Case In Point

Alberta Court of Appeal Upholds Conviction in Calf-Roping Machine Case

Date: August 15, 2013

In its decision Alberta v. XI Technologies Inc., the Alberta Court of Appeal upheld the conviction of XI Technologies in relation to the death of an employee who was operating a faulty calf-roping machine at an employer hosted-event, concluding that the employer failed to do all that was reasonably practicable to avoid the foreseeable risks in the operation of that machine.

As reported in an earlier blog post, the death occurred when a calf-roping machine the employer had rented from a third party malfunctioned and fatally struck the employee, who was assisting in its operation. The machine did not arrive with instructions, and was not functioning properly from the outset. Some employees developed a method of manually operating the machine, including the one who was fatally struck by a lever on the machine.

The employer was charged under the Alberta *Occupational Health and Safety Act* on two counts: failure to ensure the health and safety of its employees, and failure to ensure that “all equipment used at a work site would safely perform the function for which it was intended or designed.” At trial, the trial judge found that the employer had established its defence of due diligence. Among other things, she concluded that the significant risks of manually operating the equipment were “very obvious” with the benefit of hindsight “but that risk was not obvious to a reasonable person at the time that the machine was used by the operators.”

That decision was overturned by a summary conviction appeal judge, who found the trial judge failed to apply the law to the evidence she accepted. He held that the potential danger of being struck by a premature release of the lever was reasonably foreseeable.

That conviction was upheld by the Alberta Court of Appeal, who agreed that the determination of the trial judge was incompatible with the facts as she found them. For example, her finding that the employer failed to recognize that the machine should not be operated manually was inconsistent with her finding that one of the employees assigned to operate it recognized the design of the machine did not lend itself to manual operation. The Court of Appeal stated:

[34] We agree that the trial judge’s verdict that XI Technologies was duly diligent is unreasonable, as it is inconsistent with the evidence that the company knew the machine was not properly functioning and not intended to require the operator to reach into the machine to manually detach the hinge hook. Armed with this knowledge, XI Technologies did not take sufficient steps and certainly did not do all that was reasonably practicable in the circumstances to avoid the reasonably foreseeable risks.

On the question of whether the foreseeability test was properly applied, the Court agreed with the summary conviction appeal judge that the danger was reasonably foreseeable and the employer failed to address that danger, confirming that the test is not whether an employee would have foreseen the danger, but whether it was reasonably apparent to a reasonable person in the circumstances.

The Court concluded that the danger was reasonably foreseeable and the employer did not take any corrective steps in relation to that danger. It stated:

[41] That XI Technologies would even consider operating a machine that no one had any familiarity with and without either its own operator or a proper set of written instructions in itself speaks volumes as to the lack of its due diligence in this matter. This is particularly so given that the machine was going to be used by party goers who would be consuming alcohol.

[42] Accordingly, we are of the view that the summary conviction appeal judge properly found that the trial judge's decision that the risk was only obvious with the benefit of hindsight was incompatible with the balance of the evidence accepted by the trial judge, that XI Technologies did not do all that was reasonably practicable in the circumstances to avoid the reasonably foreseeable risks, and that the operating procedures had not eliminated the significant risks involved with the ride.

This decision confirms the high onus on employers under occupational health and safety legislation to protect their employees, including (and perhaps particularly) in respect of activities which fall outside an employee's normal duties, and away from the employer's premises. Employers must take all precautions in respect of health and safety that are reasonably apparent to a reasonable person in order to ensure compliance with the legislation.