

# SCORECARD: Due Diligence Cases from 2019



## EMPLOYER USED DUE DILIGENCE (4 cases)

### Alberta: Unforeseeable that Experienced Crew Would Need Basic Rigging Training

**What Happened:** Oil crew member loses 4 toes after a sling falls from a tractor hook and causes a metal boom stick to fall on his foot. Crown proves only 1 of 8 OHS violations charged: failure to adequately train the crew on using a sling long enough for safe sling angles and using a choker to make the lift safer.

**Ruling:** The Alberta Provincial Court rules employer used due diligence and dismisses charge.

**Analysis:** Although they didn't take a formal rigging course, it wasn't 'reasonably foreseeable' that this experienced crew which had worked on so many pipeline jobs needed training in this basic rigging practice.

*R v Midwest Pipelines Inc*, 2019 ABPC 118 (CanLII), June 24, 2019

### Alberta: Employer Did Enough to Prevent Bizarre and Unforeseeable Incident

**What Happened:** A tire repair worker ordered the driver of a semi-truck with a flat tire to inch his vehicle forward on the platform, not realizing that another worker was underneath jacking the front wheels. The Crown claimed the shop owner didn't take 'reasonably practicable' measures to protect the victim.

**Ruling:** The Alberta court accepted the owner's due diligence defence and tossed the charge.

**Analysis:** Both workers were experienced and properly trained and the owner had clear lockout procedures. The incident was the result of a series of errors, miscommunications and terrible bad luck that were too bizarre to reasonably foresee, the court reasoned.

*R v. Kal Tire*, 2019 ABCA 44 (CanLII), Feb. 4, 2019 (Note: Appeal is pending in

## **Ontario: Occurrence of Machine Incident ‘ Proof Employer’s OHS Violation Caused It**

**What Happened:** A large splinter of wood about 18 inches long and a bit less than a broomstick in diameter is ejected at high speed from the input end of a large industrial saw and hits a worker at least 10 feet away causing permanent and disabling nerve damage to his arm.

**Ruling:** Ontario court reverses finding of no due diligence.

**Analysis:** The cause of the incident was unknown and the evidence showed that the employer properly cleaned and maintained the saw following the procedures and schedules set out in the manufacturer’s instructions.

*Ontario (Ministry of Labour) v. Alpa Lumber Mills Inc.*, 2019 ONCJ 223 (CanLII), March 28, 2019

## **Saskatchewan: Employer with Extensive OHS Program Not Liable for Totally Unforeseeable Incident**

**What Happened:** Stack of drywall sheets collapses during unloading and hits a worker in the head causing serious injury. Employer charged with failure to ensure safe stacking and handling of materials.

**Ruling:** Saskatchewan court accepts employer’s due diligence defence and dismisses the charge.

**Analysis:** It was unclear how the incident happened or how it could have been prevented. What was clear is that the employer had an extensive and up-to-date safety program, with ongoing training, inspection and auditing. All workers were wearing the required PPE and testified that in their extensive experience they’d never seen an incident like this before.

*R v Superior General Partner Inc.*, 2019 SKPC 40 (CanLII), June 20, 2019

## **EMPLOYER DIDN’T USE DUE DILIGENCE (13 cases)**

### **Alberta: Fall Protection Plan Is Just ‘Paperwork’ When Workers Ignore It**

**What Happened:** The roofing company didn’t deny that 4 of its workers were doing re-shingling work on a 5.19-metre-high roof with no fall protection but blamed it on the workers. We revised our safety manuals, implemented a fall protection plan for the project and warned workers that they could be disciplined for non-compliance, it claimed.

**Ruling:** The Alberta Labour Relations Board rejected the company’s due diligence defence.

**Analysis:** Simply ‘doing the paperwork’ isn’t enough to prove taking all the

reasonable steps required to show due diligence, especially considering that 2 of the offending workers were supervisors.

*J & M Roofing Services Inc.*, Board File OHS2018-11, Jan. 17, 2019

## **Ontario: Safety Procedures Without Supervision + Warning Isn't Enough**

**What Happened:** Extension arm of specialized truck being used to dig holes for replacement hydro lines hits live overhead power lines fatally electrocuting worker and seriously injuring 2 others.

**Ruling:** Ontario court finds no due diligence and upholds employer's conviction of 3 OHS offences.

**Analysis:** Having and training workers on safety procedures isn't enough if the employer doesn't provide adequate supervision to ensure they're properly implemented. The workers at this site were essentially left to themselves without any information about the specific hazards they faced, including the overhead wires.

*Hydro Ottawa Limited v. Ontario (Ministry of Labour)*, 2019 ONCJ 85 (CanLII), Feb. 15, 2019

## **Alberta: Employer Can't Blame Defective Brakes on Mechanics' Failure to Inspect**

**What Happened:** Two workers are injured in a one-vehicle incident involving a buggy with defective brakes that had been taken out of service but not marked as such. The employer is charged with 12 OHS violations but claims due diligence, contending that it had a system in place to prevent this situation and it was unforeseeable that defective brakes would go unnoticed by buggy operators.

**Ruling:** The Alberta court rejects the employer's due diligence defence and convicts on 8 counts.

**Analysis:** There was no written safe work procedure for operating the buggy; there were procedures for repairing defective equipment but they didn't provide for monitoring compliance as the OHS laws require. And blaming the mechanics for the violations would be an improper delegation of the employer's own compliance duties.

*R v D & J Isley & Sons Contracting Ltd.*, 2019 ABPC 9 (CanLII), Jan. 14, 2019

## **Alberta: Employer Can't Blame OHS Inspector for Causing Machine Guarding Violation**

**What Happened:** An OHS inspector sees a sawmill worker working underneath an unguarded rotating chain on a trim saw conveyor belt and issues a \$5K administrative monetary penalty. The sawmill appeals, contending that it was planning to guard the chain and that the worker was working on the other side of the belt and crossed under the chain only after the inspector asked him to move.

**Ruling:** The Alberta Labour Relations Board doesn't buy it and upholds the AMP.

**Analysis:** The inspector didn't order the worker to put himself in danger. Allowing the machinery to run before the planned installation was finished is flatly inconsistent with due diligence, and good intentions to complete the guarding at some point in the future isn't the basis of a due diligence defence.

*DH Manufacturing Inc.*, Board File OHS2018-12, Sept. 20, 2019

## **Qu bec: Safety Rules Without Discipline Isn't Enough**

**What Happened:** For some unknown reason, a subcontractor's worker was actually on the mezzanine at the time it was demolished. The prime contractor blamed the subcontractor and the worker's unpredictably reckless behaviour.

**Ruling:** The Qu bec court found no due diligence and convicted the prime contractor of a fall protection violation.

**Analysis:** Although the prime contractor implemented safety rules, the mere fact that a worker was present on the mezzanine the moment it was about to be demolished while a foreman was present suggests that discipline on the site was lax.

*CNESST c. Renovations Olymbec Inc.*, 2019 QCCQ 158 (CanLII), Jan. 22, 2019

## **Qu bec: Cause of Forklift Fatality Is Victim's Lack of Training, Not His Carelessness**

**What Happened:** A forklift driver parked his fully loaded vehicle at the top of an access ramp with a false flat of 1' without turning off the engine or engaging the parking brake. The forklift began rolling down the ramp and the driver chased after it but lost his footing and was run over, dying of his injuries 2 days later. The employer blamed the victim and cited his signature on the safety training program.

**Ruling:** The Qu bec court rejected the due diligence defence and found the employer guilty of not implementing a safe work procedure for stopping forklifts on an incline or providing proper training.

**Analysis:** A 90-minute training presentation dedicating only a few minutes to forklift safety and no time to safely stopping on an incline wasn't enough. The employer had to verify that the victim understood the training and knew how to safely stop his vehicle.

*CNESST c. 9267-5446 Quebec Inc.*, 2019 QCCQ 5578 (CanLII), Sept. 13, 2019

## **British Columbia: No Due Diligence to Prevent Asbestos Violations**

**What Happened:** Among the many questions raised by this case involving a pair of asbestos abatement contractors charged with civil contempt for failing to obey WorkSafeBC orders was whether the defendants used due diligence to prevent their numerous OHS asbestos violations.

**Ruling:** The BC court rejected the defendants' due diligence defence.

**Analysis:** Thinking they had done enough to comply was no defence to failing to post warning signs, lay tarps and protective coating on carpeted floors, safely remove drywall, provide adequate supervision, etc.

*Workers' Comp Board of BC v Skylite Building Maintenance Ltd.*, 2019 BCSC 231 (CanLII), Feb. 22, 2019

## **British Columbia: Implementing the Wrong Fall Protection System ' Reasonable Mistake of Fact**

**What Happened:** On 2 occasions, OHS inspectors observe workers on a roof without guardrails or active fall protection. The employer concedes that the control zones fall protection system he had in place didn't meet OHS rules but argues reasonable mistake of fact due diligence.

**Ruling:** The BC Workers' Comp Appeals Tribunal (WCAT) nixes the defence and fines the employer \$7.5K for a pair of fall protection violations.

**Analysis:** Not knowing the fall protection measures the OHS laws require isn't a 'reasonable' mistake for a roofing company, especially one that was fined for a similar fall protection violation just 2 years ago, the WCAT reasons.

*A1801896 (Re)*, 2019 CanLII 45924 (BC WCAT), March 8, 2019

## **British Columbia: Safety Manual Identifies Hazard but Doesn't Explain How to Deal With It**

**What Happened:** Worker suffers severe injuries in electrocution incident that occurs after he makes contact with a bus (conductor) energized with 4160 volts while replacing an oil circuit breaker with a new vacuum circuit breaker at a client's Terminal. The employer claims due diligence, citing its extensive OHS program and efforts to protect workers.

**Ruling:** The WCAT rejects the defence and upholds a \$68,682 fine for a high-risk violation.

**Analysis:** Although the employer did take significant steps to promote safety in the workplace, it didn't take all reasonable care in this situation. Specifically, it didn't establish a clear understanding with the Terminal

about whether the bus links needed to be removed before work began; and while its safety manual identified risk of backfeed, it didn't explain how to deal with the hazard when another party outside of the employer's workers was responsible for controlling it.

*A1701648 (Re)*, 2019 CanLII 46071 (BC WCAT), Feb. 7, 2019

## **British Columbia: Due Diligence Means Preventing**

## Violations Not Correcting Them After the Fact

**What Happened:** An OHS inspector spots workers at a construction site on the roof without fall protection. The employer doesn't deny the violation but points to all the things it did to correct the problem'demote the supervisor, implement a fall protection plan, install guardrails, provide fall protection training, etc.

**Ruling:** The BC WCAT says no due diligence and imposes a \$6K fine.

**Analysis:** Due diligence isn't about correcting violations afterwards but preventing them in the first place.

*A1800365 (Re), 2019 CanLII 46596 (BC WCAT), March 19, 2019*

## British Columbia: Due Diligence Is No Defence when the Violation Is Deliberate

**What Happened:** An OHS inspector observes a worker observed installing floor joists from a height of 19 feet above ground without wearing fall protection. I know fall protection is required, the employer acknowledges, but it's not available at the site. The inspector orders him to stop the work until fall protection is in place. When he returns 3 hours later, the work is still going on and workers are still without fall protection.

**Ruling:** The WCAT fines the employer \$6,467, quadruple its workers' comp base assessment, for an intentional violation.

**Analysis:** The employer not only didn't try to prevent but actually condoned the violation.

*A1801386 (Re), 2019 CanLII 45727 (BC WCAT), Jan. 7, 2019*

## British Columbia: Due Diligence ' Letting Untrained Supervisor Monitor Workers

**What Happened:** After seeing workers on a construction site performing framing work at an elevated height without fall protection, an OHS inspector cites the employer for fall protection violations. The employer's defence: Fall protection equipment was stored at the site but the supervisor-in-training was in charge that day and didn't know where the equipment was; we also held toolbox talks that workers signed off on.

**Ruling:** The WCAT pooh-poohs the employer's due diligence defence and imposes a \$3K fine.

**Analysis:** The supervisor-in-training signed off on forms acknowledging the requirement to wear fall protection but let workers work without it. Moreover, he hadn't received fall protection training himself. A duly diligent employer wouldn't let an untrained supervisor monitor workers.

*A1800364 (Re), 2019 CanLII 46039 (BC WCAT), March 19, 2019*

## **British Columbia: Employer Can't Blame Defying Inspector's Order on Reasonable Mistake**

**What Happened:** Employer allows work to continue at site after OHS inspector verbally orders temporarily delaying work to deal with an unstable excavation banking. The employer contends it made reasonable efforts to comply and blames the inspector for not providing clear directions as to her expectations.

**Ruling:** The WCAT upholds a \$7,311 fine for a high-risk violation.

**Analysis:** The employer's argument that it made a 'reasonable mistake' in believing itself to be in compliance is 'disingenuous,' says the WCAT. The employer asked the inspector not to issue a formal stop work order and, 'in the spirit of cooperation,' she agreed and allowed the stoppage to be voluntary. The employer, which had a history of violations, knew perfectly well that it shouldn't let the work continue and couldn't plead confusion after the fact.

*A1703972 (Re)*, 2019 CanLII 46609 (BC WCAT), 2019 CanLII 46039 (BC WCAT), Feb. 26, 2019

### **MIXED VERDICT ON DUE DILIGENCE (1 case)**

## **Saskatchewan: Employer Wins on Floor Opening but Loses on Guardrail**

**What Happened:** A residential construction worker falls 20 feet through a second-floor opening fracturing his hips, pelvis and 7 ribs. The employer is charged with 2 OHS violations and makes out a due diligence case for one but not the other.

**Employer Wins:** Not guilty of failure to securely cover the opening with a covering capable of supporting a load of 360 kg per square metre. Complying with the covering requirement was impracticable. When asked how a hole of that size could be covered, the OHS officer responded, 'I honestly don't know.' And if an experienced OHS officer didn't have a solution, it would be unfair to hold the employer responsible.

**Employer Loses:** Guilty of failure to provide a guardrail and toeboard around the opening. Although the employer was in the process of installing these precautions, the court rejected its due diligence noting that for hours it left the workers exposed to the kind of fall that eventually happened without having any interim fall protections in place.

*R v Norred Construction Ltd.*, 2019 SKPC 15 (CanLII), Feb. 11, 2019