



EDITORIAL

Welcome to 2010! It looks like it will be a busy year for OHS and HR professionals already.

First, in Ontario, all employers with more than 5 workers must conduct a Risk Assessment, develop a policy, program and provide training all before June 15, 2010. This is as a result of the Bill 168 amendments to the Occupational Health and Safety Act. Gowlings has developed a Risk Assessment compliance program to assist your organization comply with Bill 168.

Further, the use of Administrative Monetary Penalties or AMPs in the United States have had an influence on Canadian OHS law. We review some of those developments in this newsletter.

In Quebec, there have been increased fines for OHS contraventions.

We hope you enjoy the newsletter. Please feel free to send us your comments and remember to work safe!"

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

## Increased Use of OHS AMPs Across North America

BY: NORM KEITH, B.A., LL.B., CRSP, PARTNER

The Federal Occupational Safety and Health Administration ("OSHA") in the United States has issued a record 87 million dollar Administrative Monetary Penalty ("AMPs") against BP Products North America Inc., for allegedly failing to correct safety hazards identified after the 2005 explosion at its Texas City refinery. Fifteen workers were killed and 170 workers were injured in that explosion and fire. The Obama administration Secretary of Labor, Hilda L. Solis was quoted as saying "This administration will not tolerate disregard of our laws".

Administrative monetary penalties, or AMPs as they are often referred to in the United States, have been the preferred method of enforcement, rather than prosecution, in the United States. There is a trend in Canada in favour of the same approach, using the administrative monetary penalties, in British Columbia, Manitoba, the Yukon. They have now been introduced in Nova Scotia.

The advantage for the OHS regulatory enforcement, using an American styled AMPs is that there is no need to prove the allegation associated with the monetary penalty which is prescribed by statute. The OHS regulator merely need

investigate and assert that there is an unlawful condition and thereafter, usually with an Order to comply, issue an administrative monetary penalty. The advantage to the company is that there is no prosecution, stigma of a criminal or quasi-criminal offence, and often less publicity associated with an administrative monetary penalty rather than a prosecution and a fine, or in the case of individuals, risk of jail.

On the flip side, an organization that receives administrative monetary penalty is not given the presumption of innocence afforded by s. 11(d) of the Canadian *Charter of Rights and Freedoms*. One of the hallmarks of modern western democratic societies is the presumption of innocence when criminal or regulatory, *quasi-criminal* charges are laid against a corporation or an individual. Therefore, the denial of the presumption of innocence is a strong disadvantage to an employer or corporation that wishes to challenge the allegations of the OHS regulator that it has contravened legal standards.

AMPs usually provide for an appeal. In other words, an employer, such as BP Products North America, would have a

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right to appeal the OSHA issuance of the literally hundreds of citations that added up to the 87 million dollar administrative monetary penalty. However, the onus of proof, from a legal perspective, is on the employer rather than on the OHS regulator. Although this is not a true “reverse onus” since there is no prosecution against the employer, for all practical purposes, it puts more responsibility on the employer, if they are advancing an appeal, to show that they did not commit any contraventions.

Although there is a great deal of legal, conceptual difference between a prosecution and the assessment of AMPs, from a corporation’s perspective, they matter little to an employer. Although an AMP may make it more difficult for an employer to challenge the decision of an OHS regulatory through an appeal, the bottom-line is that the degree of legal compliance with OHS requirements will be the standard against which the employer’s conduct is measured.

One final thought about the implications of the BP Products North America 87 million administrative monetary penalties, is that the size alone does more than provide a deterrent to the corporation for future legal violations, it also is so extreme that it may detract from the ability of the employer to adequately improve occupational health and safety in the workplace. OHS Regulators would be well advised not to be so extreme in their view of the need for legal enforcement, either by way of prosecution or administrative monetary penalties, such that they either provided disincentive to invest in the jurisdiction or make it difficult to finance health and safety improvements. Regulators, with enormous power to prosecute or impose AMPs, such as the BP Products North America case, need to recognize the implications of overzealous enforcement and punitive fines or administrative monetary penalties. Although they may have the power to use such extreme

measures, what benefit is there in improving health and safety in the workplace.

For more information please contact Norm Keith at 1-866-862-5787 ext. 85699, Norm.Keith@gowlings.com.

## Top 10 U.S. Safety Violations for 2009

BY: KATHRYN ALDRIDGE, B.A.Sc.,  
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CONSULTANT/PARALEGAL

The United States federal Occupational Safety and Health Administration (OSHA) recently released their top 10 most cited health and safety violations for 2009. A top 10 list has been compiled for several years now. Over the years many of the types of violations have remained fairly constant. Some new violations have been introduced (i.e. ladders) but for the most part violations have merely changed in ranking.

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## Complying with Bill 168 Ontario's New Workplace Violence and Harassment Legislation

Bill 168, An Act to amend the *Occupational Health and Safety Act* with respect to violence and harassment in the workplace will come into force on June 15, 2010.

Bill 168 requires every employer in Ontario, where more than five workers are employed, to take specific steps, including developing a violence risk assessment and implementing a policy and program, to prevent and manage workplace violence and harassment.

This half day seminar, developed by Norm Keith, presented by Gowlings’ lawyers and OHS Consultants, will provide a detailed legal analysis of Bill 168 and outline a practical plan for compliance.

**All participants will receive a complementary copy of a sample workplace violence and harassment policy.**

Locations: Barrie, Brampton, Brantford, London, Markham, Mississauga, North Bay, Orillia, Ottawa, Peterborough, Sault Ste. Marie, Sudbury, St. Catherine's, Thunder Bay, Toronto, Vaughan

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The OSHA, as part of the U.S. Department of Labour, enforces the *Occupational Safety and Health Act*. The agency employs approximately 2,150 people, which includes 1,100 inspectors who conduct inspections/investigations to determine compliance with OSHA standards. Penalties for a violation can range from \$0-\$70k depending on the seriousness of the actual or potential harm to workers.

OSHA's Top 10 list of most cited violations for 2009 are listed below. These violations cover from October 1, 2008 through to September 30, 2009. Out of the total violations some were considered a "serious" violation and some a "wilful" violation. OSHA defines a "serious" violation as "one in which there is substantial probability that death or serious physical harm could result, and the employer knew or should have

known of the hazard." A "wilful" violation is defined as one "committed with an intentional disregard of or plain indifference to the requirements of the *Occupational Safety and Health Act* and regulations." Listed below is a breakdown of all categories.

Rank	Violation Category	Total # of Violations	# of Serious Violations
1	Scaffolding (Standard 1926.451)	9,444	8,726
2	Fall Protection – General Requirements (Standard 1926.501)	7,087	6,283
3	Hazard Communication (Standard 1910.1200)	6,728	3,922
4	Respiratory Protection (Standard 1910.134)	4,001	2,618
5	Lockout / Tagout (Standard 1910.147)	3,431	2,814
6	Ladders (Standard 1926.1053)	3,227	2,909
7	Electrical – Wiring Methods (Standard 1910.305)	3,220	2,567
8	Powered Industrial Trucks (Standard 1910.178)	3,071	2,347
9	Electrical – General Requirements (Standard 1910.303)	2,661	2,049
10	Machine Guarding – General Requirements (Standard 1910.212)	2,476	2,240

Rank	Violation Category	# of Wilful Violations
1	Requirements for Protective Systems (Standard 1926.652)	83
2	Fall Protection (Standard 1926.501)	44
3	Scaffolding – General Requirements (Standard 1926.451)	36
4	Specific Excavation Requirements (Standard 1926.651)	30
5	Permit-Required Confined Space (Standard 1910.146)	26
6	Lockout / Tagout (Standard 1910.147)	20
7	Personal Protective Equipment (Standard 1910.132)	20
8	Process Safety Management (Standard 1910.119)	16
9	Machine Guarding (Standard 1019.212)	14
10	Asbestos (Standard 1926.1101)	14

The list reflects not only violations due to an incident but preventive inspections from OSHA inspectors. The specific violation under each category varied and included such things as lack of maintenance, failure to wear/use equipment (and properly), failure to establish and follow written programs, failure to conduct inspections, and failure to provide training and instruction.

Although the legislation is somewhat different, Canada, in comparison, sees many of the same violations. Many of the types of incidents and injuries that result are common to both countries. We will have to wait and see what 2010 brings us, however, unless significant changes are made with respect to compliance we are likely to see the same kinds of violations in the U.S. for this year.

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## Ontario Ministry of Labour Enforcement – Working from Heights

BY: ANTHONY DI GIANNI, B.A.Sc.,  
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December 24, 2009, Christmas Eve, four construction workers were killed in an industrial accident in Toronto when the suspended scaffold they were working on collapsed and plunged 13 storeys. Toronto Police in the 23rd Division investigated the incident that occurred just after 4:30pm in Toronto's north-west end. According to authorities, a construction crew was hired to repair the balconies of a highrise residential building. Five workers were on the suspended scaffold when it collapsed from the 13th floor.

Four people were pronounced dead at the scene. The fifth victim was rushed to hospital in critical condition with life-threatening injuries. Police indicated that an investigation into the incident would be conducted to determine what caused the collapse of the suspended scaffold. An official with the Ontario Ministry of Labour (MOL) was also at the scene investigating the incident.

On January 6, 2010, the MOL indicated that Inspectors would be checking for hazards involving suspended platforms at construction sites during an enforcement blitz starting mid-January 2010 and would continue for 90 days. In addition, the MOL issued safety alerts that are intended to increase awareness on a specific hazard which is deemed to be potentially harmful to workers and a contributory cause of most workplace incidents.

The MOL has released a safety alert on suspended work platforms with a purpose to provide information about the safe use, maintenance and inspection of the equipment and control measures to minimise the risks associated with using the equipment. The most significant hazard associated with suspended work platforms is workers falling from heights. The Workplace Safety and Insurance Board (WSIB) of Ontario reported that, since 2002, falls have continued to represent more than 17 per cent of lost-time injury claims.

The most commonly used suspended work platforms (suspended platforms or suspended scaffolds) are known as swing stages. They are used for window

cleaning or conducting repairs to the exterior of buildings and consist of a work platform, guardrails and a suspension system. Falls from swing stages usually occur either because the counterweight on the swing stage does not have the adequate weight, the “fulcrum” or point of support at the edge of the building fails, or the swing stage collapses because it is overloaded, inadequately attached, damaged equipment due to chemicals or corrosive materials to the motors, platforms or wire ropes.

It is important for employers who use this equipment to ensure that the proper training is provided to their workers and that a fall arrest system is being used at all times when working off a suspended platform. Employers must also ensure that the equipment being used is properly designed, constructed, used, maintained and inspected as per the *Occupational Health and Safety Act* (OHSA) and Regulation 213/91, regulation for Construction Projects in Ontario.

For more information, contact Anthony Di Gianni, Occupational Health and Safety Consultant and Paralegal at [Anthony.DiGianni@gowlings.com](mailto:Anthony.DiGianni@gowlings.com), 1-866-862-5787 ext. 84409.

## Workplace Absenteeism Management

This full-day course on Workplace Absenteeism Management has been designed specifically by **Norm Keith** to assist human resource and loss control managers and OHS professionals. It includes a review of some of the most effective management strategies for the promotion and management of employee attendance in addition to practical guidance that has been designed to help you and your organization avoid the many pitfalls associated with excessive absenteeism.

### SCHEDULED DATES:

March 2 - Toronto; March 9 - Mississauga; September 21 - Mississauga;  
October 7 - Toronto; October 21 - Kitchener; November 18 - Ottawa

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website at [www.gowlings.com/ohslaw](http://www.gowlings.com/ohslaw)**

## Inspector Hiring Blitz at the Ministry of Labour

BY: DAVID MARCHIONE, B.A., CHSC,  
OHS CONSULTANT/PARALEGAL

The Ontario Ministry of Labour recently underwent a recruitment to hire 41 new Inspectors to cover various sectors within the province. This recruitment comes after their hiring of 200 Inspectors in 2006.

According to the Ministry of Labour's website, the bulk of Inspectors were to be hired for the construction sector (20), with 18 earmarked for the industrial and health care sectors, and 3 for mining. Candidates were advised that they would undergo a six-month training program made up of both field study and classroom work. The recruitment ended on January 7, 2010.

The recruitment of new Inspectors and the focus on the construction, industrial and health care sectors is consistent with the Ministry's enforcement blitzes. Throughout 2009 the Ministry of Labour focussed on various sectors and hazards in order to target "higher risk" industries and tasks. These included blitzes on electrical hazards in mines and construction, chemical hazards, concrete formwork and fall hazards. The

Ministry intends to continue these blitzes with a view of decreasing injuries by increasing awareness. The first quarter of 2010 will see a focus on fall hazards at construction projects.

Statistics reported in the Ministry's Report Card showed an increasing trend in all areas of enforcement from 2004/2005 to 2007/2008, with a slight decrease in 2008/2009. This included an increase in the number of visits to workplaces for any reason, Orders issued, including stop work Orders and investigations. The number of prosecutions and convictions has been steadily increasing from 2005 to 2009, where we have seen an almost 400 per cent increase in the number of convictions against individuals and corporations (326 in 2005/2006 to 1,303 in 2008/2009). The same period saw an increase of approximately 466 per cent in the fines collected per year (\$6,069,251 in 2005/2006 to \$28,272,120 in 2008/2009).

The Report Card statistics and an increase in the number of inspectors indicate that the trend of ensuring compliance through enforcement and prosecution will continue. Employers should be mindful of their obligations under the *Occupational Health and Safety Act*, and should consider an audit of their health

and safety management system to ensure compliance and decrease their legal risk.

For more information please contact David Marchione, Occupational Health and Safety Consultant and Paralegal at David.Marchione@gowlings.com, 1-866-862-5787 ext. 84378.

## New Rules for Stilts at Construction Projects

BY: JOHN ILLINGWORTH, B.F.A., LL.B.,  
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For the first time in forty years, the Ontario government is allowing the limited use of stilts on construction projects. Amendments to the Regulation for Construction Projects (O. Reg. 213/91) (the "Regulation") with respect to the use of stilts came into effect on January 1, 2010.

### Changes to the Regulation

The change to the Regulation does not mean that workers have automatic "carte blanche" to use stilts at construction projects.

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Under section 116 of the Regulation, workers are only allowed to use stilts at residential construction projects, when installing insulation and vapour barriers and during drywall finishing work. Stilts used during these activities must be commercially manufactured and in good working condition, among other requirements.

In addition, workers may use stilts only after they have completed special training and only with specific safety measures in place. Refer to section 116 of the Regulation for the specific requirements.

Stilts are not allowed to be used on a scaffold or to climb up and down stairs. Stilts may be used on a work surface only if the work surface satisfies the following conditions:

- It is made of rigid material.
- It is either level or does not have a slope of more than three per cent.
- All openings on the work surface are adequately covered or guarded.
- All open sides of the work surface are adequately guarded.
- It is free of debris or anything else that may be a hazard to a worker on stilts.
- All obstructions that cannot be removed are adequately guarded, placed or secured to prevent a worker on stilts from being injured.

If stilts are used in work areas that require a guardrail system, then the guardrail system must be modified. Modifications include adding an additional top rail and intermediate rail, capable of resisting any load, including that of a worker on stilts.

### Why Use Stilts?

Stilts are used to elevate a worker so that he or she does not need to use a ladder

to reach a high point when installing drywall, for example. Stilts typically have extensive leg bracing to add support and make them safer. They are designed for use on level, flat, hard surfaces.

### The Decision to Legalize Stilts in Ontario

Stilts are legal in a number of provinces, including British Columbia as well as the Yukon and in many U.S. states. In Ontario, proponents - including home builder associations and trade unions - have been pressuring the province for more than a decade to follow their lead. The push for stilts is a result of changing working conditions in the residential sector. Due to consumer demand, many of today's residential designs feature rooms with 9 to 11-foot cathedral ceilings instead of the standard 8-foot ceiling.

Stilts took a big step towards legitimacy in Ontario after getting a passing grade from an ergonomic study conducted over six months at the University of Waterloo in 2008.

### University of Waterloo Study

In 2008, the University of Waterloo conducted a six-month lab study on stilt safety. The study examined physical stress factors on workers experienced in using stilts and on inexperienced stilt users.

The objectives of the project were to study and document joint and muscle demands and balance challenges on a) level ground with stilts and b) working from a bench. Participants extended their heads and arms from a work platform and from stilts at fixed heights. Examination of specific joints of each task were observed and documented. The centre of mass and ankle, knee, and hip joint movements were tracked to monitor body sway and loads. Walking velocity, rhythm, stride length, and limb support and stance/swing ratios were

also measured. The assessment indicated that there was considerable extension at all joints of the ankle, knee and hips working from the work platform as opposed to walking on stilts. There study also demonstrated that experienced workers were much more proficient on stilts than the inexperienced workers.

The study concluded that stilts are no less physically taxing than work platforms. In fact, the study found that working from stilts provided workers with less muscle and physical strain than when using work platforms.

### Common Causes of Stilts Injuries

Factors that may contribute to an injury sustained from using stilts include:

- Trips from poor housekeeping such as cardboard boxes, carpet edges, extension cords, loose wires, power tool cords, scaffold wheels, wall-board scrap, stacks of wood, tool carts, framing materials and plastic floor coverings.
- Slips caused by metal debris, wet drywall finishing compound, metal nuts, metal screws, water and oil.
- Falls from poor stilt maintenance such as a broken or loose strap, a wingnut falling out of a stilt, a broken spring and a broken leg bracket.
- Overexertion of the body resulting in a musculoskeletal disorder ("MSD"). Overexertion injuries can result from strains that stilts place on the body: high stress on knees, legs, hips and back; the altered mechanics of walking and the altered standing posture. Tasks required to complete the work also have an effect on the body: lifting heavy and awkward objects, working with the hands over the head, highly repetitive motions and applying high hand force.

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- Additional causes for stilts injuries include putting on/taking off stilts, loss of balance, hitting ones head on fixtures (door jamb, sprinkler) and bending over (picking up mud bucket, getting through a door).

### Proactive Steps for Employers to Prevent Injury

Here is a list of injury prevention strategies:

- Consider using scaffolding in place of stilts when possible.
- Purchase only high-quality, well-maintained stilts to reduce the stress they can place on the body.
- Implement a maintenance program to ensure stilts are repaired and maintained as necessary.
- Consider job rotation to ensure that part of the day is spent off stilts.
- Implement a documented house-keeping program.
- Implement an inspection process whereby visual inspections are completed at the beginning of each shift and when working in new areas/job locations.
- Implement documented safe work practices such as:
  - Do not permit the use of stilts on stairs.
  - Do not permit the use of stilts near un-guarded open railings, windows or shafts.
  - Replace any damaged excessively worn stilt components before use.
  - Walk only on suitable hard surface and level terrain.
  - Cover or guard floor openings, stairwells, etc.

- Train and instruct all employees who wear stilts how to inspect, maintain and properly wear the equipment.
- Train workers on the requirements of your housekeeping program, workplace inspection program and safe work practices.
- Ensure supervisors monitor and enforce work practices and procedures.

For further information on implementing a stilt safety program please contact John Illingworth, Associate at [john.illingworth@gowlings.com](mailto:john.illingworth@gowlings.com), 1-866-862-5787 ext. 77507 or Cathy Chandler, OHS Consultant and Paralegal at [cathy.chandler@gowlings.com](mailto:cathy.chandler@gowlings.com), 1-866-862-5787 ext. 87351.

### Significant Increases in the Fines Imposed by the CSST

By: Michael Garellek, LL.B., Associate and Eric Thibaudeau, LL.B., Associate

The fines imposed by the *Commission de la santé et de la sécurité du travail* (Québec's equivalent to the worker compensation boards in other jurisdictions, hereinafter "CSST") against employers will soon be multiplied six times over, reaching a maximum of \$300,000! These increases are the result of amendments to An Act respecting Occupational Health and Safety proposed by Bill 35 which was adopted on June 10, 2009. The new fines will be effective starting on July 1, 2010 however, for the first six months they will be 1/3 lower than the sanctioned amounts. It is without a doubt that such fines will constitute an overwhelming burden for certain Québec SMEs.

The CSST regularly inspects the workplace to ensure that it does not pose a

risk for the health and safety of workers. The CSST also has the power to impose fines by virtue of An Act respecting Occupational Health and Safety.

Bill 35 brought modifications to several aspects of the occupational health and safety regime. Aside from the fines, the purpose of the modifications includes prevention in the workplace and also the easing of the financial costs for employers. According to the Minister of Labour, Mr. David Whissell, simplified administrative procedures will save businesses \$75 million annually.

Nevertheless, several businesses are at risk of paying well in excess of any amounts they will save under the new regime. In effect, the new fines are up to six times greater than those under the previous regime. These increases take into account that the amounts have not changed since the entry into force of the regime in 1979.

Currently, the maximum fine is \$20,000 for a serious and direct infringement to the security of a worker. This amount will increase to \$60,000 and in the case of a repeat offence; the fine will reach up to \$300,000. These fines are subject to further increases that follow inflation as measured by the Consumer Price Index.

Several employer associations such as the *Conseil du patronat du Québec* and the *Association de la construction du Québec* have concerns. According to them, the recession is not an appropriate time to increase employers' costs. Even more so, given that employer assessments will increase starting in 2010 by as much as 30% to compensate for the deficit of \$ 3.7 billion in the *Fonds de la santé et de la sécurité du travail*.

For several years, the unions lobbied for higher fines, similar to those under the

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regimes of other Canadian provinces (where the maximum fine is as high as \$1.2 million): the Bill answered their demands. However, in contrast with the rest of Canada, the CSST applies a “zero tolerance” policy in the area of health and safety at work. The result: in 2007 there were more than 2,800 infraction notices at construction sites alone. Confronted with the “zero tolerance”

policy of the CSST, certain employers are of the opinion that there is a lack of clear criteria regarding the imposition of fines. They fear that the increase in fines will lead to increased operating costs.

Will the combined effect of the new fines and the “zero tolerance” policy lead to a real improvement in workers’

safety or is it rather a new source of taxation?

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