

## OCCUPATIONAL HEALTH AND SAFETY UPDATE

### Is Worker Error Ever a Defence?

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It is an unfortunate reality of workplace accidents that in many circumstances the worker who is the victim often bears some or occasionally all of the responsibility for the accident. We are often asked whether worker error can ever be used as a defence by an employer to charges laid under OH&S legislation. The answer to this thorny question is that in certain limited circumstances courts have been prepared to accept that where a worker is injured in a workplace that has an ongoing and effective occupational health and safety program, effective training, detailed policies and procedures, and enforcement of procedures; the employer will not be held liable for an accident that was primarily caused by worker error or blatant contraventions of the employer's safety policies.

It is important to appreciate that courts hold employers to a very high standard and in many cases even where there was clear evidence of "worker error", the employer still ended up being convicted. For example, in *Ontario Ministry of Labour v. Hershey Canada Inc.*, 2006 ONCJ 20 where an employee suffered the amputation of her left index finger when she came into contact with an exposed moving part while cleaning a machine. The employer was convicted at trial and argued on appeal that the machine at issue had a simple plug in device and that the employer's policy prohibited the cleaning of the machine when it was energized. The employer led evidence that the employee was aware of this procedure. Both the trial court and the appellate court accepted that worker error played a significant role in the accident. However, the employer's due diligence defence was rejected on the basis that on the day in question the worker was not given any directions on how to clean the machine, that written procedures were not sufficiently detailed and there was no consistent procedure for cleaning the machine.

The *Hershey* case is an example of how high the standard is for an employer who is attempting to rely upon worker error as part of a due diligence defence. It is a relatively straightforward process to unplug a machine prior to cleaning it. However, notwithstanding the worker's negligence, the court was prepared to convict the employer given the absence of proper and specific written instructions and defects with respect to developing a consistent procedure. Arguments that the hazard was "obvious" or that the worker ought to have applied "common sense" will not absolve an employer. The reality is that each element of court developed due diligence standards must be met in order for an employer to be able to rely upon worker error as part of a due diligence defence.

#### **Employers Must Anticipate Worker Error**

Ontario's highest court has recently had the opportunity to comment on the issue of worker error. In *R v. Dofasco Inc.* 2007 ONCA 769 the court overturned the acquittal of the defendant on machine guarding related charges. The case involved an employee who suffered a serious hand injury while working on a cold roll-steeling mill. The trial court concluded that the employer's

procedure for safe loading of steel into a machine negated the need for a guard. Steel was loaded into the mill by an operator in a pulpit, and workers standing near the machinery were expected to use a push bar and hand grab grippers to assist in feeding steel into the mill, which kept them arm's length from any pinch point. The employer argued that the failure of the workers to follow the company's procedure was the cause of the accident. Although the Court of Appeal accepted the fact that the injured worker wilfully disobeyed the company's procedures, it held that this was not a defence. The Court ruled that the OSHA guarding requirements were designed to protect injuries due to both inadvertent and advertent acts while performing their work. The Court indicated that the OSHA not only protects prudent workers, it is also to protect the careless or even the reckless worker. The Court noted that while the accident was caused by the employee's own failure to follow the policy, it noted that the employee's motivation for failing to follow the employer's policy was to get work done faster.

The *Dofasco* case clearly establishes that procedures cannot be a substitute for physical guards in machine guarding prosecutions. More generally, the case suggests that courts expect employers to build in safe guards for employee errors when developing safe work procedures. However, the *Dofasco* case certainly does not stand for the proposition that the use of employee error as part of a due diligence defence is no longer acceptable. Contrary to the opinion being expressed by some commentators, the *Dofasco* prosecution is primarily relevant to the issue that it is not a defence for employers to implement procedures as a substitute for physical machine guards. The Court's discussion of worker error in the *Dofasco* case was primarily in the context of providing a justification for the finding that procedures ought never to be used as a substitute for guards rather than a general prohibition on relying on worker error as part of a due diligence defence.

## Unforeseen Acts of Workers

Courts have also had to wrestle with the question of the legal consequences of cases where a worker commits a completely unforeseeable act which is outside the scope of their duties for the employer. The most recent such case is *R v. Wabi Developments Inc. et al.* (unreported, January 8, 2009, Ont. Ct. Jus., Carr J.) which involved a worker who tragically fell to his death while working for an electrical contractor on a crane disassembly project.<sup>1</sup> Both defendants were charged with failure to provide legally required fall protection to the worker. The Court held that on the evidence it was impossible to determine why and where the worker fell off the crane. The Court heard evidence that the electrical contractor had provided the worker with comprehensive fall protection training, fall protection equipment and that the constructor had a comprehensive program of enforcing fall protection rules. The Court concluded that the worker's duties on the date of the accident would not have exposed him to a fall risk and there was evidence that both defendants had implemented a comprehensive occupational health and safety program with respect to fall prevention. The defendants were acquitted of the fall protection accounts. The case establishes that where workers commit unforeseeable acts beyond the scope of their duties and the employer has a comprehensive health and safety program it is possible to successfully advance the due diligence defence.

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<sup>1</sup> Full disclosure: the author of this article was counsel to one of the defendants in this prosecution.

## **Word of Caution**

It is important to appreciate that arguments that a worker's actions were not objectively foreseeable are rarely successful. Courts generally find that the fact that the accident occurred establishes that worker's actions were foreseeable. The *Wabi* case can be distinguished from the line of authorities where employers have argued that they were unable to anticipate that workers would not follow the employer's fall protection procedures or that it was not foreseeable that a particular work activity created a fall risk. In such cases, the employer is usually convicted.

It remains the rare exception rather than the rule that an employer will be able to establish due diligence on the basis of worker error. It is clear from the Courts that even where workers commit fairly serious acts of negligence, the absence of a comprehensive health and safety program which complies with court developed due diligence standards will be fatal to a due diligence defence. This will often be the case even when workers fail to follow even the most basic safety procedures (see the *Hershey* case above). As always, the best approach for employers is to take comprehensive measures to comply with the *OHSA* in regulations. The reality is that employers hoping to rely on worker error as a defence are rarely successful.

**Contact:** For support in managing the challenges discussed above, contact Ryan Conlin at [rconlin@sbhlawyers.com](mailto:rconlin@sbhlawyers.com) or 416-862-1616.



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