You Make The Call: Did Owner Use Due Diligence to Follow Lockout Requirements?

SITUATION

Ryan, a tire repair shop worker, orders the driver of a semi-truck with a flat tire to inch his vehicle forward not realizing that his co-worker Max is underneath the vehicle jacking up the front wheels. Max survives but suffers serious injuries.

HOW IT HAPPENED

Ryan and Max are both experienced and well trained. And the tire shop has clearly written lockout policies to prevent incidents like this. But the policy is undone by a bizarre series of blunders, miscommunication and incredibly bad luck:

- The flat is in the rear but the shop attendant who issues the repair order reports its location as the front passenger side;
- Ryan takes the repair order and thinks he's doing the repair;
- Max spots the truck on the platform and decides that *he's* going to do the repair;
- Ryan and Max don't speak to or see each other and neither is aware that the other has decided to fix the flat on his own;
- Max goes inside the shop to get a jack;

- While he's gone, Ryan arrives on the scene and does a walk around;
- At that point, Ryan discovers that the flat is in the rear and that the truck has to be repositioned on the platform for a rear repair;
- In the roughly 60 seconds while this is going on, Max returns to the scene with the jack and slips underneath the vehicle without being seen;
- Ryan orders the driver to inch the truck forward without doing another walk around—if he had, he'd have seen Max's legs sticking out the front passenger side;
- Max is wearing headphones and thus doesn't hear the truck brakes release and engine start.

THE OHS CHARGE

The Crown charges the tire shop owner with failing to ensure Max's health and safety "as far as it was reasonably practicable to do so" (under Sec. 2(1)(a)(1) of the Alberta *OHS Act*). The tire shop owner raises a due diligence defence, claiming that it took all reasonable care in the circumstances.

YOU MAKE THE CALL
Did the tire shop owner exercise due diligence'

ANSWER

Yes, says the Alberta court.

EXPLANATION

The fact that the lockout policy didn't prevent Max from getting hurt didn't necessarily make the owner guilty of failing to protect him. Due diligence doesn't require employers to be perfect, only reasonable, the court explains. And reasonable must be judged not in hindsight but in terms of what was reasonably foreseeable in the circumstances at the time:

What WAS Foreseeable

According to the court, it was reasonably foreseeable that:

- Two experienced workers like Max and Ryan may miscommunicate and each think he was in charge of a repair;
- A tire needing repair may be on the other side of the vehicle so as to block Max and Ryan's view of the other;
- There could be a mix-up over which tire needed repair; and
- A worker under a truck may not hear the engine start and brakes release.

What Was NOT Reasonably Foreseeable

But the court also says that it was not reasonably foreseeable that:

- A truck that had been safely positioned on a platform after a walk around would need to be repositioned because of a mistake as to which tire needed fixing; and
- Max would slide under the truck without being seen less than a minute after Ryan's walk around.

The owner's lockout policies dealt with the foreseeable contingencies; but the unforeseeable circumstances ultimately rendered it ineffective in this situation.

What the Lockout Policy Required	What Actually Happened
Driver must take key and be directed to office to wait until work is done	The policy was followed
"Out of service" tag must be placed on the driver's door handle before work is done to ensure nobody moves or starts the truck accidentally	Max placed the tag on the handrail next to the door rather than the door handle

The worker who places the tag is the only one allowed to remove it	Ryan saw the tag but didn't remove it before ordering the driver to inch the truck forward
Tags may not be removed until somebody does a 360® walk around the vehicle	Ryan did do a walk around but didn't repeat the process after discovering the flat in the rear; meantime, Max stole under the truck unseen
Wheel chocks must be placed on both sides of a truck wheel before work is done	The policy was followed but Max didn't see or hear the chocks being removed
The driver of the truck being serviced must engage the air brakes or other brakes before restarting the vehicle	The driver did put on the air brakes but Max didn't hear him because he was wearing headphones

Together, the unforeseeable circumstances "were so unlikely or bizarre" as to render the entire incident not reasonably foreseeable, the court reasons. Result: The owner did show due diligence and isn't guilty of the charge.

R v. Kal Tire, 2017 ABPC 246 (CanLII), Sept. 28, 2017

THE MORAL

OHS laws are what lawyers like to describe as "strict liability" laws. Translation: The mere fact that an incident or injury happens at your work site may be enough for the Crown to prove that you violated an OHS law. However, thanks to the famous *Sault Ste. Marie* case, you can still avoid liability if you can show that you exercised due diligence to comply with the law and prevent the violation. And that's just what happened in this case.

THE 6 TAKEAWAYS

1. You have no shot at due diligence unless you have an OHS program and policies;
2. Your policies need only be reasonable, not perfect;
3. Reasonableness is judged according to what a reasonable person would have foreseen knowing what the employer knew in the circumstances before the incident occurred—20/20 hindsight is not allowed;
4. Breakdowns, mistakes and even policy violations are generally considered foreseeable and your policies need to account for them;
5. Foreseeability does not include happenings that are bizarre and totally unexpected;
6. BUT if it’s foreseeable that an unaddressed condition is dangerous, the resulting injury is foreseeable even if the exact manner in which it occurs is not.