

**EDITORIAL**

Welcome to the spring edition of *OHSTMLAWTM Report*. Major changes are coming to Ontario's workers' compensation system. My colleague, Stephen

Roberts outlines changes to the Workplace Safety and Insurance Act, which have been passed into law by the provincial legislature but not yet proclaimed into law. These changes may affect your business so please review this article to ensure you are familiar with these changes.

This edition of *OHSTMLAWTM report* also covers the upcoming Ministry of Labour inspection blitz on musculoskeletal disorders in Ontario. We also cover the new Accessibility for Ontarians with Disabilities Act, the new Health Care Workers team, and new changes to British Columbian OHS laws.

Finally, our OHS Consultant, David Marchione discusses the importance of continuing to manage OHS risks during an economic downturn. Gowlings continues to help clients prevent workplace injuries through training and preventative policy development.

Norm Keith, B.A., LL.B., CRSP
Partner, Gowlings

Bill 119, Mandatory Coverage for Independent Operators in Construction

BY STEPHEN ROBERTS, B.A., LL.B., C.S., PARTNER

On October 28, 2008 the Honourable Peter Fonseca, the Minister of Labour introduced the *Workplace Safety and Insurance Amendment Act, 2008* (Bill 119). He stated as follows: "The proposed Bill, if passed, would extend mandatory workers' compensation coverage to independent operators, sole proprietors, partners in a partnership, and executive officers of corporations in the construction industry."

Bill 119 received Royal Assent on November 27, 2008 but it has not been proclaimed in force yet. It is expected to become effective by 2012. Until then independent operators in the construction industry will not be required to be registered. However, it is important for employers to become familiar with these amendments to the *Workplace Safety and Insurance Act (WSIA)*.

Under the current provisions of the *WSIA*, independent operators, sole proprietors, partners in a partnership and executive officers of corporations are not required to have coverage.

The amendments to the *WSIA* would repeal the definition of "independent operator" in Subsection 2(1).

The amendments will provide an exemption from registration for inde-

pendent operators, sole proprietors, partners in a partnership, and executive officers of corporations who perform no construction work other than exempt home renovation work. Home renovation work would mean construction work that is performed by these individuals "on an existing private residence that is occupied or to be occupied by the person who directly retains the independent operator, sole proprietor, partnership or corporation, or by a member of the person's family" (Section 12.2(7)).

Bill 119 requires that "every independent operator carrying on business in construction shall register with the Board within ten (10) days after becoming such an independent operator". Furthermore, Section 141.1 has been added and states that it applies when a person directly retains a contractor or subcontractor to perform construction work. Therefore, when a person directly retains a contractor or subcontractor to perform construction work they will need to ensure that such contractor or subcontractor has complied with its payment obligations under the *Act* by obtaining a clearance certificate. In the event a person does not obtain a clearance certificate then the person may

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become liable for the obligations of the contractor or subcontractor.

The Counsel of Ontario Construction Associations (COCA) prepared a submission to the standing committee reviewing Bill 119 which supported the recommended amendments. The said submission stated as follows:

“An effective mandatory coverage system has the potential to level the business playing field across the construction industry. It can do this by:

- Eliminating loopholes in the current insurance system that provides opportunities for individuals to avoid paying insurance premiums,
- Clarifying who is responsible for paying premiums to the WSIB and,
- More easily and accurately identifying a person’s status with the WSIB.”

COCA was of the view that executive officers “who do not perform construction work or who are not exposed to the risks associated with attending a construction site should not be compelled to carry WSIB coverage.” COCA was also concerned with the exemption being provided for the home renovation sector and felt this area needed further study and revisions.

It should be noted that the government has now also passed Ontario Regulation 47/09 in February of 2009 which provides exemptions for partners and executive officers in the construction sector. The Regulation limits the exemption to one partner in a partnership or one executive officer of a corporation and only if a declaration is filed and the partner/executive officer does not perform any construction work.

Most employers in the construction industry will welcome these amendments to the *WSIA* so that a level playing field will be created within the construction industry. Currently, many employers in the construction industry

avoid the payment of WSIB premiums and thereby are able to undercut their competitors. Furthermore, there are numerous other abuses which take place regarding independent operators in the construction industry and the provisions of Bill 119 will help to correct some of these abuses.

It is very important for all employers in the construction area to become familiar with the provisions of Bill 119. All employers who engage independent operators or contractors and subcontractors should be aware of their obligations and liabilities under the *WSIA*. If you need assistance understanding your obligations please contact us.

MOL Continues Safety Blitz Focus on MSD Hazards

BY: CATHY CHANDLER, B.A. SC., CRSP,
CHSC, OHS CONSULTANT

The Ministry of Labour is continuing its safety blitz of Ontario workplaces in April 2009. The focus of the safety blitz is musculoskeletal disorders (MSDs).

According to a March 18, 2009 MOL news release, the blitz will target workplaces in the construction, health-care, industrial and mining sectors. MOL Inspectors will concentrate on tasks that require workers to exert force in lifting, pushing or carrying items and tasks that put workers in awkward postures or are repetitive.

MSD’s are injuries and disorders of the musculoskeletal system which includes muscles, tendons, and tendon sheaths, nerves, bursa, blood vessels, joints/spinal discs and ligaments.

MSD’s cost Ontario workplaces millions of dollars each year, accounting for almost half of all lost time claims reported to the Workplace Safety and Insurance Board.

New Occupational Health and Safety Team for Health Care Workers Established

BY: CATHY CHANDLER, B.A. SC., CRSP,
CHSC, OHS CONSULTANT

The Ministry of Labour recently announced that the Ontario government is creating a team of health care specialists to help improve workplace safety of health care workers in Ontario.

The goal of the new seventeen member health care specialists team is to improve enforcement of occupational health and safety regulations in health care workplaces.

The new team is part of the Safe At Work Ontario strategy designed to reduce the rate of workplace injury and illness and improve the health and safety culture of provincially regulated workplaces in Ontario.

There are more than 480,000 workers in Ontario’s hospitals, long-term care facilities, doctors’ offices, medical laboratories and other health care workplaces. These workers are exposed to a variety of unique workplace hazards such as musculoskeletal injuries from patient lifts and transfers, slips, trips and falls, violence and infectious diseases.

The new health care specialist time team will, hopefully, be able to assist employers to control workplace hazards and prevent injuries and occupational diseases by:

- Helping to enforce compliance with health and safety legislation in health care sector workplaces;
- Ensuring health care providers are better prepared for emergencies, including outbreaks of infectious diseases; and
- Responding to the recommendations in the SARS Commission final report by

Justice Archie Campbell, released in January 2007.

The new team will also support a committee of sector representatives who advise the Minister on occupational health and safety matters. Chief Physician Dr. Leon Genesove will lead the new team of health care professionals.

Improvements for Ontarians with Dissabilities

BY: KATHRYN ALDRIDGE, B.A. SC.,
CHSC, OHS CONSULTANT

Thousands of people in Ontario have a recognized disability. A disability may include some form of physical, visual, mental, learning, hearing or speech impairment. Currently in our community and businesses, barriers exist for those with disabilities that prevents or limits these persons from participating in things people without disabilities can. Ontario is presently in the process of removing all barriers with a goal of full implementation by 2025.

The Ontario government enacted the *Accessibility for Ontarians with Disabilities Act* (“AODA”) in 2005. This made Ontario the first jurisdiction in Canada to introduce accessibility standards. Several accessibility standards that are common to the private, public and not-

for-profit sectors have been or are in the process of being developed. These standards will outline how a business or organization must identify, remove and prevent barriers to accessibility. They include:

- Customer Service (in force as of January 2008);
- Information and Communications (public review completed in February 2009);
- Employment (currently available online for public review until May 2009); and
- The Built Environment.

A sector-specific standard in the area of transportation is also being developed. All standards are developed by a standards development committee, which consists of people with disabilities and people in the business community.

The introduction of these standards will have a significant impact on businesses and organizations in Ontario in terms of how everyday operations are carried out and how products/services are offered, not to mention the costs associated with meeting the standards. More of an impact will likely be felt by those who have not taken any steps up to this point to move towards a barrier-free operation. Changes that businesses and organizations will have to make include providing information in a variety of formats (i.e. small/large print and audio), making physical adjustments to

building layouts, providing disability awareness training to employees, and establishing recruitment, retention and accommodation policies. More specific adjustments will depend on the nature of each organization.

Organizations should assess their current level of compliance with the AODA and standards, identify any gaps with their current practices and develop an action plan to move towards compliance. Penalties for non-compliance for a person are up to \$50k for each day or part day that the offence occurs and up to \$100k for each day or part day for a corporation.

The Ministry of Community and Social Services has published guidance documents on the legislation. Gowlings is also available to provide advice, training and assistance with meeting the accessibility standards across Ontario.

Tough Economic Times Call for Wise OHS Decisions

BY: DAVID MARCHIONE, B.A.,
OHS CONSULTANT

During economic downturns, businesses typically cut spending to save money. Many of the first areas to be cut include health and safety and training. Many employers believe that because they do not see an immediate return on

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investment in these areas, that they can manage a cut to those budgets. However, the reality is that cuts in these areas can lead to increased unexpected costs that will directly impact your organization's bottom line.

Cuts in health and safety and/or training can lead to higher incident or injury rates. These, in turn, can lead to decreased morale among employees, higher rates of absenteeism, increased injury costs, increased workers' compensation costs and possibly costs due to a prosecution by an occupational health and safety ("OHS") regulator. It is during these times that employers should maintain these programs in order to prevent injuries and help bring injured workers back to work. This article will provide some tips on how to keep costs down by doing exactly that.

Prevent incidents from occurring in the workplace. Although this sounds like a simple statement, cutbacks in health and safety personnel and initiatives may lead to an organization becoming reactive to health and safety issues rather than being proactive. By maintaining a proactive approach, we can identify hazards before they lead to incidents and prevent them from occurring. By taking the opposite approach and dealing with incidents after they

occur, you face downtime, potentially serious or fatal accidents, lost production, and potential prosecution from the OHS regulator.

Ensure workers have been adequately trained. It is imperative that employers ensure that their workers are trained about their rights and responsibilities in the workplace, the hazards they face at work and the measures that have been put into place for their protection. There are many options available to keep training costs down, including in-house training sessions, or on-line training modules for your employees. Ensuring employees are trained helps keep them safe and productive on the job, and documented training should be part of every employer's occupational health and safety management system ("OHSMS").

Maintain your Early and Safe Return to Work Program. Research has shown that the longer someone is off work following an injury, the more difficult it is to bring them back to the workplace. Following a workplace injury, maintain contact with injured workers to monitor their recovery and offer them duties that are available and within their functional abilities as soon as possible. By assisting workers in returning to work, employers can

decrease the cost of workers' compensation claims, and potentially avoid costly premium surcharges.

Keep your OHSMS up to date.

Ensure that documentation is completed, policies and procedures are reviewed and amended as required, and that your OHSMS is complete and functioning. Such a system will help create a safety culture within the workplace. This, in turn, will help prevent incidents and injuries. By keeping your OHSMS up to date, you avoid potentially larger expenditures in order to do so in the future. A functioning and documented OHSMS is also good evidence of due diligence and may help prevent a potential prosecution should a workplace incident occur.

During trying economic times, it is important to spend wisely. By taking a few steps to maintain your health and safety program you will realize short term savings by preventing incidents and long term savings and increased profits by keeping workers at work and performing effectively. Cutting OHS and training programs will only result in a deeper cut to your bottom line.

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Changes to British Columbia OHS Law

By: E. ELLEN RIPLEY, B.Sc., M.Sc., LL.B., ASSOCIATE

Recently WorkSafeBC Board of Directors took approved amendments to eight Parts to the *Occupational Health and Safety Regulation* (OHSR). The changes took effect on January 1, 2009, with the exception of the new avalanche assessment requirements (effective September 1, 2009).

Recognition of professional geoscientists and professional foresters: The OHSR will include a definition of “professional geoscientist” and also the broader term of “qualified registered professional”, that includes professional engineers, professional geoscientists, and in relation to forestry operations, professional foresters or holders of special permits under the Foresters Act. Reports prepared by professional geoscientists will now be accepted by WorkSafeBC, as part of the general project notification requirements for underground projects. Written instructions prepared by professional geoscientists and professional foresters for excavation projects that do not require support structures, including sloping and shoring requirements, will also be recognized under the OHSR.

Harmonization with new BC tobacco laws: Employers will be required to control the exposure of workers to environmental tobacco smoke by restricting smoking to a safe outdoor location that is a minimum of 3 metres from a doorway, window or air intake of an indoor workplace. Patios used in conjunction with a public place where food or beverages are being served, and casino and bingo hall patios

are exempt from this restriction, providing that certain criteria are met relating to patio enclosure, and use of patio doorways, windows, and air intakes near the patio. Employers must also ensure that workers do not work in indoor areas where smoking is allowed. This restriction is also subject to certain exemptions. Further, portions of the OHSR will be deleted, which provided for smoking in public entertainment facilities such as bars, bingo halls, bowling alleys, cocktail lounges, restaurants gambling casinos, nightclubs, or pubs.

Changes to the classification of reproductive toxins and sensitizing agents: In order to maintain consistency with terminology employed by the American Conference of Governmental Industrial Hygienists in recording the critical health effects of substances, a new classification system will be adopted for reproductive toxins and sensitizing agents. This change will not affect the current requirement that an employer must consider substitution for designated substances.

Crane and hoist operators' duties: This amendment addresses one recommendation made by the BC Coroners Service in response to a June 2005 incident involving a worker who was fatally injured after being struck by the overhaul ball of a mobile crane. Operators of cranes, hoists and boom trucks are now under a duty to have full control of the equipment controls whenever the hoisting equipment is in use, and must not engage in other duties while operating the equipment. This provision is intended to capture not only the use of crane and hoist equipment for lifting and supporting loads, but also the set up and take down of the equipment.

Seating and seat belt requirements during worker transport: The amendments to Part 17 of the OHSR

are two-fold. The first group are intended to harmonize the OHSR with the *Motor Vehicle Act* (MVA) and *Motor Vehicle Act Regulations* (MVAR). Where a worker transportation vehicle is used off a highway, the seating and seat belt assembly requirements under Division 39 of the MVAR and Section 220 of the MVA apply as if the vehicle was operated on a highway. A worker transportation vehicle, newly defined, means a motor vehicle provided by or arranged by an employer to transport three or more workers, to or from a workplace.

The scope of the provisions relating to crew cars, buses and crummies have been expanded to include all worker transportation vehicles used primarily off highways (roads not covered by the MVA). The second group of amendments implement specific obligations on employers and operators of worker transportation vehicles to ensure that the vehicles are inspected by qualified persons before first use of the vehicle on a work shift. Further, operators are now prohibited from operating vehicles in which workers have failed to properly secure available seat belts.

Construction excavation and demolition: In order to minimize the risk to a person on or near a fill or stockpile from a failure or instability, new obligations will be introduced relating to stockpile and fills in relation to planning, construction and maintenance activities. This includes the introduction of a height limitation for unstable stockpile faces.

Oil and Gas Industry:

Driver Training: The OHSR will recognize certification through driver training courses offered by Enform Canada. The amendments also anticipate the development and recognition of new specific driver training courses from Enform Canada.

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Riding Hoist Equipment: In emergency situations, subsection 23.51(2) of the *OHSR* permits an injured worker to be lowered from a derrick by means of the travelling block or a tugger hoist. The new amendments will prohibit the suspension of persons by load lines during training exercises using hoist equipment that has not been rated by the manufacturer for hoisting personnel.

Snubbing Operations: Snubbing operations will be required to be carried out in accordance with recognized industry safe work practices.

Emergency Escape Systems: New changes will provide more flexibility of choice in drilling or service derrick emergency escape systems. Instead of the previously prescribed “Geronimo-style” equipment, a new option will be available for selecting an alternative escape system that meets the following criteria:

- 1) It must be available for use at the racking board whenever a person is working at that level during drilling or well servicing operations,
- 2) It must simultaneously and safely transport all persons from the racking board level, either individually or as a group, to a location at ground level removed from the source of danger,
- 3) It must shield the persons using the system from any danger coming from the well bore during the descent or separates the persons using the system from such danger during the descent,
- 4) It must have a means to keep the persons using the system from falling out of or off of the emergency means of escape during descent, and

- 5) It must have a means, either automatic or manually controlled, to control the rate of descent to a speed that minimizes the risk of injury to the persons using the systems when they near ground level.

There will also be other requirements involving the placement of equipment and movement of vehicles, inspection, testing and training of workers in respect of alternative escape systems.

The amendments can be found in the Resolution of the Board of Directors (dated September 10, 2008), published in *The British Columbia Gazette*, Part II, October 7, 2008, Volume 51, B.C. Reg. 258/2008.

What is the Difference Between an OHS Policy and Program?

BY: CATHY CHANDLER, B.A. SC., CRSP,
CHSC, OHS CONSULTANT

In Ontario, employers are legally obligated to develop a written occupational health and safety (“OHS”) policy and program. Section 25(2)(j) of Ontario’s *Occupational Health and Safety Act* (“*OHS Act*”) states,

An employer shall prepare and review at least annually a written occupational health and safety policy and develop and maintain a program to implement that policy.

In order to meet the intent of section 25(2)(j) of the *OHS Act*, one must first understand that the terms ‘policy’ and ‘program’ are not synonymous. A typical OHS policy is a one or two page document stating management’s intent

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and commitment towards OHS. A program, on the other hand, is a detailed series of policies, procedures and systems designed to put the OHS policy into effect. This article will explore the general elements of a typical OHS policy and program. Keep in mind the specifics of your own policy and program will depend on the circumstances of your own company such as your company size and workplace specific hazards.

An OHS policy should provide a clear indication of your company's health and safety objectives. The policy should include statements about personal injury, occupational hazards, occupational disease and a commitment to meeting the requirements, duties and standards set out in the *OHSA* and its applicable regulations. The policy should also contain statements on the company's OHS program objectives such as:

- ensure all workers are aware of and understand their duties and responsibilities under the *OHSA*;
- prevent injuries, equipment damage and property loss;
- establish accountability for occupational health and safety responsibilities;
- effect recommendations for the continuous improvement of our health and safety program;
- provide guidelines for consistent implementation of our

health and safety program;

- educate and train workers on the policies and procedures in place at our organization as well as known job related hazards and unsafe situations; and,
- cultivate a positive safety culture for our workers.

The OHS Policy must be current, dated and reviewed annually in consultation with the joint health and safety committee or health and safety representative. The policy should also be signed by the most senior level person in the organization and posted at a location in the workplace where it can easily be seen by all employees.

The OHS policy itself is meaningless unless a program exists to put the policy into effect. Furthermore, you will not be in compliance with section 25(2)(j) of the *OHSA* unless there is a written program in place to implement the OHS policy. To put your policy into effect you will need to make sure that:

- your policy is communicated to everyone in the workplace;
- responsibilities are clearly defined, assigned and understood;
- methods of accountability are established;
- proper procedures and program activities are established; and
- adequate financial and other resources are provided.

Once your policy has been pre-

pared, a program is required to put the policy into effect. Such a program will differ from one workplace to the next depending on factors such as organization structure, nature of the operation, and hazards. As a general rule, however, program elements should link with your health and safety policy objectives. For example, if a policy objective is to identify all hazards, related program elements would include scheduled workplace inspections and job tasks analysis'.

The following elements should be part of all OHS programs:

- Health and safety responsibilities;
- Standards;
- Worker involvement;
- Systematic identification, assessment and control of actual and potential hazards;
- Training;
- Program monitoring; and
- Program auditing.

In keeping with the underlying philosophy of the *OHSA*, which is to foster cooperation and involvement between management and workers, ensure that the JHSC or health and safety representative has a role in the development, implementation and review of OHS programs.

For further information on OHS policy and program development contact a Gowlings' OHS Consultant.

Want to read more on Occupational Health and Safety Law in Canada?

A Practical Guide to Occupational Health and Safety Compliance in Ontario, Third Edition

BY NORMAN A. KEITH AND ELIZABETH RANKIN



Know how to comply with the Occupational Health and Safety Act (O.H.S.A.) and regulations to avoid worker injury, promote safety, and avoid potential costly employer liability or criminal infractions.

Various sections of the Act are discussed, including:

- health and safety representatives and joint Health and Safety Committees
- the Workplace Hazardous Materials Information System
- the right of workers to refuse to do unsafe work
- developing an effective health and safety management system, including training programs and document management
- the high fines that are imposed on employers who fail to comply with the O.H.S.A. ...and more!

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