THE INSIDER'S 10th ANNUAL DUE DILIGENCE SCORECARD: A Look at the Due Diligence Defence in Recent Cases

Due diligence is more than a defense to OHS violations—it's an approach to workplace safety that can protect workers and prevent safety incidents from ever occurring. That's why it's so important that safety professionals understand the elements of due diligence. But this apparently simple concept can be quite complicated when you try to apply it to your workplace and operations. And there are no assurances that the steps *you* believe are reasonable to ensure compliance with the OHS laws and prevent safety violations will pass muster when examined by a court. However, because courts rely on the decisions in other due diligence cases when deciding the ones before them, you can examine these decisions for guidance on what constitutes due diligence and which factors the courts will focus on in their analysis.

For the 10th year, the *Insider*'s annual Due Diligence Scorecard includes recently reported safety cases involving the due diligence defence from across Canada. This year's version picks up where last year's left off—in Sept. 2013. First, we'll review the key facts about due diligence and then look at the facts and

decisions in the cases.

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6 KEY FACTS ABOUT DUE DILIGENCE

Here are six key facts about the due diligence defence:

1. There are two kinds of due diligence: reasonable steps—the defence most commonly argued—and reasonable mistake of fact.

2. Due diligence is a defence that must be proven by a company or individual charged with a safety offence on a balance of probabilities. And having a strong OHS program based on due diligence may even keep OHS charges from being laid in the first place.

Example: In BC, the Crown announced that no charges would be filed against a sawmill based on an explosion and fire that killed two workers and injured many others. The government said there was no substantial likelihood of conviction for any regulatory offences due to the inadmissibility of some of the evidence gathered by investigators and the sawmill's likely due diligence defence [*Babine Forest Products*, Govt. News Release, Jan. 10, 2014].

3. Anyone charged with a violation of the OHS laws, including companies and individuals such as corporate officers, owners, supervisors and workers, can raise a due diligence defence.

4. The due diligence defence applies to violations of the OHS and environmental laws as well as to other so-called "regulatory" laws.

Example: A crash truck was positioned to protect workers cleaning up the scene of a traffic accident. It's amber lights were flashing and it had an illuminated arrow directing drivers into the center lane. A truck driver slammed his tractor-trailer into the crash truck, injuring himself, the driver of the crash truck and two workers. The truck driver was charged with careless driving. He argued that he'd exercised due diligence. But the court convicted him, ruling that he didn't take all reasonable steps to avoid the accident [*R. v. Krzyzanowski*, [2014] ONCJ 479 (CanLII), Sept. 12, 2014].

And due diligence can also arise in other, related contexts, such as a defence in a civil lawsuit.

Example: Two workers for a community centre were shot and injured in the centre's parking lot. They sued the city that ran the centre for violating the collective agreement and its duties under the OHS law. The arbitrator said the city knew the centre was in a high-risk neighbourhood and had had frequent violent incidents. The workers there considered it unsafe and the city was aware of their concerns. It had gotten recommendations on how to make the centre safer, which would have been easy to implement. But the city made only a few of the requested changes despite the fact its own safety audit indicated the risk of a workplace incident was high. So the arbitrator concluded that the city failed to take reasonable steps to ensure the centre was a safe working environment [*Toronto (City) v. Canadian Union of Public Employees, Local 79 (Charles Grievance)*, [2014] O.L.A.A. No. 34, Jan. 20, 2014].

5. Although due diligence isn't technically a defence to criminal negligence or so-called "C-45" charges, proving that you exercised due diligence makes it essentially impossible to be convicted of criminal negligence.

6. Courts consider various factors when evaluating a due diligence defence, including foreseeability, preventability, control and degree of harm.

***Insider* Says:** For more information on due diligence, go to the Due Diligence Compliance Centre, which contains each year's Due Diligence Scorecard as well as dozens of other articles and information on this defence, including 10 due diligence traps to avoid and industry standards and due diligence.

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THE SCORECARD

This year, we found 21 safety prosecutions decided since Sept. 2013 in which the verdict turned on the success or failure of a company's or individual's due diligence defence. (Last year's Scorecard had 12 cases.) For each of this year's Scorecard cases, we tell you what happened, whether the company (or individual) won or lost and how the court or tribunal analyzed the due diligence defence. In Part 2, we'll explain the lessons you can learn from these cases and use to evaluate your OHS program.

In this year's Scorecard:

- The defendant won in three cases from BC and ON;
- In one case from the Yukon, one defendant won, but three others lost; and
- The defendant lost in 17 cases from AB, BC and ON.

Most of the defendants in the Scorecard cases were companies prosecuted as employers under the OHS laws. But a few cases involved the prosecution of companies as constructors or prime contractors.

The most common violations prosecuted in these cases:

- Fall protection (9);
- Excavations/trenches (2);
- Guarding (2); and
- Power lines (2).

All of the cases involved the reasonable steps version of the due diligence defence but, in two cases, defendants also argued reasonable mistake of fact.

2014 DUE DILIGENCE SCORECARD

Here's a synopsis of 21 cases decided since Sept. 2013 in which a court or tribunal had to evaluate a company's (or individual's) due diligence defence in an OHS prosecution.

[learn_more caption="COMPANY/INDIVIDUAL WINS"]
[box]**BC:** *WCAT-2013-02719*[/box]

What Happened: A safety officer saw a worker in a road-side excavation with walls that were almost vertical and had no shoring. The excavation also appeared to be more than four feet deep. The officer asked the subforeman if the

excavation had been certified by a professional engineer and he said no, explaining that they believed that the asphalt at the top of the excavation kept it safe. As a result, the employer was charged with OHS violations, including failing to train and supervise its workers. The employer was hit with administrative penalties for these offences and appealed as to the training and supervision violations (it admitted violating the trenching requirements).

Ruling: The BC Workers' Compensation Appeals Tribunal overturned the penalties, ruling that the employer had exercised due diligence.

Analysis: The employer argued that it trained and supervised its workers in an effective manner. The Tribunal agreed. In fact, the employer had sent the workers and subforeman to a safety course on trenching a week before the officer's observations. The failure to comply with the trench requirements as to this excavation fell on the subforeman. And because the employer had taken all reasonable steps to ensure that he was trained, supervised and knowledgeable, the employer acted with due diligence and wasn't liable for his oversight, concluded the Tribunal.

WCAT-2013-02719 (Re), [2013] CanLII 80619 (BC WCAT), Sept. 30, 2013

[box]**ON:** *Flynn Canada Ltd.*[/box]

What Happened: A company hired an electrician to assess damage that was done to an electrical cable by a worker operating a drill. To do an initial examination of the cable, the electrician met with a company supervisor. They climbed a ladder that was held secure by a worker to look at the cable. The ladder didn't have non-slip feet. When the electrician returned a few days later to repair the cable, he climbed the same ladder but it wasn't secured or held by anyone. The ladder slipped and he fell, suffering serious injuries, including a broken wrist, severed main artery, dislocated elbow and fractured face. The company and its supervisor were charged with various OHS violations. The trial court acquitted the defendants, so the Crown appealed.

Ruling: The Ontario Court of Justice upheld the acquittal, ruling that the company and supervisor had exercised due diligence. The court also accepted the supervisor's mistake of fact defence.

Analysis: The court noted that the company had safety policies and training on ladder safety. It had previously used the electrician, who was well trained in safety. And the supervisor had instructed him not to use the ladder without it being held. So the court concluded that the company had taken every reasonable precaution in the circumstances. In addition, at the electrician's request, the company had made a scissor lift available for the work, added the court. The supervisor mistakenly believed the electrician wouldn't use the ladder without someone holding it and would use the scissor lift instead. These mistaken beliefs were reasonable. Thus, the mistake of fact defence also applied, concluded the court.

R. v. Flynn Canada Ltd., [2013] O.J. No. 6232, Oct.. 31, 2013

[box]**ON:** *Bay Grenville*[/box]

What Happened: Workers for a subcontractor at a construction site were using a crane to move a platform from the 23rd to the 22nd floor. To do so, they removed

safety fencing on the 23rd floor. The crane knocked a heavy piece of cast iron pipe off the 23rd floor, striking a supervisor for a plumbing company standing below and causing fatal head injuries. The MOL charged the constructor, a site superintendent, the subcontractor, the plumbing contractor and its site foreman with OHS violations. The subcontractor pleaded guilty, while the remaining four defendants went to trial and were acquitted.

Ruling: The Ontario Court of Justice upheld the acquittals, ruling that the defendants had exercised due diligence.

Analysis: The court found that the subcontractor was primarily, if not solely, responsible for the incident. One of its workers who was supposed to guide the crane from below was out of position and the other shouldn't have told the crane operator to go ahead before ensuring there was nothing in its path. The court also found that the other defendants had exercised due diligence. As to the constructor and site superintendant in particular, the court observed that the constructor had taken numerous steps to ensure the safety of the work at this large project, including developing a safety manual for the project, having the site superintendent constantly onsite to deal with safety issues and conducting weekly inspections to identify hazards.

Ontario (Ministry of Labour) v. Bay Grenville Properties Ltd. et al., [2014] ONCJ 349 (CanLII), July 21, 2014
[/learn_more]

[learn_more caption="SPLIT DECISION"]
[box]**YT:** *Yukon Tire*[/box]

What Happened: An oil company took its truck to a tire shop for work, where it was parked and its engine turned off, with the keys left in the ignition. A worker jacked up the truck but took no precautions to prevent it from moving. A supervisor started the truck's engine while the worker was still working. An oil company worker came to pick up the truck, got in it and drove away, running over the worker who'd gone underneath it to retrieve a jack and killing him. The tire shop and a supervisor and the oil company plus one of its supervisors were charged with OHS violations.

Ruling: The Territorial Court of Yukon convicted the tire shop, the oil company and its supervisor, ruling that they hadn't exercised due diligence. But it acquitted the tire shop supervisor.

Analysis: Although the tire shop fostered safe work, the court found that its OHS program as to lockout wasn't sufficient. For example, leaving the keys in a vehicle's ignition was "normal practice." Likewise, the oil company had an extensive safety manual, which required "walk-arounds" before using a vehicle. But it didn't enforce the walk-around policy. And in fact, the driver failed to do a walk-around, causing this tragedy. In addition, the oil company's training of the driver wasn't complete.

Yukon (Director of Occupational Health and Safety) v. Yukon Tire Centre Inc., [2014] YKTC 4 (CanLII), Jan. 29, 2014
[/learn_more]

[learn_more caption="COMPANY/INDIVIDUAL LOSES"]
[box]**BC:** *WCAT-2013-02380*[/box]

What Happened: The general contractor for a home construction project hired an excavation company to prepare the site for construction. The excavator operator made a cut below a retaining wall and repacked the fill against the bank to hold it and the wall in place. He then told the site superintendent that one slope appeared to be unstable. An engineer provided a suggested plan to address the issue. The site superintendent gave the uncertified plan to a form company making the foundation. While the form company's workers were preparing piling holes, part of the bank and retaining wall collapsed onto a young worker. He sustained a broken pelvis and internal injuries. The general contractor was issued an administrative penalty for OHS violations. It appealed.

Ruling: The BC Workers' Compensation Appeals Tribunal upheld the penalty, ruling that the general contractor hadn't exercised due diligence.

Analysis: The Tribunal was critical of the general contractor's safety efforts at the site. For example, there was no safety plan in place nor did workers get a site orientation before the excavation work started. The general contractor didn't properly supervise the site superintendent, who didn't follow its safety procedures. Lastly, the contractor was aware of a safety hazard—the unstable slope—but didn't take adequate steps to address it.

WCAT-2013-02380 (Re), [2013] CanLII 79016 (BC WCAT), Aug. 26, 2013

[box]**BC:** *WCAT-2013-02499*[/box]

What Happened: A pulp and paper company operated two mills connected by a pipe bridge, which was leaking. The bridge ran under three power lines. The company hired a scaffolding contractor so that repairs could be made to the bridge. A worker standing on a scaffold platform near the bridge was handed a more than 20' long piece of aluminum tubing and flipped it over. As he did so, it contacted a power line and the resulting electrical shock threw him across a beam in the bridge. The worker suffered serious injuries. The company, as prime contractor for the work, was issued an administrative penalty for violating the OHS laws. It appealed.

Ruling: The BC Workers' Compensation Appeals Tribunal upheld the penalty, ruling that the company hadn't exercised due diligence.

Analysis: As the prime contractor, the company was required to do everything reasonably practicable to ensure safety on the work site. And the Tribunal acknowledged that the company had taken numerous appropriate steps, such as screening the scaffolding contractor, training its workers and auditing its safety systems. But the proximity of the power line to the scaffolding was an obvious hazard. A worker standing on the top deck would be within the safe approach limits—even without holding any equipment, noted the Tribunal. Thus, it was incumbent on the company to ensure that safety planning was conducted to address this hazard, which it didn't do.

WCAT-2013-02499 (Re), [2013] CanLII 80043 (BC WCAT), Sept. 9, 2013

[box]**ON:** *Reliable Wood*[/box]

What Happened: A driver for a wood shavings company positioned a truck underneath a flooring company's silo and began to transfer wood shavings from the silo into the truck box. He was working alone. Two workers later went to the

silo but couldn't find the driver, who was eventually discovered buried under the shavings in the truck box. He died from his injuries. The driver's employer was charged with two OHS offences.

Ruling: The Ontario Court of Justice convicted the employer, ruling that it hadn't exercised due diligence.

Analysis: The evidence showed that when the material in the silo clogged, the standard procedure was for the worker to stand inside the truck box and poke at the material until it fell. The employer was aware that this procedure was dangerous. But its safety materials didn't warn workers of the danger posed by the falling material or tell them to stay away from the silo opening during the procedure. Thus, the employer didn't exercise due diligence to protect workers performing this inherently dangerous task.

R. v. Reliable Wood Shavings Inc., [2013] ONCJ 518 (CanLII), Sept. 18, 2013

[box]**BC:** *WCAT-2013-03241*[/box]

What Happened: A safety officer saw a worker and a supervisor at a worksite installing roofing material on a cedar shingle roof. Although they were wearing fall protection harnesses, they weren't attached to lifelines. There were roofing materials in the work area that posed a tripping hazard. And the cement path and fence below that area increased the likelihood that they'd suffer a serious injury if they fell. As a result, the employer was issued an administrative penalty for a fall protection violation and appealed.

Ruling: The BC Workers' Compensation Appeals Tribunal upheld the penalty, finding that the employer hadn't exercised due diligence.

Analysis: The employer argued that the worker and supervisor were experienced roofers who'd been properly trained and had the appropriate fall protection equipment. And the Tribunal agreed that the employer had properly trained them as to fall protection. But it didn't adequately supervise them. The employer conducted spot checks of workers and verbally warned non-compliant workers. But given this incident and the employer's prior fall protection violations, it was clear that this system wasn't motivating workers—and supervisors—to comply with the fall protection requirements. So the employer should've done more to ensure their compliance, such as requiring non-compliant workers to get additional training. Thus, it didn't exercise due diligence, concluded the Tribunal.

WCAT-2013-03241 (Re), [2013] CanLII 79442 (BC WCAT), Nov. 21, 2013

[box]**BC:** *WCAT-2013-03358*[/box]

What Happened: At a residential construction site, a painting sub-contractor held a ladder in place on a lower roof section while a worker climbed it to paint a gable. Neither were wearing fall protection. The ladder became unstable and both fell, suffering minor injuries. The prime contractor for the site was issued an administrative penalty for OHS violations and appealed.

Ruling: The BC Workers' Compensation Appeals Tribunal upheld the penalty, ruling that the prime contractor hadn't exercised due diligence.

Analysis: The prime contractor argued that the painting sub-contractor was at

fault and it had exercised due diligence to ensure this contractor complied with the OHS laws. But the Tribunal explained that the prime contractor, as owner of a multiple employer worksite, had to have not only a generally effective system in place to oversee contractors, but also specific systems relevant to that particular workplace and specific contractor. Although the prime contractor had a general oversight system, it failed to effectively oversee this worksite and this sub-contractor. It simply told the painting sub- contractor what his duties were but didn't otherwise supervise him, assuming he would comply. The Tribunal concluded that although the painting sub-contractor was obviously at fault, the prime contractor's failure to adequately supervise him reflects its breach of its own safety obligations and lack of due diligence.

WCAT-2013-03358 (Re), [2013] CanLII 80101 (BC WCAT), Nov. 29, 2013

[box]**BC:** *WCAT-2013-03550*[/box]

What Happened: A young worker who'd only been hired days before was working as a traffic control person at a road construction site when she was hit from behind by a vehicle and suffered life-threatening injuries. Her employer was issued an administrative penalty for various OHS violations and appealed.

Ruling: The BC Workers' Compensation Appeals Tribunal upheld the penalty, ruling that the employer hadn't exercised due diligence.

Analysis: The Tribunal noted that there had been several near misses at this same site in which traffic control persons were nearly hit by oncoming vehicles. The employer was aware of these near misses and the safety issues they raised, such as the speed of traffic near the site and visibility of the traffic control persons. But it didn't properly investigate these near misses or implement corrective measures in response to them, concluded the Tribunal. It also didn't ensure that basic safety measures, such as having a traffic control supervisor on site, were in place.

WCAT-2013-03550 (Re), [2013] CanLII 95360 (BC WCAT), Dec. 19, 2013

[box]**BC:** *WCAT-2013-03580*[/box]

What Happened: An anonymous caller informed the workers' comp board that workers were on a roof without fall protection. A safety officer went to the site and saw two workers working at the edge of a roof without proper fall protection. They were at risk of falling 20-30 feet. Their employer was issued an administrative penalty for several safety violations. It appealed.

Ruling: The BC Workers' Compensation Appeals Tribunal upheld the penalty, ruling that the employer hadn't exercised due diligence.

Analysis: The Tribunal acknowledged that the employer had a detailed overall safety program. But it didn't take all reasonable steps to ensure that workers wore fall protection as directed. For example, the employer didn't have a supervisor visually confirm workers' use of appropriate PPE and check on its continued use on a regular basis. In this instance, the employer didn't have a supervisor confirm even once that these workers were using their fall protection.

WCAT-2013-03580 (Re), [2013] CanLII 95347 (BC WCAT), Dec. 20, 2013

[box]**BC:** *WCAT-2014-00065*[/box]

What Happened: A safety officer saw workers for a roofing company at a multi-story housing development site on the roof without fall protection. One worker was talking on his cell phone while standing with his back to the edge of the roof. In addition, although the fall protection plan for the site required the installation of guardrails and anchors, there were no guardrails along the roof's perimeter or anchors. The company was issued an administrative penalty for fall protection and other safety violations. It appealed.

Ruling: The BC Workers' Compensation Appeals Tribunal upheld the penalty, ruling that the company hadn't exercised due diligence.

Analysis: The company blamed the prime contractor for the violations. But the Tribunal said that when the company's crew arrived and found that the guardrails and anchors hadn't been installed as required by the fall protection plan, the supervisor should've contacted the prime contractor and found out when this equipment was going to be installed. He could also have refused to let the crew work on the roof until the equipment was installed or made other arrangements for its installation. Instead, the supervisor deviated from the safety plan, developed a modified plan and then took the only handwritten copy of the new plan with him when he left the site. And the workers weren't trained on or supervised in executing this new plan, added the Tribunal.

WCAT-2014-00065 (Re), [2014] CanLII 44439 (BC WCAT), Jan. 10, 2014

[box]**BC:** *WCAT-2014-00128*[/box]

What Happened: A ski resort used a device called a "magic carpet" to transport skiers from the bottom to the top of the hill. This moving walkway was operated by a drive station at the top and a return station at the bottom, which was essentially a box containing a revolving drum that the carpet looped around. To clear ice from the drum, which can cause the carpet to get off track, workers were instructed to open an access panel in the return station and spray the drum with a de-icing product. The resort also warned them not to reach into the return station while the carpet was moving. But while de-icing the drum, a worker reached his hand in and got it caught. He suffered a serious injury. The resort was penalized for lockout, guarding and other violations. It appealed.

Ruling: The BC Workers' Compensation Appeals Tribunal upheld the penalty, ruling that the resort hadn't exercised due diligence.

Analysis: The Tribunal commended the resort for developing written safety procedures for de-icing the drum and training workers on them. But the written procedures, verbal warnings and signs weren't adequate and couldn't substitute for the obvious need for a machine guard. A physical barrier could've been installed on the return station without interfering with the de-icing process. The Tribunal concluded that due diligence isn't "merely acting without negligence." It requires taking all reasonable steps, and a reasonable and obvious step here was to install guarding.

WCAT-2014-00128 (Re), [2014] CanLII 44604 (BC WCAT), Jan. 16, 2014

[box]**BC:** *WCAT-2014-00331*[/box]

What Happened: A safety officer inspected a worksite and saw two workers and a supervisor on a steeply sloped roof about 20 feet above grade without any fall protection. They were distributing materials received by crane. When the officer asked the supervisor why they weren't using fall protection, the supervisor said he "knew better but the crane was charging by the hour." The supervisor also failed to complete a fall protection plan. The employer was hit with an administrative penalty for a fall protection violation and appealed.

Ruling: The BC Workers' Compensation Appeals Tribunal upheld the penalty, ruling that the employer hadn't exercised due diligence.

Analysis: The employer took some steps to ensure safe work practices, such as providing safety training for workers and conducting unannounced site checks, said the Tribunal. But it failed to take adequate steps as to its supervisors. For example, the supervisor involved in the circumstances that led to the violation hadn't gotten all of his supervisory training before starting to work as a supervisor. In addition, he also said he wasn't sure how seriously he took safety and discipline. So the employer didn't take reasonable steps to provide adequate supervision and ensure that those in supervisory positions had the training and attitude necessary to ensure safety on the job, concluded the Tribunal.

WCAT-2014-00331 (Re), [2014] CanLII 44460 (BC WCAT), Jan. 31, 2014

[box]**BC:** *WCAT-2014-00457*[/box]

What Happened: A safety officer saw two workers on the leading edge of a roof about 14 feet above the ground. Neither were wearing fall protection, despite the fact that the fall protection plan for the site required the use of fall protection when working near the edge. And there was a supervisor on the ground who could see the workers on the roof. The employer appealed the imposition of an administrative penalty for various safety offences.

Ruling: The BC Workers' Compensation Appeals Tribunal upheld the penalty, ruling that the employer hadn't exercised due diligence.

Analysis: Although the employer provided some fall protection training for workers and supervisors, it wasn't sufficient, said the Tribunal. For example, the supervisor wasn't able to answer the safety officer's questions about the fall protection hierarchy. In addition, the employer didn't discipline workers who violated the fall protection requirements. Thus, the Tribunal found that the employer didn't exercise all reasonable care under the circumstances.

WCAT-2014-00457 (Re), [2014] CanLII 43942 (BC WCAT), Feb. 13, 2014

[box]**BC:** *WCAT-2014-00554*[/box]

What Happened: Workers for a concrete finishing company were working on the second floor of a multi-story construction project, 18 feet above grade. Although they were outside of an installed guardrail system, they weren't wearing fall protection. After the company was issued an administrative penalty for a fall protection violation, it appealed.

Ruling: The BC Workers' Compensation Appeals Tribunal upheld the penalty, ruling that the company hadn't exercised due diligence.

Analysis: The Tribunal criticized the company for relying on the prime contractor and site safety officer to supervise and ensure the safety of its workers. It also didn't conduct its own toolbox talks independent of those held by the prime contractor. And it didn't discipline workers for violating safety rules, although it had a disciplinary policy.

WCAT-2014-00554 (Re), [2014] CanLII 45748 (BC WCAT), Feb. 21, 2014

[box]**BC:** *WCAT-2014-00711*[/box]

What Happened: A hotel hired a window cleaning company to regularly clean the glass canopy attached to it. A worker for that company fell from the canopy to the concrete sidewalk below and died. She wasn't wearing fall protection at the time. After an investigation, the hotel was issued an administrative penalty for an OHS offence and appealed.

Ruling: The BC Workers' Compensation Appeals Tribunal upheld the penalty, ruling that the hotel hadn't exercised due diligence.

Analysis: The hotel was the prime contractor with a duty to coordinate health and safety at the multi-employer workplace. But the Tribunal found that the hotel didn't have a system for ensuring that contractors complied with the OHS laws. For example, it didn't ensure that the window cleaning company was familiar with the glass canopy's fall restraint system or that its workers had been properly trained on using that system. The hotel also didn't require safety programs from all contractors or audit their compliance. In short, the hotel simply assumed that contractors would work in a safe manner, concluded the Tribunal.

WCAT-2014-00711 (Re), [2014] CanLII 45714 (BC WCAT), March 6, 2014

[box]**ON:** *Anray*[/box]

What Happened: A truck driver was loading a 14 tonne excavator onto a trailer behind a truck when the excavator slipped off the trailer and fell onto its side. The glass in its cab shattered and he was injured. The excavation company was charged with OHS violations.

Ruling: The Ontario Court of Justice convicted the company, ruling that it hadn't exercised due diligence.

Analysis: The company owner was the only one who was supposed to operate the excavator but there were no written safety rules to that effect. The presumption within the company was that once oral instructions were conveyed, they would be understood and complied with by workers. But the court noted that there was no evidence as to how those instructions would be reinforced or enforced, or whether any steps were made to ensure that anyone working for the company understood the instructions. And though the company was small, it still needed to have a system and process for establishing appropriate written OHS policies and procedures, communicating them, monitoring them and enforcing them in a vigilant manner, concluded the court.

Ontario (Ministry of Labour) v. Anray Ltd., [2014] ONCJ 203 (CanLII), April 15, 2014

[box]**BC:** *WCAT-2014-01444*[/box]

What Happened: Workers for a roofing company were on the roof of a three-story building about 25-30 feet above the ground removing old roofing material. They weren't using a fall protection system. The company owner was also on the roof without fall protection equipment. The company was issued an administrative penalty for fall protection and other safety violations. It appealed.

Ruling: The BC Workers' Compensation Appeals Tribunal upheld the penalty, ruling that the company hadn't exercised due diligence.

Analysis: Although the company took some steps to ensure the safety of workers, it didn't do enough, said the Tribunal. For example, it didn't provide effective supervision. In fact, the company's owner himself was in violation of the fall protection requirements while ostensibly supervising the workers. And although the owner told workers they'd be fined if they failed to use fall protection, he never actually imposed any fines.

WCAT-2014-01444 (Re), [2014] CanLII 42351 (BC WCAT), May 13, 2014

[box]**BC:** *WCAT-2014-01871*[/box]

What Happened: An employer supplied a crane, along with an operator and rigger, to a prime contractor. The prime contractor directed the employer's workers to operate the crane outside the safe zone established by the employer. While doing so, the crane came into contact with an energized power line. WorkSafeBC imposed an administrative penalty on the employer for failing to provide adequate supervision. It appealed, arguing that the prime contractor had assumed the duties of an "employer" under the law at the time of the incident.

Ruling: The BC Workers' Compensation Appeals Tribunal ruled that the sawmill hadn't exercised due diligence.

Analysis: The Tribunal found that the employer didn't take adequate steps to confirm that the prime contractor was qualified to assume responsibility for supervising its workers operating the crane or to clearly communicate who would be responsible for supervising them. Thus, the employer failed to exercise due diligence when it largely abdicated its responsibilities for supervision once the crane was rented by the prime contractor, concluded the Tribunal.

WCAT-2014-01871 (Re), [2014] CanLII 42633 (BC WCAT), June 20, 2014

[box]**AB:** *Value Drug*[/box]

What Happened: A worker bent down to plug in a portable scale under a moving conveyor belt. She felt something tug her from behind and tried to use her hands to avoid getting pulled into an unguarded drive shaft. But the worker lost some hair, injured her hand and part of her thumb was amputated. The employer was charged with two OHS violations.

Ruling: The Provincial Court of Alberta convicted the employer, ruling that it didn't exercise due diligence.

Analysis: The court said it was reasonably foreseeable that the unguarded drive shaft posed a safety hazard. But the employer didn't take reasonable steps to

protect workers from this hazard, such as by guarding the shaft, properly training workers on the dangers of conveyors or posting signs warning people to be cautious around conveyors. The court also rejected the reasonable mistake of fact argument that company officials reasonably believed that guards *were* installed on the conveyor's drive shafts because there was no evidence to suggest that such guards had ever been installed.

R. v. Value Drug Mart Associates Ltd., 2014 ABPC 164 (CanLII), July 29, 2014 [/learn_more]