

Measures Taken after Safety Incident May Impact Due Diligence Analysis



After a safety incident occurs in your workplace, you should take appropriate steps to determine the cause of the incident and address it to prevent similar incidents from happening in the future. But is taking such post-incident steps the equivalent of an admission that you were in violation of the OHS laws *pre-incident*?

A recent Ontario case addressed the issue of what relevance an employer's post-incident conduct should have in a related OHS prosecution.

A worker was trying to dislodge wood shavings from a silo that had become clogged. When he finally loosened the material, it fell on and buried him. He later died from his injuries.

After the incident, the employer implemented a procedure to prevent the clogging of the silo, removing the need for workers to physically clear blockages. The employer was charged with OHS violations. At trial, evidence of the new procedure was presented.

As to this evidence, the court said, 'I believe that I can look at post accident conduct in assessing what was reasonable in all of the circumstances. What I cannot do is treat them as an admission of liability.' The court added that it was relevant that the present procedure was instituted by the employer 'shortly afterwards and continues to this day.'

As a result, the court rejected the employer's due diligence defence and convicted it [*R. v. Reliable Wood Shavings Inc.*, [2013] 2013 ONCJ 518 (CanLII), Sept. 18, 2013].

Bottom line: Although an employer's post-incident addressing of a safety issue may not be treated as an admission of guilt, such conduct may be considered in assessing what steps were reasonable under the circumstances of the incident and

so could undermine your due diligence defence.

Does that mean you shouldn't take steps to address the causes of safety incidents? Of course not. But you should be prepared to explain why you didn't take such steps sooner.

Here's a look at two other cases that considered whether remedial measures taken by a company after a safety incident should be allowed as evidence of the company's guilt *before* the incident.