

*A national workplace risk management newsletter*



The autumn brings cooler weather and new energy as we see students go back to school and businesses forge ahead with new initiatives, goals, and planning for the next year. With the increased activity at work and home, it is easy to forget that workplace risks are omnipresent. For this reason Gowlings is adding new training seminars and staff to help Canadian employers manage and mitigate workplace risk.

Gowlings is growing again. Anthony Di Gianni has joined Gowlings as an OHS Consultant, providing training and consulting services in the industrial and mining sectors. Graham Walsh has joined the OHS Practice as a lawyer practicing OHS, human resources, and emergency management law.

Cathy Chandler is co-presenting a seminar on health care OHS prevention. Ailsa Wiggins is co-presenting a seminar on alcohol and drugs in the workplace.

I encourage you to "go back to school" with Gowlings this fall and invest in prevention through our courses and seminars.

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

## OHS Liability: Is Personal Exposure on the Rise?

By John Illingworth, B.F.A., LL.B.

Apprehension for personal exposure to OHS charges and fines has arguably never been higher. To date in 2007, convictions and fines against individuals would appear to give credence to those concerns.

Individuals who are convicted of an offence under the Ontario *Occupational Health and Safety Act* (the "Act") can be fined up to \$25,000 and/or sentenced to up to 12 months imprisonment for each offence. While it is not uncommon for a supervisor to be charged together with his or her employer, a series of convictions over the course of this year are illustrative of the various capacities in which an individual faces exposure under the statute.

Examples include the following:

- A home owner was fined a total of \$5,000 for three offences in connection with the death of a worker who fell from the roof of his house. The home owner was charged both as an employer and as a constructor. Two contracting companies were also convicted.
- A general manager of a fitness club was fined a total of \$25,000 for four offences, including failure as a supervisor to ensure compliance with a stop work order and obstructing an inspector during the course of an investigation. The manager's employer was also convicted of various offences.

*continued on p. 2*

## Statistics Canada's Canadian Community Health Survey

By Jennifer Hogan, B.A.Sc.

Statistics Canada has recently published an article entitled "Work Injuries," summarizing the findings of the 2003 Canadian Community Health Survey ("CCHS"). The survey was the first of its kind on a national level and received over 75,000 Canadian respondents between the ages of 16 and 75. The objective of the survey was to analyze injury occurrence by occupational category and to examine the relationship between work-related and personal fac-

tors.

Injuries caused by accidents are the result of a number of factors coming together or failing to come together in order to provide the opportunity for an accident to occur. Risk arises from an interplay of both conditions in the work environment and individual characteristics. For this reason, Statistics Canada collected a vast amount of multi-factorial information that prior to the CCHS was simply not available.

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## OHS Liability: Is Personal Exposure on the Rise?

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- A farmer was fined \$5,000 for failure as an employer to develop and implement a procedure for operating, maintaining and cleaning a piece of equipment.
- An individual worker was fined \$10,000 for failure to work in a safe manner. The worker's employer and site supervisor were also convicted.
- A company director was fined \$10,000 for failure to ensure a worker was protected by a fall arrest system.

Many employers invest significant time and resources towards ensuring their workplaces are compliant with health and safety regulations. However, it is equally critical to be conscious of the fact that every individual in the workplace - owner, director, officer, manager, supervisor, and individual worker - has personal duties and corresponding liabilities under the statute.

Individuals must be aware of and committed to discharging their own health and safety responsibilities in the course of promoting and maintaining the employer's compliance. It should also be borne in mind that one individual's failure to com-

ply with the law is almost certain to also bring charges against the employer.

While numerous express duties are prescribed to individuals in various capacities under the Act and Regulations, some of the broader responsibilities for individuals include the following:

- Owners must ensure that a workplace complies with the Act and Regulations, and that all prescribed facilities are provided and maintained appropriately.
- Directors and officers of a corporation must "take all reasonable care" to ensure that a corporation complies with the Act and Regulations, as well as any orders or requirements of inspectors or the Ministry of Labour.
- Supervisors are responsible for ensuring that workers work in a safe manner, as required by the Act and Regulations, for advising workers of potential or actual dangers, for providing written instructions where required, and for taking all reasonable precautions in the circumstances for the protection of a worker.
- Workers are responsible for working in compliance with the Act and Regulations, for using or wearing pro-

TECTIVE equipment as required, and for reporting to their supervisors any defects, hazards, or contraventions.

Of course, for many individual workers and supervisors, OHS compliance is a daily point of focus. However, for owners and directors, concern for personal exposure to OHS liability may not be so readily apparent. Nevertheless, these individuals are increasingly being held personally accountable in addition to the company itself. Moreover, the law in Ontario at present would suggest that personal indemnity provisions are not applicable or enforceable with respect to fines or costs arising from an individual's conviction for a quasi-criminal offence.

The combination of these factors, recent convictions, as well as the Bill C-45 amendments to the *Criminal Code*, would suggest that instances in which owners, directors, or senior management are personally charged in relation to an OHS offence are likely to increase. As such, these individuals - and indeed, all individuals in the workplace - would do well to take stock of their personal OHS compliance, as well as that of the overall workplace. ■

### OHS Due Diligence for Managers and Supervisors

#### ALBERTA

September 26 & 27	Fort McMurray
October 17 & 18	Medicine Hat
October 24 & 25	Edmonton
October 30 & 31	Red Deer
November 7 & 8	Lethbridge
November 14 & 15	Calgary
November 21 & 22	Fort McMurray
November 28 & 29	Grande Prairie
December 5 & 6	Edmonton

**Fee:** \$695\* per person, plus GST

#### BRITISH COLUMBIA

November 6	Vancouver
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#### MANITOBA

November 14	Winnipeg
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#### SASKATCHEWAN

October 11	Regina
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**Fee:** \$465\* per person, plus GST

#### ONTARIO

September 19 & 20	Toronto
September 26 & 27	Kitchener
October 2 & 3	Ottawa
October 24 & 25	Mississauga
November 21 & 22	Toronto

**Fee:** \$695\* per person, plus GST

**\*Discount:** Register multiple individuals from the same organization to attend the same course on the same date(s) and save: \$75 per person when 2 or more register; \$100 per person when 4 or more register

For course descriptions or to register online, visit [www.gowlings.com/ohslaw](http://www.gowlings.com/ohslaw)

## The Asbestos Epidemic: A Canadian Perspective

By Cathy Chandler, B.A.Sc., CRSP

Cancer was the most common occupational disease in 2005, numbering 383 deaths in Canada. Of the 383 deaths attributed to cancer, 89% were determined to be the result of asbestos exposure, totalling 340 asbestos-related deaths in 2005. This represented a substantial increase from less than 60 asbestos-related deaths in 1996.

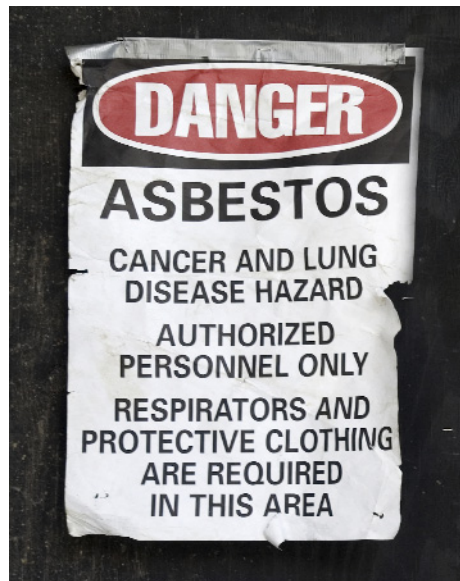
Asbestos is a general term applied to certain fibrous materials popular for their resistance, tensile strength and acoustic insulation properties. Prior to the 1980s, these materials were widely used in many industries. Canada continues to mine and export asbestos while many other OECD countries, such as Sweden, Germany, Italy, France, and Saudi Arabia, have implemented bans.

It is suspected that most current deaths as a result of asbestos exposure trace back to exposure prior to the implementation and enforcement of stricter control measures. Due to the long latency periods (20-50 years) of asbestos-related diseases, it is likely that the number of work-related deaths has not yet peaked.

In support of this position, a recent report now suggests that Canada is in the midst of an epidemic of work-related asbestos cases that will manifest over the coming decades. The report, entitled *Canada's Asbestos Legacy at Home and Abroad*, published in the May 2007 issue of the *International Journal of Occupational and Environmental Health* ("IJOEH"), provides some of the first estimates of the human and financial toll in Canada caused by exposure to asbestos. This article will highlight the issues outlined in the report.

### Workers Not Compensated

Each province in Canada has an employer-funded system in place to compensate workers for work-related injuries and diseases. However, according to the IJOEH report, many workers with mesothelioma and other asbestos-related diseases remain uncompensated (mesothelioma is a rare and typically fatal cancer, whose only known cause is previous exposure to



asbestos).

In Ontario, mesothelioma is recognized as a "Schedule 4" disease (WSIB Operational Policy 16-02-12). This legal designation provides for an irrefutable presumption that mesothelioma is work-related and is, therefore, automatically compensable. However, it is possible to deny a claim for mesothelioma in Ontario on the following grounds: where a worker has less than two years of proven exposure to asbestos; or one's particular employment is not included in the Schedules.

According to the IJOEH report, between 1993 and 2006, more than 100 cases of mesothelioma in Ontario were denied compensation. In addition, a report released by Cancer Care Ontario and the WSIB revealed that 1,487 male cases of mesothelioma occurred between 1980 and 2002 in Ontario - but only 550 claims were filed for the illness with the WSIB. In a statement to the *Globe and Mail* newspaper on July 14, 2007, the WSIB asserted: "most people with the disease don't apply for compensation and, out of those who do, about 90 per cent are compensated."

### Asbestos Regulations

Although asbestos use in Canada has decreased by over 75% between 1998 and 2003, Canada remains one of the world's largest miners and exporters. Today, each province has specific standards and poli-

cies for regulating asbestos exposure. For example, in the province of Ontario, the asbestos exposure standard is 0.1 fibers/cc, which is a level determined by Health Canada to be of very low risk for affecting human health adversely.

Nevertheless, while Canada is in line with the strictest occupational exposure limits in the world for asbestos, such an exposure is still associated with lifetime risks for lung cancer (5 per 1000) and asbestosis (2 per 1000). The IJOEH report's co-authors assert that even the best workplace controls are not a realistic alternative to a ban on the use and exportation of asbestos.

### Call for a Transition Strategy to Ban Asbestos Exportation

Resistance to mining and exporting asbestos among Canadians appears to be growing. A national network of trade unions, environmentalists, medical and scientific associations endorse the eventual phasing-out of both use and export of asbestos and would like to see the Canadian government develop a transition strategy to meet this goal. While there is considerable public pressure, it is presently unclear whether Canada will ever institute a ban on use and exportation of asbestos.

In the meantime, Canadian employers have a legal duty to comply with their provincial legislative requirements pertaining to asbestos. In Ontario, for example, amendments to the regulation respecting asbestos on construction projects and in building and repair operations (O. Reg. 278/05) take effect November 1, 2007. These amendments include new requirements for asbestos workers and supervisors involved in "Type 3" operations to successfully complete a training program approved by the Ministry of Training, Colleges and Universities, as well as changes to various provisions of the asbestos management program.

For more information about this article or your province's legislative requirements on asbestos, please contact Cathy Chandler, OHS Consultant at 416-369-7351 or [cathy.chandler@gowlings.com](mailto:cathy.chandler@gowlings.com). ■

## Statistics Canada's Canadian Community Health Survey

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In the past, data was compiled by individual provincial worker compensation boards, which collected information provided only when an injury was reported to the respective board. Respondents were asked to provide information regarding activity-limiting injuries related to work. According to the results, in 2003, 5% of men and 2% of women experience at least one activity-limiting occupational injury.

The CCHS collected information related to the injury itself, such as the type of injury, the body part that was injured, and information about treatment (however, the CCHS excluded repetitive strain injuries). Work-related information that was collected included the injured worker's job category, weekly hours of work, shift type, and physical work demands. Personal information was also collected by the CCHS and included factors such as age, income, alcohol consumption, smoking, educational attainment, personal stress, body weight, type of residence area, and race.

As estimated in past health and safety literature, the CCHS confirmed that fewer than half of injured workers file a worker's compensation claim. Analysis of the CCHS data revealed a number of significant factors, both intrinsic to the job and personal characteristics that were strongly associated with occupational injury. Over one-

quarter (28%) of occupational injuries were to the hand, followed by the lower back (16%). Forty-nine percent of occupational injuries reported to the CCHS were caused by falls and overexertion or strenuous movement. A further 32% of occupational injuries were due to accidental contact with a sharp object, tool or machine, or being accidentally struck or crushed by an object. The majority of injuries were suffered by men (72%) and of these injuries, three-quarters were within "blue-collar" industries. The CCHS defined "blue-collar" according to the Standard Occupational Classification and included sales and service occupations; trades, transport and equipment operators; occupations unique to primary industry; and occupations unique to processing, manufacturing and utilities.

For men, occupational injury risk increased proportionately to the number of hours worked, which is consistent with previous research findings that routine overtime increases the risk of occupational injury.

Analysis also revealed that women with more than one job and women in sales and services were at a higher risk of injury when compared to female "white-collar" jobs, which was defined according to the Standard Occupational Classification and included management occupations; business, finance and administrative occupations; natural and applied sciences and

related occupations; health occupations; occupations in social science, education, government services and religion; and occupations in art, culture, recreations and sport.

Shift work, physically demanding jobs, chronic health conditions, and smoking were identified as factors, similar between the sexes, that are strongly associated with occupational injury.

Findings of the CCHS help to identify and quantify the impact of work-related conditions and personal characteristics that are strongly associated to occupational injuries. Previous to the study, the health and safety community was conscious of these factors; however, only anecdotal evidence or isolated studies were available to support them. Armed with this quantified knowledge, organizations can work towards implementing further strategies in accident prevention to combat both work-related and personal factors. Examples include instituting stress management training, safe shift-work management programs and limiting the need for routine overtime, as well as healthy eating and exercise programs.

The full article and CCHS findings can be accessed at Statistics Canada's website: <http://www.statcan.ca/english/freepub/82-003-XIE/2006007/articles/injuries-en.htm> ■

October 25, 2007

Toronto

9:00 am - 12:00 pm

\$245\* per person, plus GST

\*\$45 discount per person available for 2 or more registrants

## Workers' Rights and Responsibilities

### In this half day course your workers will learn about:

- Workers role in workplace safety
- Occupational health and safety law in Ontario
- The duties of different workplace parties, including constructors, employers, supervisors and workers,
- The three rights of all workers under OHS law
- Different enforcement possibilities under the OHSA
- The practical framework behind Ontario's workers' compensation system
- The roles of the worker, supervisor, and employer in case of a workplace accident, including accident reporting, early and safe return to work, the duty to co-operate, and reporting material changes
- How to prevent accidents and incidents
- Role of the Joint Health & Safety Committee in the workplace

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## Changes to the WSIA Will Benefit Workers

By David Marchione, B.A.

On March 22, 2007, the Ontario Government introduced Bill 187, the *Budget Measures and Interim Appropriation Act*, which included several amendments to the *Workplace Safety and Insurance Act* ("WSIA"). The bill was passed on May 17, 2007 and became effective on July 1, 2007.

The amendments to the WSIA include changes to the indexing for workers receiving partial wage loss benefits, additional benefits for workers who are beyond the 72-month lock-in review, changes to the way worker benefits are calculated for ongoing wage loss benefits, and an increase to the lump sum payout threshold for Loss of Retirement Income benefits. The changes have resulted in the implementation of a number of draft Operational Policies which came into effect July 1, 2007.

### 1. Changes to cost of living indexing for partial wage loss benefits

As a result of Bill 187, approximately 155,000 workers receiving partial wage loss benefits will have a cost of living adjustment of 2.5 per cent for three consecutive years. The adjustments will take place on July 1, 2007, January 1, 2008 and January 1, 2009. This change only affects workers receiving a partial wage loss benefit, as they are indexed using the Modified Friedland Indexing formula. Benefits paid to workers who receive a full wage loss benefit are indexed using the Consumer Price Index on January 1 of each year.

When asked why no changes have been contemplated beyond 2009, the Workplace Safety and Insurance Board ("WSIB") confirmed that the Ontario Government makes all decisions on changes to the Act. The WSIB administers the Act and will provide support in any regulation developed on this issue.

### 2. Deteriorations Beyond the 72 Month Lock-In

Previously, the WSIA did not allow for a review of a worker's benefits if they suffered a temporary or permanent deterioration of their compensable condition

after their 72 month lock-in or 60 month post Future Economic Loss ("FEL") determination. The amendments from Bill 187 will allow some workers to receive additional benefits in the event of a significant deterioration of their condition post lock-in. The WSIB will look at the determination and the need for future active treatment, surgery, objective medical information, changes to the worker's functional abilities or job change impacts to determine if there has been a significant deterioration.

### 3. "Determining" vs. "Deeming" Worker Benefit Level

The changes included in Bill 187 remove the word "deeming" from the WSIA and replaces it with the word "determining" with respect to worker earnings in the context of return-to-work and following retraining. In the past, worker earnings were "deemed" based on earning potential for a particular job. Workers were not so much concerned that the WSIB was determining their future level of income. Instead, they were concerned with the manner in which this function was being performed.

The changes included in the law and Operational Policies cause the WSIB to examine a worker's personal and vocational abilities, functional abilities, the suitability of work and the availability of suitable employment in the worker's local labour market. The WSIB will evaluate the worker's circumstances to determine the likelihood of the worker reasonably securing a job, as the ultimate goal is to get the worker back to work.

The changes demonstrate a goal of gaining an understanding of the worker's unique situation and making decisions to reflect that understanding. In situations where workers secure employment, but their earnings are below their pre-accident level, the WSIB will consider their actual earnings in setting and paying benefits.

### 4. Loss of Retirement Income Threshold

Loss of Retirement Income ("LRI") benefits are paid to workers by the WSIB once

they reach age 65 and are no longer entitled to wage loss benefits. Workers may receive this money by lump sum or by monthly instalment, depending on how much money is in their LRI account as established by the WSIB. The changes to the WSIA increase the threshold amount for lump sum payment from \$1,166.44 to \$3,000. This change will increase the number of workers who will receive their LRI benefit by lump sum, giving them more financial control.

The WSIB has commented that the changes brought about through Bill 187 will not cause an increase in premium rates. The WSIB has also indicated that if all system partners continue to work together to aggressively pursue accident prevention and return to work, it should still be able to achieve its goal of eliminating its unfunded liability by 2014.

The Operational Policies created due to Bill 187 became applicable July 1, 2007 but remain in draft format as the WSIB considers stakeholder feedback. The WSIB is accepting feedback on the policies until November 1, 2007. For more information on Bill 187 and the changes listed above, visit [www.wsib.on.ca/wsib/wsibsite.nsf/public/PolicyUpdatesBill187](http://www.wsib.on.ca/wsib/wsibsite.nsf/public/PolicyUpdatesBill187). ■

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Interview with Ontario's Ministry of Labour regarding Asbestos Reg. 278

#### July 2007 Episode:

Handling young workers responsibly regarding OHS in the workplace

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## First Farming Conviction Handed Out in Ontario

By Kathryn Fisher, B.A.Sc.

A farmer was recently convicted as an employer under Ontario's *Occupational Health and Safety Act* ("OHSA") in relation to an incident that occurred on the employer's farm. The incident resulted in an ankle injury to the employer's worker. This is the first conviction for a farming operation since farming operations were included in coverage under the OHSA in June 2006.

The incident occurred when the employer and worker were harvesting tomatoes using a vehicle called a tomato harvester. The conveyor on the harvester jammed so the worker went to investigate the problem. The employer then decided to reverse the vehicle and he advised the worker, but apparently the worker did not hear him. As the worker was standing on

one of the tires of the harvester, the employer reversed the vehicle and caused the worker's legs to become caught, resulting in the injury.

The employer was convicted for his failure to implement a procedure for the safe use of the harvester and failure to ensure the worker was in a safe position. The fine was \$5,000. Like other industry sectors, farming operations have significant hazards to which workers may be exposed. Some hazards include the potential to be hit by, caught in or between moving equipment, entrapment, exposure to hazardous substances, injuries related to working with livestock, musculoskeletal injuries, and others. Hazards in this industry have always existed so now that farming operations are covered by the OHSA the expectation is that the safety of a farming workplace will be improved and accidents reduced. ■



## Workplace Accident Investigation Course

### ONTARIO

October 18  
November 27  
November 29

Ottawa  
Mississauga  
Kitchener

### ALBERTA

October 4  
November 13

Fort McMurray  
Edmonton

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## Alcohol & Drugs in Canadian Workplaces

October 11, 2007 - Toronto

9:00 am - 12:00 pm

**A seminar on the legal and human resource challenges of alcohol and drug use and abuse in the workplace, and what employers can do to minimize the risks.**

### SPEAKERS

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

**Dr. Barry Kurtzer**, B.Sc., M.D., M.R.O.  
Chief Medical Review Officer with  
DriverCheck Inc.

**Ailsa Wiggins**, B.A., LL.B., LL.M.  
Special Counsel with Gowlings

**Howard Moyer**, B.A., M.B.A.  
Consultant, Workplace Policies  
Former Manager of Imperial Oil Limited's  
Alcohol and Drug Program

### COST

**\$245.00** per person, plus GST

Save \$45.00 per person when  
two or more attend from the  
same organization

### In this half-day seminar you will learn about:

- Impact of alcohol and drugs on worker performance
  - Role of police in workplace alcohol and drug enforcement
  - Developing workplace alcohol and drug policies
  - The role of the Medical Review Officer in giving guidance to manage drugs, medications, and testing in the workplace
  - The law regarding searches and surveillance
  - Legal challenges to an alcohol and drug policy
  - Human Rights considerations in the non-union workplace
  - Legal considerations in the unionized workplace
  - Review of current court and human rights decisions regarding alcohol and drugs in the workplace
- and more...

For more information and to register [www.gowlings.com/ohslaw](http://www.gowlings.com/ohslaw)

**GOWLINGS**

## European Court of Justice Health and Safety Ruling "Best Possible" Result for the U.K.

By David Young  
Partner with Eversheds LLP

A key decision in the European Court of Justice ("ECJ"), dated June 14, 2007, saw the U.K. win a significant law suit against the European Commission over its interpretation of health and safety legislation. According to Eversheds, the judgment in the Commission v. United Kingdom ("U.K.") case will be a huge relief to those who feared a ruling in favour of the Commission, which would have led to a major overhaul of U.K. health and safety laws.

The case saw the U.K. challenged by the European Commission over its interpretation of the extent of an employer's duty to provide a safe place of work for its employees.

The Commission argued that under European law the duty was absolute and the U.K. had in effect re-drawn the duty in more qualified terms in that employers are obliged to ensure a safe place to work "so far as is reasonably practicable". This, said the Commission, introduced an economic test allowing the level of risk to be measured against the cost and extent of provisions to manage the risk which in turn meant that the U.K. had misinterpreted European law and had therefore failed in its obligation to properly implement European law in national legislation.

In January, the Opinion issued by the Advocate General recommended that the Court should find in favour of the U.K., but at the same time raised some doubt whether the U.K.'s system of "reasonable practicability" was lawful. So there was concern that the Court might find against the U.K. when it delivered its full judgment.

By finding in favour of the U.K., and the basis of the finding in particular - that the Commission had failed to satisfy the Court on the evidence that the interpretation it argued for was correct, and further that it had failed too in establishing a failure to

implement by the U.K. - it appears that the U.K. test of "reasonable practicability" is safe for now. Whether this could result in changes to the way health and safety legislation is interpreted in Europe under the Framework Directive is doubtful as most European legal systems are codified rather than the common law system we have in the U.K.

This is the best possible result for the U.K., which has fought to defend "reasonable practicability" for several years on the basis that we have criminal sanctions in the U.K. for health and safety breaches and an effective regime as a result given that the U.K. has one of the lowest levels of work-

place accidents in Europe. This is on any view a heavy defeat for the Commission, as the Court stated that it had failed to prove its case in any way.

If the Court had found against the U.K., it would have meant a complete overhaul of existing health and safety legisla-

tion. Finding in favour of the U.K. poses an interesting challenge for the Commission whether to seek to strengthen or modify the EU Framework Directive, but frankly we expect little fall-out on that front.

Employers should welcome this decision as the prospect of a major overhaul of such a key area of regulation would not have been welcome. Few employers doubt that compliance with health and safety legislation is tough and most would bridle at any suggestion that employers are "let off" in the U.K. when it comes to health and safety in the workplace.

*Eversheds LLP and its world wide associate offices have over 2,000 legal and business advisers providing services to the private and public sector business and finance community. Access to all these services is provided through our network of international offices. Eversheds combines local market knowledge and access with the specialisms, resources and international capability of one of the world's largest law firms.*

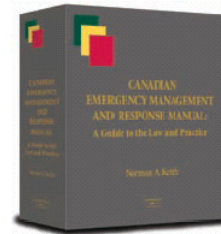
**If the Court had found against the U.K., it would have meant a complete overhaul of existing health and safety legislation.**

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

#### Try these books:

#### Canadian Emergency Management and Response Manual: A Guide to the Law and Practice

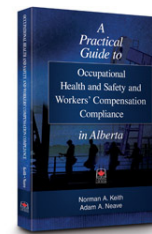
by Norman A. Keith



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

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## Worker Awarded LOE Benefits for Stress Brought on by Harassment

By Goldie Bassi, B.A., LL.B., LL.M.

A worker employed as a lab technician who was subjected to intense harassment from two of his co-workers in the form of teasing, name calling, and other forms of intimidation has been awarded loss of earnings ("LOE") benefits for absence from the work a result of related stress.

The worker, who had a history of seeking psychological counselling and treatment related to his low self-esteem, depression and stress-management abilities, filed a claim with the WSIB seeking LOE benefits for stress. However, his claim was denied by the Operating Branch because it could not be characterized as an accident. The denial was upheld by the Appeals Resolution Officer and ultimately appealed by the worker to the Appeals Tribunal, which allowed the appeal and held that the worker was entitled to 100% LOE benefits for stress stemming from the verbal harassment.

Under s. 2(1) of the WSIA, "accident" is defined as, "(a) a wilful and intentional act, not being the act of the worker, (b) a chance event occasioned by a physical or natural cause, and (c) disablement arising out of and in the course of employment." Although the psychological effects of harassment may not at a first glance be characterized as an "accident", the Appeals Tribunal held that the definition was reasonably expansive. Further, the Appeals Tribunal relied on Operational Policy #15-03-02, which states that a worker may be entitled to benefits for traumatic mental

stress. Examples given of events that may cause traumatic mental stress include harassment.

The applicable test for mental stress was set out in an earlier decision (No. 422/96), and is sometimes referred to as the "average worker" test. The test is as follows:

1. Is it reasonable that workers of average mental stability would perceive the workplace events to be mentally stressful?
2. If so, would such average workers be at risk of suffering a disabling mental reaction to such perceptions?

The answer to both questions must be in the affirmative in order for the mental stress to be compensable. Decision No. 871/99, further modified this test, holding that the "thin-skull rule" applies: even if the employee suffers greater harm from the injury than an average employee would due to a pre-existing condition, so long as the working environment caused the injury it is compensable.

In this case, the appeals tribunal applied these tests to the evidence and concluded that the worker's psychological disability was the direct result of the harassment he was subjected to in the workplace, notwithstanding the worker's pre-existing vulnerable personality.

This case serves as an important reminder to employers that, along with other legal and moral reasons, there is also a financial imperative in providing a conflict-free work environment for all employees. ■

## The Gowlings National OHS Team

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## FAQ Ask the OHS Legal Expert



### You asked. We answered.

Does a federally regulated organization require a Joint Health and Safety Committee with certified members?



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