

You Make The Call: Did Wal-Mart Show Due Diligence to Keep Aisles Free of Trip Hazards?



SITUATION

A Wal-Mart worker is using a manual skid jack to move a pallet loaded with toilet paper from a truck to the store receiving area. Because he's moving backward, he doesn't see the empty skid that someone carelessly left in the aisle. So he trips and bangs his head on the floor. The Ontario MOL charges Wal-Mart with failing to keep the receiving area floors clear of hazards. We didn't do anything wrong, Wal-Mart insists; and even if a violation was committed, we shouldn't be liable because we exercised due diligence and the incident was the workers' fault.

THE DUE DILIGENCE RULE

An employer isn't liable for an OHS violation (in this case, Sec. 11 of the OHS Reg. for Industrial Establishments which requires employers to keep floors used by workers free of hazards and obstructions), if it can prove on a 'balance of probabilities,' i.e., more likely than not, that it took all reasonable steps to avoid the incident.

YOU MAKE THE CALL

Did Wal-Mart take all reasonable steps to prevent the trip incident'

The empty skid the victim tripped over clearly didn't belong in the middle of the receiving aisle. The question was whether Wal-Mart did enough to prevent the mess-up (and ultimately the incident it caused).

KEY EVIDENCE

Evidence supporting Wal-Mart's argument that it took reasonable safety measures, including the fact that:

- The store had a safety sweep (mandatory sweeps every 2 hours) program designed to keep walkways clean, unobstructed and free of tripping hazards;
- Workers received specific training on slip, trip and fall hazards and were required to follow a 'clean-as-you-go' housekeeping policy;
- Wal-Mart held workers accountable for working safely and meted out discipline for safety violations;
- The workplace joint health and safety committee did regular inspections and issued recommendations for avoiding trip and fall hazards;
- The victim was a 14-year veteran who should have recognized the dangers of facing backwards when operating a skid jack; and
- There were no previous tripping incidents involving skids left in the aisles.

Evidence supporting the prosecution included the fact that:

- The aisle where the skid was left led to an emergency exit, which made the infraction that much more egregious;
- CCTV footage of the workplace from the day of the incident showed other workers walking backwards when moving loads and routinely ignoring the clean-as-you-go policy; and
- The victim had no history of working unsafely.

THE RULING

The Ontario Court of Justice ruled that Wal-Mart didn't show due diligence [*Ontario (Ministry of Labour) v. Wal-Mart Canada Corp.*, 2016 ONCJ 267 (CanLII), May 6, 2016]. Wal-Mart appealed but the Superior Court upheld the ruling [*R. v. Wal-Mart Canada Corp.*, 2017 ONSC 6726 (CanLII), Nov. 8, 2017].

EXPLANATION

Sure, Wal-Mart had an impressive program to keep aisles free of tripping hazards. But the issue was with the implementation. With all these measures in place, how and when did that skid get left in the aisle? How long was it there? It was up to Wal-Mart to answer these questions. But it was unwilling (or perhaps unable) to produce logs and other evidence explaining the safety breakdowns. Bottom Line: Because Wal-Mart didn't meet its burden to prove reasonable steps on a balance of probabilities, its due diligence defence failed.

THE MORAL

Lesson 1: Just having a safety program didn't get Wal-Mart over the due diligence hump. All it did was show that the company was acutely aware of how important it was to keep walkways in loading areas clear of trip hazards. But to prove due diligence, it also had to show that it effectively implemented its safety measures.

Lesson 2: Failure to produce evidence showing how OHS measures were actually implemented is apt to be held against you by the court and all but doom your efforts to win a due diligence defence.