because the conveyor posed a hazard to workers and

wasn’t compliant with the OHS laws.

B. Yes, because due diligence isn’t a defense to administrative penalties.

C. No, because the equipment must comply only with the safety standards in effect when it was first implemented in the workplace.

D. No, because the store exercised due diligence as to the conveyor.

ANSWER

A. The store must comply with the order and pay the penalty because it failed to address a hazard posed by the conveyor and ensure that this equipment complied with all applicable OHS requirements.

EXPLANATION

This hypothetical is based on a Nova Scotia labour board decision, which upheld a compliance order and administrative penalty against a retail store owner for failure to address a hazard and upgrade a conveyor to meet OHS requirements. Although the conveyor posed the risk of entanglement to workers, the store took no steps to protect workers from this hazard. In addition, the board said the owner’s ignorance of 15-year-old OHS requirements that applied to pinch points wasn’t a defense. Operators of equipment such as the conveyor have an obligation to know and comply with the legal requirements applicable to such equipment. Therefore, the order and penalty were warranted.

WHY THE WRONG ANSWERS ARE WRONG

B is wrong because due diligence *can* be a defense to an administrative penalty. Due diligence is a defence that can be raised in prosecutions for violations of the OHS laws. Administrative monetary penalties (AMPs) or administrative

penalties are essentially fines that OHS inspectors or other government officials can impose without going through a full-blown prosecution. (AMPS are very common under environmental law.) The jurisdictions that have administrative penalties may permit employers to argue due diligence in defence of those penalties. For example, in Nova Scotia, where this hypothetical is set, administrative penalties are allowed and due diligence may be raised as a defence to such penalties. So although the store wasn't formally prosecuted for a guarding violation, it may still raise due diligence as a defence to the administrative penalty for that violation.

***Insider* Says:** For more information about due diligence, visit the Due Diligence Compliance Centre.

C is wrong because employers must always comply with the current requirements in the OHS laws. Unless the OHS laws specifically provide an exception or 'grandfather' pre-existing equipment, employers must comply with current requirements set in those laws'regardless of the equipment's age. In this case, there are no exceptions to the guarding requirement for older equipment. During the 18 years the owner has owned the store and the conveyor, it could'and should'have asked what regulations, if any, cover this equipment and is the store in compliance with those regulations' But the owner apparently never asked this question and never upgraded the equipment to comply with current requirements. So the administrative penalty is warranted.

D is wrong because a lack of safety incidents 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. Here, despite the fact that there'd been no safety incidents involving the conveyor, the equipment posed a foreseeable entanglement hazard to workers. In addition, the conveyor wasn't in compliance with the guarding requirements under the current OHS regulations. And there was no evidence the store owner took any steps to update the conveyor, address the entanglement hazard and ensure compliance with all applicable OHS requirements, including those for the guarding of pinch points. So the store didn't exercise due diligence as to the conveyor.

SHOW YOUR LAWYER

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