DUE DILIGENCE: ARE WE SPEAKING THE SAME LANGUAGE?

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Special Thanks

This presentation is based on information from Red Deer College and is part of their Transportation Safety Director Program.
DUE DILIGENCE

• WHY ARE YOU HERE?
DUE DILIGENCE

• What is due diligence?
• Who is responsible?
• What are you responsible for?
Metron Construction

• A project manager who oversaw a construction crew involved in a fatal scaffolding collapse in 2009 was convicted in the deaths of four workers under his charge.

• An Ontario Superior Court judge found the project manager guilty of four counts of criminal negligence causing death and one count of criminal negligence causing bodily harm.

• The manager was aware that fall protections were not in place, but he nevertheless allowed his workers to board the swing stage, the judge said.
Metron Construction

• “In his failure to act, he showed wanton and reckless disregard,” Judge Ian MacDonnell said.
• The construction company involved in the case, pleaded to criminal negligence causing death and was eventually fined $750,000 plus a victim surcharge.
• The company that supplied the swing stage, was fined $350,000 for failing to ensure the platform was in good condition.
“LEGALLY YOURS”

• The following web site shows Stop Work Orders, Penalties & Convictions specific to Manitoba.

• http://www.gov.mb.ca/labour/safety/compliance.html
DUE DILIGENCE

• The legal concept of due diligence is extremely important for health and safety.
• Not only is ignorance of the law no excuse, but due diligence is your only defense.
The History of Due Diligence

• In the early 1980’s the supreme court of Canada created the defense of due diligence in a decision involving the city of Sault Ste. Marie.
The History of Due Diligence

• Before this OHS statutes were regarded as Absolute Liability.

• That meant that if an accident occurred, you (the company) were guilty no matter what you had done to prevent it from happening.
The History of Due Diligence

• For example, regulations under the act might specify that respirators be worn when cleaning a tank that had carried toxic materials. Under the absolute liability statutes, even if the employer had provided the proper personal protective equipment, trained employees in the use of it, and disciplined employees for failing to use the equipment, the employer would still be found guilty if an employee was injured as a result of not wearing the proper equipment.
The History of Due Diligence

- Under the absolute liability concept, if the event that was not supposed to happen did happen, you the employer, were guilty. The employer’s effort to ensure that employees followed safety procedures did not matter. What mattered was that the employee did not wear a respirator and was hurt.
The Sault Ste. Marie case brought about a significant change for employers. Employers could now use their H&S programs as a defense against charges under the Act. Since the supreme court decision, if an employer provides instruction to employees, and takes other such reasonable steps to protect employees, the employer can use the defense of due diligence in the event of a charge.
Using Due Diligence

• Due Diligence is both a legal concept and a standard that tells us what an effective H&S program looks like.

• It is also the level of judgment, care, prudence, determination and activity that a person would reasonably be expected to do under particular circumstances.
Using Due Diligence

• This means that the employer needs to take all reasonable precautions, under particular circumstances, to prevent injuries or accidents in the workplace.

• This can also apply to situations that are not addressed elsewhere in the OHS legislation.
Using Due Diligence

• To exercise due diligence, an employer must implement a plan to identify possible workplace hazards and carry out the appropriate corrective action to prevent accidents and injuries arising from these hazards.
Using Due Diligence

• If charged, a defendant may be found not guilty if they can prove that due diligence was used. They must prove that all precautions, reasonable under the circumstances, were taken to protect the health and safety of workers.
Using Due Diligence

- In the legislation, the concept of due diligence is commonly referred to as the “General Duty Clause”. Every province and territory in Canada has similar occupational OHS legislation that describes the obligation of the employer to the worker.
Using Due Diligence

• Manitoba “general duty clause” example.
• By including the words reasonably practicable, legislators make the OHS act “strict liability” rather than “absolute liability” and this introduces the possibility of a due diligence defense.
Using Due Diligence

• Due diligence tells employers what is expected of them in the development, implementation and monitoring of their health and safety programs.

• Legislation requires that companies take all reasonable care and diligence, or what a reasonable person would do in a similar circumstance.
Using Due Diligence

• Successfully bringing due diligence into the workplace requires that the employer integrate reasonable care into all company standards.

• It is not as easy as handing out your policies and procedures and expecting that they will be followed.

• The **employer** and **supervisors** must ensure that these are present, but equally important they must ensure they are actually applied and complied within the workplace.
Elements of Due Diligence

• Due Diligence cannot be made up after the fact. To use due diligence as a defense, employers must be able to prove that they took all reasonable care to avoid accidents before they happen.
• This is demonstrated by your actions before an event occurs, not after
Elements of Due Diligence

• There are 6 main elements that need to be present to ensure due diligence in the workplace.
  – Policies, procedures and practices to identify and deal with workplace hazards
  – Communication and training
  – Monitoring to ensure effectiveness
  – Employee responsibilities
  – Accident investigation and reporting
  – Documenting Due Diligence
Policies, Procedures & Practices

• The employer must have in place written occupational health & safety policies, practices and procedures.

• These demonstrate and document that the employer has carried out workplace safety audits, identified hazardous practices and conditions and made changes to correct these.
Policies, Procedures & Practices

• Supervisors cannot be everywhere. Employees therefore must be given the information they need to operate in a safe way.
Policies, Procedures & Practices

• To meet this aspect of the due diligence obligation, employers must examine the activities that occur in the workplace and identify those which are hazardous.

• In order to meet the requirement of due diligence, management is expected to look at the workplace in some depth to identify hazardous conditions. “I didn’t think of that” is not an acceptable excuse.
There are several approaches that can be used to meet this element of due diligence:

– Supervisor, in viewing the activities in their work area, should be constantly alert for hazards that have become familiar. By making this effort to step back and see the work area through fresh eyes, hidden hazards may become apparent.

– Inviting supervisors or managers from other work areas to do reviews or inspections of other areas

– Using outside professionals to perform audits.
Policies, Procedures & Practices

• Specific procedures must be developed for the safe performance of any hazardous activities.
• The degree of detail in the procedure varies with the risk and the complexity.
• High risk/complex tasks require very detailed procedures
• Low risk/simple tasks require much less detail
Policies, Procedures & Practices

• Policies, procedures, and practices have to be kept up-to-date. As new equipment is introduced in the workplace, and new regulations or new procedures are added, changes must be made and communicated to employees.
Communication and training

• The employer must provide the appropriate training and education to the employees so that they understand and carry out their work according to the established policies, practices, and procedures.

• You are not meeting due diligence standards if employees are allowed to perform work on equipment that they have not been trained to operate.
Communication and training

• Training is an essential element of due diligence in the workplace.
• Supervisors also need training to ensure they are competent persons, as defined in legislations.
Communication and training

• Competent persons are those who:
  – Are qualified because of their knowledge, training and experience to organize the work and its performance.
  – Are familiar with the provisions of the Occupational Health and Safety Act and the regulations that apply to the work that they are supervising.
  – Have knowledge of any potential or actual danger to health or safety in the workplace.
Communication and training

• New hazards and new employees mean that hazard information has to be constantly communicated to employees.
• “for example” management must make sure that an employee who has never done a particular task before understands and can deal with the hazards of that task.
• Also changes in workplace conditions or equipment have to be properly communicated to employees.
Due Diligence requires more than just creating the paperwork.

In addition to having specific, written procedures, companies must have a practice of ongoing reinforcement of these policies and procedures.
Monitoring to Ensure Effectiveness

• It is the employers’ responsibility to monitor the workplace and ensure that employees are following the policies, practices and procedures.

• Written documentation of progressive disciplining for breaches of safety rules is considered due diligence.
Monitoring to Ensure Effectiveness

• Monitoring involves the following:
  – Instructing employees about the existence of, and the requirement of the policies, procedures, and practices.
  – Routine monitoring in the workplace to ensure compliance.
  – The use of the employer’s authority to ensure that in fact employees are complying with the policies, procedures and practices. This includes the use of discipline when necessary to ensure compliance.
Employee Responsibilities

• There are obviously many requirements for the employer but workers also have responsibilities.

• They have a duty to take reasonable care to ensure the safety of themselves and their coworkers.

• This includes following safe work practices and complying with regulations.
Accident Investigation and Reporting

• The employer needs to have an accident investigation and reporting system in place.

• Employees should be encouraged to report “near misses” and these should be investigated also.

• Encouraging employees to report near misses, and then investigating them can help prevent future accidents.
Accident Investigation and Reporting

• Incorporating information from these investigations into revised, improved policies, practices and procedures will also establish the employer is practicing due diligence.
Documenting Due Diligence

• It is not enough to say that you have taken steps to implement due diligence; you have to prove it.
• Due diligence is an employer’s best (if not only) defense against charges in the event that an accident occurs in spite of the employer’s due diligence efforts.
Documenting Due Diligence

• The employer should document, in writing, all of the steps we have discussed.

• Management needs to ensure that such things as training activities, safety audits, disciplinary actions, health & safety meetings are all documented, and the documentation is retained.
Documenting Due Diligence

• This documentation will give the employer a history of how the company’s occupational health & safety program has progressed over time.
• Up-to-date documentation can be used as a defense to charges in case an accident occurs despite an employer’s due diligence efforts.
Documenting Due Diligence

• In the event of charges being laid under the Act, employers who have an effective program to bring due diligence to the workplace will want to be able to prove the program’s existence.

• The only way to do this is through on-going documentation.

• With out proper documentation, it is very difficult for employers to prove the extent of their efforts.
Questions