

Worker Recklessness No Defence to Charge of Failing to Guard a Machine

Landon P. Young

A worker's recklessness did not provide a defence to an employer charged with failing to have a guard on a steel mill. This was the decision of Ontario's Court of Appeal in the recent case of *Ontario (Ministry of Labour) v. Dofasco Inc.*

The worker seriously injured his hand when it was caught in a pinch point while feeding steel coils into the steel mill. The mill lacked a physical guard to prevent his hand from getting caught in the mill. Dofasco was charged with failing to have a guard on the steel mill to prevent access to the pinch point as required under the Industrial Regulations to the Ontario *Occupational Health and Safety Act*.

The employee deliberately did not follow the procedures established by his employer, Dofasco, for the feeding of the coils because it would have resulted in delays and curtailed production. Had the employee followed these procedures, the accident would not have happened. Dofasco argued that this should provide it with a defence to the charge of failing to have a guard on the machine.

Dofasco also contended that the presence of a "push bar" on the mill, which had to be pushed to start the mill, prevented worker

access to the mill's pinch point so that a physical guard was not required.

Important Training Opportunity

There's An OH&S Inspector At The Door!

How to Respond to OH&S
Accident Investigations, Search
Warrants and Routine Inspections

April 1, 2008 - Vaughan
April 25, 2008 - Thunder Bay
May 15, 2008 - Barrie

For more information
and to register go to
Public Seminars
at :

www.sbhlawyers.com

OH&S Due Diligence Update

The Court's Decision

Dofasco was acquitted at trial, but the Court of Appeal overturned the acquittal and found Dofasco guilty. In a strongly worded decision, the Court stated that employees do not "deliberately injure themselves" and the requirement for a physical guard is to prevent injury due to inadvertence, such as by misjudging distances or a lapse in concentration.

The Court noted that the worker's failure to follow the procedure set by Dofasco was not motivated "to spite or injure the employer", but to keep production moving efficiently. The "push bar", which would have prevented access to the pinch point, did not work properly on the type of steel being put through the mill, so Dofasco could not rely on it as a substitute for a physical guard.

The requirement to have a guard on a machine as set out in the Industrial Regulations, according to the Court, means that an employer is strictly liable if it fails to have the guard and employee misconduct cannot be a defence. The Court also held that a defence of due diligence was not open to Dofasco because there was no evidence that it had taken any steps to install a guard to prevent access to the pinch point.

Implications of this Case for Employers

This decision demonstrates that employers should not assume that workers would always follow procedures and do what they are supposed to do when it comes to safety. As we have discussed in prior dispatches, an effective system of health and safety due diligence must take into account the fact that workers will

sometimes take short cuts or be guilty of lapses of judgment or concentration in performing their work. An effective system will take into account these realities of human behaviour and build in safeguards that cannot be easily bypassed.

Employers should also ensure that their equipment strictly complies with safety regulations. Alternative procedures or other types of protections that appear to provide equivalent safety protection should not be considered as a substitute for compliance with the requirements of the regulations.

Is Your Equipment Properly Guarded?

One of the most common types of charges brought against employers by the Ministry of Labour is for failing to have equipment properly guarded to prevent workers from coming into contact with moving parts. The regulations to the Act are quite simple and clear in requiring guarding or another device to prevent access to the moving part where that part may endanger the safety of a worker. As demonstrated by the *Dofasco* case, work procedures that may prevent an accident if properly followed by the worker are not a sufficient substitute for guarding where a moving part may endanger a worker.

Sometimes it may not be obvious that a moving part poses a potential danger, so employers need to consider whether a danger may be created if a worker does something he or she is not supposed to do in the ordinary course. This can require a degree of imagination, which can sometimes be difficult for supervisors when they are so familiar with a workplace and the equipment in it. Therefore, you should consider having some workplace safety inspections performed by individuals who

OH&S Due Diligence Update

are not always in that workplace. Also consider bringing in an outside health and safety consultant with the skills and experience to spot hazards that have been overlooked by those who work every day around the equipment.

By taking into account the possibility that workers may not always do what they are supposed to do when operating equipment, you may discover that equipment in your workplace that you thought was safe requires guarding. You can then reduce the risk of serious injury to your workers as well as the possibility of costly penalties for lack of guarding that have become all too common.

For questions about this article, please contact Landon Young

lyoung@sbhlawyers.com (416) 862-1616



OH&S Due Diligence Update is an electronic publication of
STRINGER BRISBIN HUMPHREY

110 Yonge Street, Suite 1100
Toronto, Ontario M5C 1T4

T: 416-862-1616
F: 416-363-7358

E: sbhevent@sbhlawyers.com

65 Cedar Point Drive, Unit 806a
Barrie, Ontario L4N 5R7

T: 705-727-0808
F: 705-727-0323

I: www.sbhlawyers.com

The information contained in OH&S Due Diligence Update is general information only and should not be relied upon as a substitute for legal advice or opinion.