The Top 10 OHS Compliance Cases of 2023 & Their Impact on You

Workplace safety legislation and regulations outline the basic health and safety requirements that your OHS program must meet. Unfortunately, there's a lot more to the law than these sources. Court, administrative tribunal and arbitration rulings fill in the crucial details OHS coordinators need to know to ensure compliance. Cases are where the rubber meets the road and the legal principles written by lawmakers and regulators are applied to real-life situations. In addition to telling us what the laws actually mean, the cases answer the questions that OHS laws and regulations deliberately leave unanswered counting on the courts to apply the rules as each case warrants. That includes the all-important rules governing what kinds of reasonable steps employers are expected to take to meet the standard of due diligence and thereby avoid liability for an OHS violation.

Halfway through 2023, there have already been a number of significant cases. Here's a briefing on what we believe are the 10 most important rulings and their practical implications for your own OHS program.

1. Supervisor Convicted of C-45

Criminal Negligence for Worker's Drowning Death

The so-called Westray Law, aka, Bill C-45, that took effect nearly 2 decades ago to hold those 'in control' of work criminally accountable for egregious indifference to life and safety hasn't generated the stream of criminal prosecutions that many expected. However, there was a rare C-45 conviction this year. It involves a construction supervisor who now faces life in prison after being found guilty of criminal negligence in the drowning death of a young worker at wastewater treatment plant in 2018. The supervisor decided to conduct a leak test when water leaked into a hole that was 8-feet deep and 3.5 feet wide while a worker was inside cleaning debris. The rubber plug inserted into the pipe while the test was performed came loose and 14,000 litres of water gushed into the hole, trapping the worker who wasn't even notified that the test was being performed. The New Brunswick court found the supervisor guilty of the C-45 criminal offence (Section 219 of the *Criminal Code*) of engaging in an act or omission causing a person's death with 'wanton or reckless disregard for the lives or safety of other persons' [*His Majesty the King v Jason Andrew King*, 2023 NBKB 084, June 5, 2023].

> ***Takeaway:*** *The Internal Responsibility System (IRS) on which Canadian OHS laws are based assigns liability for health and safety to not just employers but all stakeholders, including supervisors. As the King case illustrates, supervisors can also be liable for criminal negligence under C-45. That makes it incumbent on OHS coordinators to take steps to manage supervisor liability risks to protect not just supervisory staff but the entire company.*

2. Relying on Worker's Experience Isn't Due Diligence, Says Québec Court

An important case from Québec began with the tragic death of a garage mechanic when the forklift tire he was repairing exploded. CNESST charged the employer with failing to protect a worker performing repair work. The employer claimed due diligence contending that the victim's carelessness caused the explosion. But the Québec court didn't buy it, noting that the initial assembly of the wheel wasn't done according to industry standard, in effect turning the tire into a time bomb and faulting the employer for doing nothing to ensure that the work methods were safe, other than relying on the victim's experience [*CNESST c. 9033-5878 Quebec inc. (Pneu Dauville),* 2023 QCCQ 3842 (CanLII), June 14, 2023].

> ***Takeaway:*** *For OHS coordinators, monitoring court cases is imperative because it sheds light on what steps a company is reasonably expected to implement to prove 'due diligence' and thus avoid liability for a safety violation. Using the OHS Insider Due Diligence Scorecard is one of the best ways to keep track of the cases and draw the appropriate practical lessons for your own OHS program.*

3. BC Supermarket Fined $603,000 for Machine Guarding Violation

One of the year's biggest OHS fines was the $603,915 administrative monetary penalty (AMP) that WorkSafeBC imposed on a supermarket for a pair of high-risk violations. Surprisingly, there were no fatalities. The victim walked away with only unspecified serious injuries while improperly using a bandsaw to cut meat. WorkSafeBC inspectors called to the

scene discovered that the manufacturer's instructions for the saw specified that it shouldn't be used for cutting that type of meat and that the equipment wasn't fitted with adequate safeguards [*Pattison Food Group Ltd./Save-On-Foods Division,* April 25, 2023].

> ***Takeaway:*** *Machine injuries are among the most devastating and gruesome that can take place in any workplace. Not surprisingly, machine incidents and injuries perennially draw some of the country's highest OHS fines. That makes it imperative to implement a legally sound machine guarding policy at your site.*

4. Alberta Inspector Can Issue AMP 3 Months After Visiting the Work Site

AMPs of $5,000 rarely show up in our Top 10 OHS Court Cases lists. However, the small dollars in this particular case belied the important principles involved. It began when an Alberta OHS inspector spotted 4 workers on a roof without fall protection. After ordering the crew to get their harnesses on and speaking to the roofing contractor about the violation, the inspector left without issuing any fines. Thinking it was getting off with just a warning, the contractor was jarred to received notice of a $5,000 AMP 3 months later. The Alberta labour board upheld the AMP, finding that it was well within the 2-year *OHS Act* limit for issuing a penalty [*Model Roofing Company Inc*., Board File No. OHS00079, March 15, 2023].

> ***Action Point:*** *It's not unusual for OHS inspectors to do what the Alberta investigator did in this case, namely, concentrate on the immediate danger and issue a penalty later. Bottom Line: Take nothing for granted and implement a sound plan for managing and responding to a government OHS*

inspection.

5. Alberta Employer Fined for Refusing to Let OHS Inspector Interview Employees

Another Alberta OHS inspection case involving small dollars but big principals was the tragic aftermath of a fatality in which a worker driving a company truck accidentally ran over his co-worker. Ironically, the driver was talking to the company OHS coordinator when the incident occurred. Government investigators who came to the scene asked to interview the driver and OHS manager without a lawyer present but, on the advice of counsel, the company said no. It also refused to order the witnesses to show up for interviews scheduled by the OHS investigator unless a lawyer was present. As a result, the investigator imposed AMPs of $5,000 on the company and $1,000 each on the witnesses for obstructing an OHS investigation. The Alberta Labour Relations Board upheld the penalties, finding that the investigator followed fair procedures and didn't misuse his investigative powers. The Court of King Bench rejected the company's appeal [*Neustaedter v Alberta Labour Relations Board*, 2023 ABKB 294 (CanLII), May 16, 2023].

> ***Action Point:*** *OHS laws give inspectors very broad authority to interview witnesses and collect evidence and this case illustrates how easy it is to get into trouble for failing to cooperate with an OHS officer when you think you're simply safeguarding your rights. That's why you need to recognize the risks of obstruction and implement measures to avoid them and survive the OHS inspection process.*

6. Failing Pre-Employment Drug Test Is Grounds to Revoke Offer for Safety-Sensitive Job

As usual, there were some important cases evaluating the legality of a company's drug testing policies and procedures in the first 6 months of 2023. One key case began when a pipeline company offered an applicant the safety-sensitive job of Business Continuity and Emergency Management Advisor but then withdrew the offer after the applicant flunked his pre-employment drug test. The applicant admitted to having marijuana THC in his system but claimed it came from CBD oil he legally used to treat a respiratory ailment and sued the company for disability discrimination. The Alberta human rights tribunal dismissed the case because the company didn't know he was disabled. Nor did the company have a duty to inquire into whether he was disabled since the applicant, knowing that flunking the test might cost him the offer, never revealed his condition or the fact that he used CBD oil made from marijuana to treat it and there were no other reasonable grounds to suspect he had a disability [*Greidanus v Inter Pipeline Limited*, 2023 AHRC 31 (CanLII), March 13, 2023].

> ***Takeaway:*** *The Greidanus case illustrates the importance of having and properly implementing a legally sound drug and alcohol testing policy, which may include pre-employment testing after offering applicants jobs that are safety-sensitive.*

7. Non-Negative Drug Test Doesn't Prove Impairment, Says Federal

Arbitrator

Another big case that went against employers involved a conductor who was away from his post when his train car ran through a switch triggering for-cause urine drug testing that came back non-negative for cocaine. The conductor admitted to using cocaine after his previous shift 4 days earlier, something you don't want to hear from any safety-sensitive worker; but he insisted that he wasn't impaired on the job when the incident occurred. The federal arbitrator found that the urine drug test results didn't definitively prove impairment while noting that the swab test came back negative for cocaine. Result: The railway had to reinstate him immediately and without conditions [*Canadian Pacific Kansas City Railway v Teamsters Canada Rail Conference,* 2023 CanLII 55343 (CA LA), June 19, 2023].

> ***Takeaway:*** *While ensuring that workers who perform safety-sensitive jobs are fit for duty and not impaired by drugs or alcohol is an overriding concern, it must also be balanced with privacy, disability and other individual rights. That makes it essential to implement a legally sound and balanced substance abuse game plan for your workplace.*

8. Ontario Court Rules that Firefighter's PTSD Is Work-Related Under Workers Comp

All agreed that a firefighter who was terminated for cause had PTSD. The question was whether he got the condition because of the job or the fact that he was fired. Concluding that both were contributing factors, the Ontario WSIA Tribunal ruled that the PTSD was work-related and approved the firefighter's claim for health benefits; but it denied him future loss of earnings since those losses were a result of being terminated.

The employer claimed that getting fired was the sole reason for the diagnosis and that the firefighter should get no benefits since that's a work-related stressor that workers comp doesn't cover. But the appeal failed [*City of Toronto v WSIAT and Beebeejaun*, 2023 ONSC 3875 (CanLII), June 29, 2023].

> ***Takeaway:*** *Workers comp coverage of PTSD and other work-related stress has become an issue of significant importance, particularly in the wake of COVID-19. Coverage rules vary, with a few provinces continuing to limit coverage to mental stress suffered as the result of a discrete traumatic event that occurred at work and excluding coverage for mental stress that builds up gradually over time as a result of continual exposure to work-related stressors, such as harassment. Regardless of the coverage rules of your province, it's imperative to ensure your workers a psychologically safe workplace.*

9. Nova Scotia Arbitrator Hammers Employer for Failing to Accommodate Injured Worker

How far must employers go to accommodate workers seeking to return to work from an injury' A case asking that question was brought by a welder who was incapable of performing his old job due to workplace injuries wanted to return to light duty work. Since it had no such work to offer, the employer terminated him. The Nova Scotia arbitrator ruled that the employer didn't accommodate the welder's disability to the point of undue hardship. It was a small company with limited work for people who couldn't weld, the arbitrator acknowledged. But the company didn't try enough to explore the alternatives. It should have at least assessed the welder's capabilities and sought to piece together a permanent position suited to those abilities. **Result:** Termination was wrongful

and the welder was entitled to roughly 12 months' termination notice, $48,000, for wrongful dismissal [*Dauphinee v Lunenburg Foundry & Engineering Limited,* 2023 NSLB 12 (CanLII), January 26, 2023].

> ***Takeaway:*** *The duty to accommodate is only one of several legal issues that may arise during the return-to-work process. What's needed is a game plan to ensure that the process is not only legally sound but also safe for all parties involved.*

10. Worker's Failure to Follow Conveyor Safety Rules Was Foreseeable

Should employers who implement sound safety rules be liable for an OHS violation that happens because workers don't follow those rules' A case illustrating the factors courts consider in deciding that issue started when a worker cleaning a dumpster decided to take a short cut by jumping on a moving conveyor. He lost his balance and fell to his knees causing his shoes to get stuck between the conveyor and the flap at the back of the trailer. He cried out for help, but it took over an hour for anybody to hear him. By then, he had suffered injuries requiring amputation of both legs from the knee down. Charged with an OHS violation, the employer claimed that it exercised due diligence and that the victim's decision to disobey conveyor safety rules was totally unforeseeable. But the Qu□bec court disagreed and upheld conviction. For one thing, the safety procedures didn't follow manufacturer's instructions. More damning, the employer was aware that other workers were regularly ignoring the rules and leaving the conveyor running while cleaning dumpsters from the trailer [*Claude Chagnon Enterprises Inc. vs. CNESST*, 2023 QCCS 972 (CanLII), March 27, 2023].

Takeaway: *Workers taking short cuts and evading safety rules is something you should expect in seeking to prevent conveyor incidents and injuries. The only way to guard against liability is to implement a legally sound conveyor safety and compliance game plan to minimize the risk of those injuries and incidents.*