GOWLINGS

OHSLAW™ REPORT

JUNE 2008

A NATIONAL WORKPLACE RISK MANAGEMENT NEWSLETTER

EDITOR'S NOTE

With the summer season upon us, thoughts of children getting out of school, public safety and vacation plans may take priority over workplace health and safety. However, OHS issues continue to exist and challenge workplace parties who work throughout the warmer summer months.

Gowlings' OHS team will also continue to be active throughout the summer. We have added a new technical course, on Asbestos Risk Management, developed and taught by Kathryn Aldridge-Fisher on July 10, 2008. Please see the information at p. 4 of this OHSLAW Report.

We also are pleased to announce that Alain Blair has joined Gowlings' Vancouver office and the OHS Practice Group. Alain has a great deal of experience in representing employers in B.C. and Federal OHS enforcement.

Finally, we look forward to making several exciting announcements regarding our OHS Practice in the September OHSLAW Report. Until then, on behalf of our entire OHS Team at Gowlings, we wish you and your family a very safe and healthy summer.

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

Province-Wide Prohibition on Pesticide Use

BY: ANTHONY DI GIANNI, OHS CONSULTANT

On April 22, 2008, Earth Day, Ontario's Premier Dalton McGuinty introduced legislation to implement a province-wide ban on the cosmetic sale and use of pesticides. The ban is being considered by supporters to be one of the toughest in North America.

Gideon Forman of the Canadian Association of Physicians for the Environment and other organizations, including the Canadian Cancer Society and the David Suzuki Foundation joined together to lobby for a ban. During last fall's election campaign, McGuinty made a pledge to enact a province-wide ban. However, McGuinty said there will be a few exceptions. Pesticides will still be allowed for use in farming operations, forestry, or areas of health and safety concern, such as controlling mosquitoes that can potentially carry diseases like the West Nile Virus. The exception also extends to golf course maintenance, provided that certain conditions are met in order to minimize the effects on the environment.

The ban is being considered by supporters to be one of the toughest in North America.

The province-wide ban is aimed at replacing currently enacted local city by-laws and creating one unified ban. Gideon Forman said "more than 300 pesticide products will be banned for use in Ontario once the ban is fully implemented in 2009." When referring to the ban of cosmetic use of pesticides, this includes herbicides, insecticides and fungicides, which are now used on residential lawns, gardens and fruit trees, all of which contain nitrogen, phosphorus and potassium.

Studies have shown a link between pesticide use and harmful health effects, including some forms of cancer, Parkinson's Disease and birth defects. Another major concern with pesticides is the effect it may have on children. Studies have also shown a link between pesticides and leukemia in young children.

Ontario's ban is following that of Quebec which enacted a similar ban in 2004, phasing it in over a period of three years. The implementation of Ontario's ban is planned to be more aggressive in its implementation stage, taking full effect spring of 2009. According to the David Suzuki Foundation, only 4 million of Ontario's 12 million residents are currently protected by municipal pesticide bans. The organization fully supports the ban, calling it a huge step toward protecting Ontarians from dangerous chemicals. ■

INSIDE:

- WSIB Review of the Experience Rating Program, p. 2
- Ontario's Injury Reduction Target Achieved, p. 5
- The Debate Continues over Pre-Employment and Random Drug Testing, p. 6

WSIB Review of the Experience Rating Program

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

On March 10, 2008 the WSIB announced that it was going to be undertaking a review of its Experience Rating Program. In addition, the WSIB announced that effective March 10, 2008 if an employer was responsible for a workplace fatality they would not be eligible for a rebate from the WSIB in that year. These announcements by the WSIB should be taken very seriously by all employers in Ontario.

Experience Rating Program

The Experience Rating Program currently in existence with the WSIB provides a financial incentive for employers to prevent accidents from occurring. In addition, it encourages employers to return workers to work as soon as possible so that the costs of WSIB claims are reduced. Section 83 of the *Workplace Safety and Insurance Act* provides that the Board may establish experience and merit rating programs to encourage employers to reduce injuries and occupational diseases and to encourage workers to return to work. Furthermore, section 83 also provides that the Board shall increase or decrease the amount of an employer's premiums based upon the frequency of work injuries or the accident costs or both. The WSIB has three (3) experience rating plans which are as follows:

1. New Experimental Experience Rating Plan (NEER) which applies to all rate groups in Schedule 1 except those in CAD-7 and those employers who pay more than $25,000.00 in average annual premiums;
2. CAD-7 which applies to employers with rate groups in the construction industry who pay more than $25,000.00 in average annual premiums; and
3. The Merit-Adjusted Premium Program (MAP) which applies to employers that pay from $1,000.00 to $25,000.00 in average annual premiums.

Employers who pay less than $1,000.00 in average annual premiums are not currently experience rated by the WSIB.

The NEER program, which covers the most employers in Ontario, bases its experience rating plan on the principle of retrospective rating. The NEER program reviews an employer's claim costs for a given accident year in each of the three (3) following years. This review is conducted on September 30 in each of the three (3) following years and at that time employers are issued either rebates or surcharges.

Employers in similar rate groups in the NEER program are advised what their expected costs should be. On September 30 their claim costs for a given year are calculated. In the event their actual costs exceed their expected costs, employers must pay a surcharge. If have been successful in preventing injuries and reducing the costs of their WSIB claims such that their actual costs are less than their expected costs then employers receive a rebate. These surcharges and rebates are in addition to the regular premiums that all employers covered by the WSIB must pay annually. Depending on the size of an employer the amount of these rebates and surcharges can be quite substantial and are commonly in the six (6) figure range.

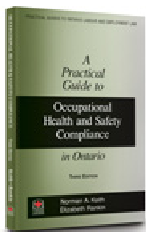
Experience Rating Review

Pursuant to the announcement made on March 10, 2008, the Experience Rating Review is "looking to find areas of improvement in the system and better align the program to the WSIB's strategic plan *The Road to Zero*." The announcement also stated that the review will make recommendations to modernize and strengthen the program in areas such as: "accounting for legislative non-compliance, creating a process to validate workplace health and safety performance, and a long-term plan to directly tie all of our incentive programs to proactive health and safety initiatives."

The issues which the WSIB will be looking into when they conduct their

continued on p. 3

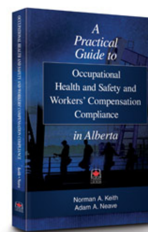
Want to read more on Occupational Health and Safety Law in Canada?



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

BY NORMAN A. KEITH AND ELIZABETH RANKIN

Canada Law Book, 2006
214 pages, $69



A Practical Guide to Occupational Health and Safety and Workers' Compensation Compliance in Alberta

BY NORMAN A. KEITH AND ADAM A. NEAVE

Canada Law Book, 2007
174 pages, $72

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WSIB Review of the Experience Rating Program (cont'd)

review of the Experience Rating Program are as follows:

- *"Alignment with the Road to Zero*
- *Compliance with the Occupational Health and Safety Act and the Workplace Safety and Insurance Act*
- *Validation of information reported by workplaces and used in the calculation of experience rating refunds*
- ***Review windows for our experience rating programs** (NEER is currently three (3) years and CAD-7 is currently five (5) years*
- ***The objectives of SIEF and the impact it has on experience rating***
- *Develop appropriate recommendations for moving forward which are consistent with the WSIB's vision in the Road to Zero"*

Employers should be very concerned with the issues the WSIB will be looking into. For example, there has been prior concern that the WSIB will expand the review windows for its experience rating programs and in particular, expand the NEER review window from three (3) years to five (5) or six (6) years. If this were recommended then an employer would be responsible for the costs of a WSIB claim for possibly twice as long as under the current experience rating program. Furthermore, employers currently have the benefit of pursuing the transfer of costs and obtaining cost relief through the Second Injury Enhancement Fund (SIEF) when the WSIB recognizes that a worker has a pre-existing condition or disability which has prolonged or enhanced the worker's recovery. By applying for and obtaining cost relief from SIEF an employer can have a percentage of the costs of a WSIB claim transferred to SIEF. These costs are not included for the purposes of calculating its actual claims costs for rebates and surcharges. The purpose of having the Second Injury Enhancement Fund is to encourage employers to hire and continue employing workers who currently suffer from pre-existing conditions and disabilities and rewarding these employers by transferring a percentage of costs from the employer when these workers become injured again. Employers should be very concerned that this benefit could possibly be removed as a result of the Experience Rating Review.

In May of 2008, the NDP of Ontario put forward a motion in the legislature requesting that the WSIB's current experience rating programs be cancelled altogether. Furthermore, numerous labour organizations have been very vocal in demanding the resignation of the current Chair of the WSIB because the experience rating programs have not been removed and cancelled. Accordingly, the labour movement in Ontario is making this issue a priority and is demanding that the WSIB experience rating programs be cancelled, not just reviewed.

The WSIB has stated that this review is currently underway and that necessary changes will be made over the next twelve (12) months. The WSIB also stated that it would inform stakeholders through its website and its e-newsletter on the progress of the review and that as the review progresses it would solicit input and feedback from both employers and labour.

Program Change for Traumatic Fatalities

As stated above, effective March 10, 2008 the WSIB announced, without any prior consultation, that if a company was responsible for a workplace fatality they would not be eligible for a rebate from the WSIB in the year in which the fatality occurred. The announcement did not provide any details with regard to how the WSIB will determine whether or not an employer is responsible for a fatality. The WSIB did states as follows: "Employers are considered responsible for the health and safety of their employees, including in the event of a fatality. Exceptions may be considered on an individual basis. All decisions made by the WSIB are appealable."

This announcement by the WSIB could have a serious financial impact on many innocent employers across Ontario. Workplace fatalities sometimes occur without there being any responsibility on behalf of the employer. For example, many workers are killed in highway traffic accidents that are just that, accidents, which are not caused by the fault of the employer or perhaps

continued on p. 4

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Manitoba

October 1 Winnipeg

Saskatchewan

October 23 Regina

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WSIB Review of the Experience Rating Program (cont'd)

even the employer's own worker. However, this change will result in an employer being penalized in two (2) ways. Firstly, if a fatality occurred in 2008 and that employer had already been successful in reducing its WSIB claim costs in the prior three (3) years and was going to be receiving a substantial rebate in 2008, such rebate would be lost. Furthermore, as a result of the fatality occurring to the employer for the accident year 2008, the costs of that claim would be assessed against the employer in the subsequent year 2009 and could result in the employer paying a surcharge for that particular accident year as the claim costs of fatalities are substantial. Most employers are very diligent in attempting to prevent accidents in their workplaces. It is commendable that the WSIB has adopted a zero tolerance for workplace fatalities but the reality is that unfortunately fatalities are going to occur in the workplace and sometimes they are through no fault of the employer. Furthermore, the entire workers' compensation system in Ontario since its inception in the early 1900's has been based on a no fault system. The concept of negligence and fault does not enter into the historic trade-off that was created when the workers' compensation system came into existence. This announcement by the WSIB will change this concept and will result in employers being presumed to be negligent and having caused workplace fatalities and then being penalized. It is my understanding that the WSIB has recognized that further review of this announcement is necessary and will hopefully be providing some additional guidelines on how this new program change will be implemented.

Employers should be keeping a very watchful eye on the WSIB's review of its current experience rating programs. The previous reviews and enhancements have resulted in more substantial surcharges being paid by employers and, given recent comments made by the Chair of the WSIB and the current Minister of Labour, it would not appear that the review of the experience rating program will be of benefit to employers. Accordingly, employers have to remain very vocal on this issue and support relevant employer organizations to lobby and provide input and feedback to the WSIB regarding employers' issues. Employers should continually review their health and safety policies and work diligently to prevent accidents in the workplace. The importance of accident prevention and positive health and safety practices will be very important as we move forward and the WSIB undertakes its Experience Rating Review. The WSIB is very committed to its new five (5) year plan for the Road to Zero and it should be expected that the changes to be made to the experience rating programs will result in further penalties for employers who do not practice strong health and safety initiatives. Furthermore, it will be necessary for employers to continue being proactive and creative in offering suitable work to workers to assist in their early and safe return to work. Ideally, the Experience Rating Review will not remove the necessary financial incentives to employers to assist in promoting positive health and safety practices and incentives for employers to return workers to work. ■

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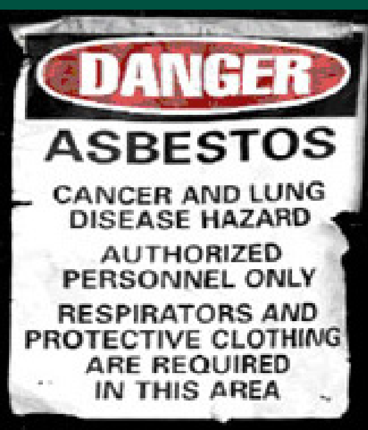

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- Air Monitoring Methods
- Personal protective equipment requirements

www.gowlings.com/ohslaw **Date: July 10, 2008** **Cost: $465 per person, plus GST**

Ontario's Injury Reduction Target Achieved

BY: KATHRYN ALDRIDGE-FISHER

In 2004, the former Ontario Minister of Labour set a goal to reduce workplace injuries by 20% by the year 2008. According to the current Minister of Labour, Brad Duguid ("Duguid"), that goal has been achieved.

Duguid recently announced this achievement at the opening ceremony for the Industrial Accident Prevention Association's Health and Safety Canada conference in Toronto. In 2004 the number of lost time injury/illness claims reported to the Workplace Safety and Insurance Board ("WSIB") was 352,474 and the number of total registered workplace fatalities was 572. The latest statistics for 2006 published by the WSIB indicate the number of lost time injury claims was 336,851 and fatalities was 528. No published statistics for 2007 are yet available.

The Ministry of Labour's ("MOL") four year strategy included increased prevention efforts and enforcement tactics. As part of the strategy the MOL and WSIB worked together to target high risk employers, those who experienced a high lost time injury rate, by conducting more inspections and issuing compliance/stop work orders, if necessary. As well, the MOL's Pains and Strains campaign was introduced to help emphasize the need to address ergonomic hazards and related injuries. These injuries account for over forty percent of workplace injuries. Consequently, the number of orders issued by MOL Inspectors and convictions for health and safety violations has increased a great deal. This has caused several employers to wonder, with all the obvious enforcement activity, has the MOL really put the same effort into prevention?

Reducing incidents in the workplace is an ongoing challenge that requires commitment by all workplace parties and a continual effort to maintain an effective health and safety management system. Employers who have worked hard over the years to prevent/minimize their injury (and disease) occurrences deserve to be congratulated but as many know the hard work is not over. As long as workplaces have hazards, the potential exists for workplace injuries and fatalities. Hopefully, in the next four years we will see further reductions in Ontario and across Canada. ■

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BRITISH COLUMBIA
NOV 4 VANCOUVER

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October 28, 2008

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The Debate Continues over Pre-Employment and Random Drug Testing

BY: AILSA JANE WIGGINS

Two cases on workplace drug testing have recently been considered by appellate courts. The results on appeal illustrate the divide that has developed between Ontario and Alberta in relation to workplace alcohol and drug testing.

The recent decision of the Ontario Divisional Court in *Imperial Oil Limited v. Communications, Energy & Paperworkers Union of Canada, Local 900,* (2008) dealt primarily with the legality of Imperial's re-introduction of random drug testing using oral fluid testing at its refinery in Nanticoke, Ontario. Imperial had temporarily suspended its original random drug testing program that used urinalysis testing after the Ontario Court of Appeal in *Entrop v. Imperial Oil Limited* (2000) stated that drug testing (using urinalysis) suffered from the fundamental flaw that it cannot measure present impairment.

The majority of the board of arbitration, chaired by Michel Picher, held that random drug testing was not permissible in a workplace governed by a collective agreement even though the oral fluid testing technology used proved current impairment. Arbitrator Picher noted that there was only one Canadian case in which an arbitrator upheld random testing in a unionized workplace, *Communication Energy and Paperworkers Union Local 777 and Imperial; Gabriel Grievance,* an unreported decision of Christian, Neuman and Chahley issued from Edmonton, Alberta on May 27, 2000.

Imperial applied for judicial review but the Divisional Court found that the Board's decision was not patently unreasonable and dismissed Imperial's application. From an employer's point of view, the only positive thing about this decision is that the Board and the Court acknowledged that the oral fluid drug test used by Imperial does disclose current impairment by cannabis rather than just the presence of the drug in the body. Thus, the concern about drug testing expressed by the Ontario Court of Appeal in *Entrop* has been met as there is a drug testing technology that can be used to prove impairment, at least in non-union workplaces. Therefore, random alcohol and drug testing of safety-sensitive employees may be justified as a *bona fide* occupational requirement.

However, there is no doubt that this decision will be a disappointment to Ontario employers with unionized workplaces who believe that random drug testing is a necessary safety measure, and that it should be justifiable in unionized and non-unionized workplaces if the test used proves current impairment. In contrast, Alberta employers may take advantage of oral fluid drug testing, and rely on the *Gabriel Grievance* and the more understanding approach of the Alberta courts towards workplace alcohol and drug testing.

The more understanding approach of the Alberta courts is illustrated by the Court of Appeal's decision in *Alberta (Human Rights and Citizenship Commission) v. Kellogg Root & Brown (Canada) Company,* (2007). A candidate for the position of receiving inspector at the Syncrude oil sands plant in Fort McMurray, Alberta, tested positive for marijuana in a pre-employment drug test. He was allowed to start work before the test results were

continued on p. 7

Workers' Compensation Courses in Ontario and Alberta

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(ONTARIO, ALBERTA)

June 4, 2008	Toronto
June 10, 2008	Calgary
September 16, 2008	Toronto
September 23, 2008	Edmonton
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October 9, 2008	Fort McMurray
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October 23	Ottawa

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(ONTARIO)

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June 26, 2008	Toronto
September 30, 2008	Mississauga
October 16, 2008	Hamilton

For course descriptions, more dates and locations, and to register visit
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The Debate Continues over Pre-Employment and Random Drug Testing (cont'd)

received but was dismissed when his employer learned of the positive result.

The Human Rights Panel of Alberta found that the pre-employment drug test was *prima facie* discriminatory against drug dependent persons but that there was no discrimination against the complainant in this case because he did not have a disability, actual or perceived. He testified that he was not an addict and that his use of marijuana was recreational. The Court of Queen's Bench of Alberta held that the employer's policy treated all prospective employees who tested positive for drugs as if they were addicts and likely to report to work impaired.

Madam Justice Martin's approach to perceived disability was similar to the approach of the Ontario Court of Appeal in *Entrop*. The administrative guidelines to Imperial's alcohol and drug policy contained wording that was found to explicitly link recreational users with dependent users. The Court held that although the casual user is not a substance abuser and therefore not handicapped, Imperial's policy treated casual users as if they were substance abusers. Thus, according to both the Alberta Court of Queen's Bench decision in *Kellogg Root & Brown* and the Ontario Court of Appeal decision in *Entrop*, an employer may be found to perceive an employee as disabled on the basis of the wording of its policy, even if it does not actually perceive the employee to be disabled.

In *Kellogg Root & Brown,* the employer was successful on appeal. The Alberta Court of Appeal stated that Madam Justice Martin's findings on perceived disability were unsustainable and declined to follow the *Entrop* decision on this issue. The Court of Appeal found instead that the employer did not incorrectly perceive the complainant to have a disability but rather "that persons who use drugs at all are a safety risk in an already dangerous environment". This decision is important in acknowledging safety concerns in high risk industries, stating: "Extending human rights protections to situations resulting in placing the lives of others at risk flies in the face of logic."

Where does this leave us? Apparently, with different rules in different jurisdictions. In Ontario, if an employer conducts random drug testing of its safety-sensitive employees using a technology that proves impairment, such testing may be justifiable as a *bona fide* occupational requirement in a non-union workplace, but it will not be permissible in a unionized workplace unless there is an "out of control drug culture". Even if there is no evidence that the employer actually perceived an employee to be disabled, Ontario adjudicators may scrutinize the employer's alcohol and drug policy for language suggesting the perception that an employee who is a casual user is disabled. If such language exists, the employer may be found to have perceived the employee to be disabled. In Alberta, on the other hand, the casual user appears to no longer be able to claim human rights protection, at least in the absence of evidence that the employer actually perceived the employee to be disabled. A random drug testing program would more likely be upheld in Alberta. Until these matters are addressed by the Supreme Court of Canada, the law on random drug testing, pre-employment drug testing and the extent to which the casual user is protected by human rights legislation will remain uncertain. ■

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Consulting

- Develop and review claims management programs
- Application of Second Injury Enhancement Fund (SIEF)
- Develop Early and Safe Return to Work Program
- Cost Transfer Applications
- Experience Rating and Classification Review
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- Hazardous Material Disposal
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- Soil Remediation Services
- WHMIS Training and Related Services
- Workplace Harassment & Respect Training
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Read the answer at **www.gowlings.com/ohslaw**

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