

A national health & safety and workers' compensation law newsletter



The need for effective health and safety programs and training has been made more compelling by recent Court decisions and the release of recent national accident statistics.

The National Association of Workers' Compensation Boards recently released its accidents statistics for 2001. In that year there were 373,216 lost time injuries in Canada. There were 920 occupational fatalities from workplace related accidents or illness - an average of 17 fatalities per week.

Gowlings is committed to helping its clients reduce workplace accidents and legal risk by providing effective training and consulting services.

Gowlings is a Workplace Safety & Insurance Board ("WSIB") approved provider of Part One certification training for certified members of joint health & safety committees in Ontario and offers due diligence training programs for managers and supervisors throughout Canada. For more information on our training and consulting services, visit our website at www.gowlings.com/ohscourses.

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

Employers Not Responsible for "Rogue Acts" of Employees, says Ontario Court

A recent decision of the Ontario Court of Justice addresses employer responsibility for unforeseen conduct of an employee. In a prosecution under the *Occupational Health and Safety Act* ("OHS") the employer was blamed for the death of a worker. The worker suffered fatal head injuries when he was struck by the moving part of a machine that was stacking lumber.

The stacking machine had been guarded with a perimeter guardrail, that was painted yellow, and in place to prevent workers from going underneath the equipment. The worker, a trained and qualified mill-

wright, was experienced and the employer could demonstrate he had been trained in lock-out procedures.

The worker was identified by all witnesses to be a conscientious worker. He had been observed, on numerous occasions, locking-out equipment.

The accident occurred when the deceased was "trouble-shooting" the machine to determine the nature of the problem that had been reported by the machine operator. The millwright specifically requested the machine remain running so that he could observe the machine

continued on p. 3

Workplace Heat Stress Prevention and Employer Liability

Hot weather and hot working environments present OHS and legal challenges for employers across Canada. In addition to heat and humidity, workers may be exposed to direct sunlight or heat and humidity from processes or equipment. Failure to take preventive steps may establish legal liability.

Physical work and protective clothing increase the heat loading on the body, therefore increasing the risk of heat-related injury. Personal factors such as pregnancy, medical conditions and alcohol consump-

tion can further increase the risk.

Most Canadian jurisdictions look to Heat Stress and Strain Guidelines developed by the American Conference of Governmental Industrial Hygienists (ACGIH) for guidance.

Some provinces have passed regulations dealing specifically with temperature extremes, referring directly to the ACGIH Guidelines or their own standards. All provinces have developed regulations, advisories or guidelines that outline their

continued on p. 4

Also in this OHSLAW REPORT

- Tax Deductibility of OHS Penalties - A Double-Edged Sword, p. 2
- West Nile Virus & OHS Legal Responsibilities, p. 2
- Young Workers: Greater Risk = Greater Responsibility, p. 2
- Alberta Updates Workers' Compensation Act, p. 3
- Update on Criminal Code Amendments, p. 3
- Federal Health & Safety Representative & Committee Training, p. 3
- Due Diligence Training for Managers & Supervisors, p. 4

Tax Deductibility of OHS Penalties - A Double-Edged Sword

The Supreme Court of Canada has ruled that fines and monetary penalties associated with regulatory contraventions are tax deductible as business expenses.

The case related to a fine imposed by the British Columbia Egg Marketing Board. A poultry farm was fined for producing too many eggs, in violation of a quota set by the Board. This fine was held to be tax deductible because the activity in question was performed for the purpose of earning income.

This decision has clarified and confirmed the tax deductibility of fines and monetary penalties in health and safety, environmental and other regulatory enforcement proceedings. An employer need only establish that the prohibited activity was engaged in for the purpose of earning income.

Although this Court ruling has been publicly criticized by the Ontario Federation of Labour and others, it has also had some negative effect on corporations. Publicity associated with this tax ruling has resulted in greater awareness among health and safety regulators and prosecutors across Canada.

When a sentence or penalty phase of a regulatory prosecution or enforcement hearing occurs, reference is often made to the tax deductibility of the fines and monetary penalties.

In short, higher fines and penalties are being sought and obtained because they are now tax deductible. Prosecutors are arguing that the fines and monetary penalties be increased to compensate for the tax deductibility. ■

West Nile Virus & OHS Legal Responsibilities

Governments across Canada have flagged West Nile virus as a serious occupational health and safety issue. Employers have a legal responsibility to take every reasonable precaution in the circumstances for the protection of their workers, including protection from West Nile virus.

Outdoor workers are particularly vulnerable to West Nile virus. Research indicates that most infected people were bitten by an infected mosquito. A mosquito becomes infected when it feeds on the blood of an infected bird. There is no evidence that the virus can be spread by casual contact or passed directly from infected animals to people.

The risk of becoming infected with West Nile virus is greatest during mosquito season. In Canada, this can start as early as mid-April and last until September or October when the first frost occurs.

The virus has already been confirmed in Nova Scotia, Quebec, Ontario, Manitoba, and Saskatchewan. It is estimated that less than one percent of mosquitoes in any given area are infected with the virus.

Employers who ignore their workers' exposure to West Nile virus risk quasi-criminal OHS prosecution, fines and even jail terms. Employers also face the possibility of work refusals by employees at risk. The legal threshold for a work refusal is relatively low: workers need only feel that a workplace condition is likely to endanger them or another person. If an assessment and appropriate protections have not been provided, it is possible that a continuing work refusal will occur and may be evaluated by a government regulator. An officer or inspector may decide that the workers

have a continued right to refuse, and this may lead to orders against the employer including outdoor work stoppages.



Employers and workers can take a number of precautions to reduce the risk of infection:

- Assess the relative risks of outdoor hazards.
- Encourage workers to wear light coloured clothing that covers as much of the body as possible, and tuck pant cuffs into socks or boots, especially when working in long grass or wooded areas.
- Have workers who are outdoors apply insect repellent to exposed skin and clothing. The most effective repellents contain DEET. Formulations with 30 percent DEET offer approximately six hours of protection.
- Eliminate workplace sources of stagnant water. Mosquitoes can breed in standing water retained in a number of sources such as buckets, wheelbarrows, tires, birdbaths, rain gutters or ditches.
- Minimize outdoor activities at dawn or dusk, if possible. Mosquitoes are most active at these times.
- If possible, avoid areas in which mosquitoes like to dwell, such as weedy, wooded or shaded areas.
- Beware of and do not handle dead birds with your bare hands. ■

Young Workers: Greater Risk = Greater Responsibility

Young workers are statistically at greater risk for health and safety injuries and illnesses. Recent national statistics show that over 110,000 young workers were injured on the job in one year. In Ontario an average of 42 young workers per day are injured or become ill on the job.

Recent court decisions in several provinces have made it clear that the prosecutors and regulators expect employers to

provide appropriate training and supervision.

Specific awareness campaigns have been developed nationally to target the unique concerns that put this category of workers at greater risk.

Courts in several provinces are backing up this sentiment by imposing some of the highest fines for serious injuries and fatalities involving young workers. ■

Alberta Updates Workers' Compensation Act

The Workers' Compensation Act, R.S.A. 2000, c. W-15, was reviewed and Bill 26, or the *Workers' Compensation Amendment Act* received royal assent May 21, 2002.

Changes affecting employers include:

- The Appeals Commission is now separated from the Workers' Compensation Board to promote independence and procedural fairness. An appeal is now available to the Court of Queen's Bench on questions of law or jurisdiction.
- Although the legislation took effect on January 1, 2003, the Workers' Compensation Board has committed to confer with stakeholders on the rollout of the new fines and penalties for compliance issues before implementing the changes.
- Where a corporation commits an

offence under the Act, directors, officers and agents of the corporation who agreed to, or participated in, the commission of the offence are also guilty of that offence.

- The Board may levy an administrative penalty against an employer for fraudulent reporting and contravening certain sections of the Act up to a maximum amount of \$25,000.
- Directors of corporations performing work for their corporations, whether by way of manual labour or otherwise, are not "workers" and thus are not covered, unless they have purchased Personal Coverage.
- Coverage for Alberta employers for work conducted outside of Alberta is more flexible and can be for longer periods of time. ■

Employers Not Responsible for "Rogue Acts"

Continued from p. 1

during operation. While the millwright was out of sight of the machine operator, the millwright stood up on a guardrail and was struck by the moving equipment.

The Court addressed the responsibility of the employer in these circumstances. The trial Justice said, "The *Occupational Health and Safety Act* envisions a shared responsibility on the subject of safety. Further, employers are not to be held to a standard of perfection nor are they to be held responsible for what could be termed rogue acts by employees or isolated acts of carelessness or aberrations in

conduct by employees."

The Court went on to consider the experience, knowledge and training of the millwright. It concluded that the prosecutor had not proven a contravention of the *OHS Act* and dismissed all charges.

This case does provide helpful insight to the level of employer responsibility. The more experienced and well trained a worker, the more an employer should be able to rely upon the worker.

This case, at minimum, shows employers across Canada that a comprehensive OHS System will be a defence to OHS charges. ■

Update on Criminal Code Amendments

On June 12, 2003, the Federal Government introduced Bill C-45, proposed amendments to the Criminal Code to lower the standard of care to hold directors, officers and corporations liable for criminal negligence arising from workplace accidents. This Bill puts directors, officers and senior managers at risk of criminal prosecution arising from work place accidents and fatalities, and is expected to be passed into law in the fall of 2003.

The four purposes of Bill C-45 are as follows:

- a) establish rules for attributing to organizations, including corporations, criminal liability for the acts of their representatives;
- b) establish a legal duty for all persons directing work to take reasonable steps to ensure the safety of workers and the public;
- c) set out factors for courts to consider when sentencing an organization; and
- d) provide optional conditions of probation that a court may impose on an organization.

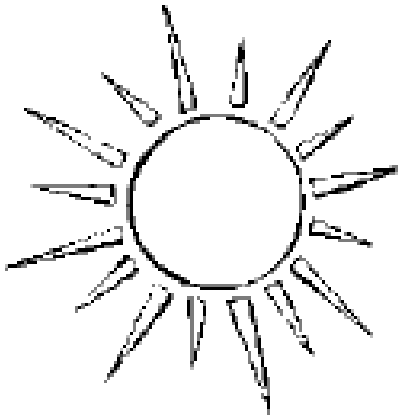
Gowlings will be providing a half-day seminar on September 30, 2003 in Toronto and October 9, 2003 in Calgary to help you and your organization manage this new risk.

For more information, or to register please contact Olga Jordache, Training Co-ordinator at Gowlings, 1-866-862-5787 ext. 3645 or olga.jordache@gowlings.com. ■

Federal Health & Safety Representative and Committee Training

The Canada Labour Code - Part II, regulating health and safety in federally regulated workplaces, requires training of members of work place health and safety committees, policy committees, and health and safety representatives. Gowlings offers a one-day training course that provides an overview of the Code, the role of representatives and committees, and instruction on how to conduct meetings, inspections and investigations.

For more information on this course, please contact Yvonne O'Reilly, Senior OHS Consultant at Gowlings, 1-866-862-5787 ext. 3580, yvonne.oreilly@gowlings.com or visit our website at www.gowlings.com/ohscourses.



Preventing Heat Stress in the Workplace

Continued from p. 1

own requirements and expectations.

Canadian health and safety regulators are placing greater responsibility on employers to prevent heat stress at work.

To avoid injury from heat stress, fluid lost through perspiration must be replenished so the body can be cooled. Signs and symptoms of heat stress include heat rash, heat cramps, heat exhaustion, fainting, and heat stroke, which can be fatal.

In New Brunswick, an employer was convicted of failing to ensure that a heat stress prevention program was in place. A worker was exposed to an excessively hot work environment, collapsed and died.

In Ontario, an employer and supervisor are currently facing charges for the death of a 44-year old bakery worker who died from heat stroke in 2001. They could face maximum penalties of up to \$500,000 for the corporation and \$25,000 and/or 12 months in prison for the supervisor, per offence.

Your Heat Stress Program should include, but not be limited to:

1. Initial and ongoing assessments of your workplace for potential worker exposure to heat stress;
2. Development of a comprehensive workplace heat stress prevention program; and
3. Provision of heat stress awareness training to ensure full compliance with the prevention program.

Effectively managing heat exposure will help prevent workers from becoming ill due to heat exposure, prevent workers' compensation claims, minimize the risk of work refusals and downtime, prevent legal liability, and add to the company's due diligence. ■

Due Diligence Training for Managers & Supervisors

Occupational health and safety law requires employers to ensure that they meet the requirements of due diligence. Failure to do so may not only result in employer liability, but managers and supervisors may also be held personally liable if they do not comply with their OHS legal responsibilities.

Gowlings provides due diligence training courses for the following jurisdictions:

Alberta:

- Oct 7 & 8, 2003 (Calgary)
- Nov 18 & 19, 2003 (Calgary)

British Columbia:

- Oct 21 & 22, 2003 (Vancouver)

Ontario:

- Aug 13 & 14, 2003 (Kitchener)
- Sep 10 & 11, 2003 (Markham)
- Oct 22 & 23, 2003 (Sudbury)
- Oct 28 & 29, 2003 (Hamilton)
- Nov 12 & 13, 2003 (Toronto)

Federal:

- Sep 23 & 24, 2003 (Ottawa)
- Oct 15 & 16, 2003 (Toronto)
- Nov 5 & 6, 2003 (Vancouver)
- Dec 10 & 11, 2003 (Calgary)

For further information, contact Yvonne O'Reilly, Senior OHS Consultant at 1-866-862-5787 ext. 3580. ■

Gowlings' National OHS Team

For more information on Gowlings' OHS Team please contact
Norm Keith for legal inquiries or Yvonne O'Reilly for training and consulting inquiries.

Norm Keith, B.A., LL.B., CRSP
Partner
Toronto 416-862-5699
Toll Free: 1-866-862-5787 ext. 5699
norm.keith@gowlings.com

Yvonne O'Reilly, CRSP
Senior OHS Consultant
Toronto (416) 862-3580
Toll Free: 1-866-862-5787 ext. 3580
yvonne.oreilly@gowlings.com

Tom Groves, M.A., LL.B.
Associate, Kitchener/Waterloo

Kacey Krenn, B.A., LL.B.
Associate, Vancouver

Tina Maisonneuve, LL.L., LL.B.
Associate, Toronto

Kim Nutz, B.A., LL.B.
Associate, Calgary

Elizabeth Rankin, B.A.Sc.
OHS Consultant, Toronto

Elisa Scali, LL.B.
Associate, Ottawa

Michelle Scott, B.Sc., B.A.Sc.
OHS Consultant, Toronto

www.gowlings.com/ohscourses