

A national occupational health & safety (OHS) and workers' compensation law newsletter



As 2005 draws to a close, Gowlings continues to monitor and report on occupational health and safety and workers' compensation developments across Canada. Recently in Ontario, the new asbestos regulation arguably places a number of employers immediately out of legal compliance with the regulation. Therefore, we recommend a review of current asbestos control programs.

OHS and workers' compensation regulators increased their level of cooperation and determination to identify poorly performing employers and to audit them for contraventions and prosecution.

In a disturbing trend, more responsibility and potential liability is being placed on OHS professionals and some are subject to OHS prosecutions.

The OHSAS 18001 article demonstrates the value of an internationally recognized OHS management system to guide employers towards regulatory compliance. While OHSAS 18001 is not an OHS panacea, it is a huge step towards an OHS management system that will achieve the legal standard of due diligence.

Have a safe & happy holiday season!

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

November 1, 2005 Marks New Beginning for Asbestos Regulation

By David Marchione, B.A.

On November 1, 2005, Ontario Regulation 278/05, the regulation respecting Asbestos on Construction Projects and in Buildings and Repair Operations came into force. This regulation revokes and replaces Ontario Regulation 838 of the same name. Some of the changes in the new regulation include:

- A new definition of "asbestos-containing material". Under the new regulation, asbestos-containing material means material that contains 0.5 per cent or more asbestos by dry weight,
- Updated respiratory protection requirements with specific require-

ments depending on the type of work being performed,

- Clarified duties of owners, and
- Updated requirements for bulk sample asbestos analysis.

A copy of the new regulation is available at www.e-laws.gov.on.ca.

The changes contained in Regulation 278/05 are significant and will impact virtually all employers with asbestos on their worksite. Most employers that were in compliance with Regulation 838 will be in contravention of Regulation 278.

The maximum penalty for a contravention of the *Occupational Health and Safety Act* or the Regulations is \$25,000 and/or

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OHSAS 18001 and OHS Due Diligence

By Adam Neave, B.A.Sc. and
Norm Keith, B.A., LL.B., CRSP

Gowlings' Occupational Health and Safety ("OHS") Practice has been receiving an increasing number of inquiries regarding OHSAS 18001, an international Occupational Health and Safety Administrative System. The inquiries surround the value of complying with the specifications of OHSAS 18001 to achieve an effective OHS management system. Does compliance with OHSAS 18001

assist in a due diligence defence?

With prosecutions on the rise across Canada, implementing an effective OHS Management System ("OHSMS") is becoming increasingly important. In Ontario, for instance, the number of convictions rose from 287 in 2001 to 618 in 2003 - an increase of 215%. Also, the Bill C-45 amendment to the *Criminal Code* has an implied duty for organizations to implement and maintain an effective OHSMS.

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Three New Federal Regulations Under Development

By Kathryn Fisher, B.A.Sc.

The federal government is working towards the introduction of 3 new regulations under the *Canada Labour Code, Part II* (the "Code"). The Hazard Prevention Program Regulation, Violence Regulation, and Ergonomics Regulation are currently under development.

Bill C-12, the amendment to the Code, came into effect as of September 30, 2000. This amendment placed increased responsibility on federally regulated workplace parties to manage occupational health and safety ("OHS") in the workplace. However, it was still believed that the existing Federal OHS Regulations did not adequately ensure worker protection from all types of hazards. Thus, the 3 regulations were proposed in Bill C-12.

The Hazard Prevention Program Regulation was published in the *Canada Gazette* on November 27, 2004 for public consultation. The regulation will require the employer to develop, implement and monitor a program to prevent hazards in the workplace. The program requires an implementation plan, hazard assessment, preventive measures, employee education and program evaluation. The regulation may come into force as early as December 2005.

The Violence and Ergonomics regulations are currently being drafted. These are expected to be published in the *Gazette* in early 2006. Employers who do not currently have a hazard prevention program in place or already address the potential for workplace violence and ergonomics will likely require an improvement to their OHS management system to achieve compliance. Employers that are presently managing these areas may only have minor adjustments to make. ■

Can Compliance with OHSAS 18001 Help?

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OHSAS 18001 is the foremost emerging international OHSMS. The British Standards Institute developed the virtual ISO standard in 1999 as a successor to BS 8800, with the purpose of making the framework of the Standard more compatible with the International Organization for Standardization ISO 9001 and 14001. While OHSAS 18001 is not a recognized ISO standard, it is growing in its wide, international acceptance and best estimates suggest that approximately 2000 worksites worldwide have been registered to the OHSAS 18001.

OHSAS 18001 is based on the continual improvement theory and requires organizations to manage OHS issues by complying with the following specifications:

- 4.1 Establish and maintain an OHSMS;
- 4.2 Establish an OHS Policy;
- 4.3 Plan to ensure success of the OHSMS;
- 4.4 Implement practices, programs and procedures related to OHS issues;
- 4.5 Check for and correct identified problems as well as monitor and measure to evaluate OHS performance; and
- 4.6 Review the entire OHSMS at senior management level.

Across Canada, due diligence is a legal defence to occupational health and safety and other regulatory charges. Due diligence includes the application of the internal responsibility system in Canadian health and safety law by establishing an effective OHSMS. The internal responsibil-

ity system is realized by a series of duties placed on workplace stakeholders and the development of a managed system to identify, assess and either eliminate or control hazards.

Based on Gowlings' experience in defending employers' and supervisors' OHS charges across Canada, successful due diligence defences have been able to demonstrate the accused took the following "reasonable steps":

1. Hazards were identified;
2. Risks of the hazards were assessed;
3. Risks were eliminated or controlled;
4. Hazards, risks and control measures were communicated to workers;
5. The workplace and worker performance was monitored and supervised;
6. Any hazardous situations were corrected or remedied; and
7. The aforementioned six (6) points were documented.

In our opinion, the specifications of OHSAS 18001 are in line with the key elements of a successful due diligence defence. Due diligence requires the documented elements of an effective OHSMS. Therefore, complying with OHSAS 18001 assists in, if not establishes, a due diligence defence.

Gowlings, in partnership with the Canadian General Standards Board, offers a two-day course in the essentials of OHSAS 18001, auditing and due diligence.

For more information on these or any other services, please contact Olga Jordache, OHS Practice Coordinator, at 1-866-862-5787 ext. 83580 or olga.jordache@gowlings.com. ■

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Health and Safety Professionals Increasingly at Risk

By Elizabeth Rankin, B.A.Sc.

Two health and safety professionals in Ontario have recently been convicted as individuals under the *Workplace Safety and Insurance Act*, ("WSIA"), and ordered to pay fines of \$18,000 and \$11,000 respectively. A health and safety manager in Nova Scotia was recently charged as a worker with 6 counts under the *Occupational Health and Safety Act* ("OHSA") for his alleged failures in relation to a fatal injury to a worker. He faces a potential maximum penalty of \$1.5 million, up to 12 years in prison, or both.

OHS professionals and employers need to take notice: employers cannot delegate their legal duties by merely hiring someone to manage health and safety. However, OHS professionals are not immune from the law. Although there are no specific legal duties placed on OHS professionals in Canadian law, it appears that the courts will hold them legally accountable for the duties that are imposed on them via their position and responsibilities in the workplace.

Contrary to what seems to be a belief

amongst some health and safety professionals that they are merely "corporate babysitters", health and safety professionals play a much more important and active role in workplace OHS management. While the role of a health and safety professional is intended to be that of "advisor", it is absolutely essential to ensure that the advice given, including development of policies, programs and procedures, is not negligent and is in compliance with the applicable laws. This means they are to ensure, to the best of their abilities and within the scope of their authority, that the company and others who represent the company, are working in compliance with the relevant statute and applicable regulations.

But that is only part of the equation. Many OHS professionals are company representatives who are given responsibility to manage health and safety in the workplace.

Health and safety professionals are relied upon by their employers to ensure the organization is not at risk of prosecution. However, a common complaint of many OHS professionals is the lack of sup-

port they receive from management. They provide advice that may or may not be taken. Here are some tips to help you, as an OHS professional, gain senior management support:

- Ensure expectations are clearly communicated to senior management.
- Identify gaps in the OHS law and management system and communicate these clearly to senior management.
- Ensure senior management understands their corporate and individual legal duties and liability.
- Set objectives, with target dates, and assign a senior manager who has authority in the area to carry out the objectives.
- Measure progress on a frequent and regular basis.
- Ensure consistency in application of policies, programs and procedures.
- If variance is required, ensure there is a process in place to manage it.
- Keep accurate records of your activities. ■

WSIB Implements New Form 7

By David Marchione, B.A.

As of November 1, 2005, the Workplace Safety and Insurance Board (WSIB) in Ontario requires all employers to report workplace injuries/illnesses on their updated Employer's Report of Injury/Disease (Form 7).

Failure to use a WSIB approved form for reporting claims constitutes an offence under the *Workplace Safety and Insurance Act* ("WSIA").

Employers using an unapproved form may face administrative penalties of \$250, or prosecution. The maximum penalty for an individual convicted for an offence under the WSIA is \$25,000 and/or 6 months imprisonment. The maximum fine for a corporation is \$100,000.

The new Form 7 is available from the WSIB at www.wsib.on.ca. ■

Increased Role for the Ministry of Labour and WSIB

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

A Coroner's Inquest into the death of a worker at an industrial mining plant produced several recommendations aimed at the Ministry of Labour for Ontario and the Workplace Safety and Insurance Board (WSIB).

The Jury's recommendations focused on certification of supervisors at all levels, including CEO's. The Jury envisioned a certification system similar to the Joint Health and Safety Committee member certification, but with increased training, testing, upgrading, and re-certification.

The Jury also recommended that the definition of "competent person" as

found in section 1 of the Ontario *Occupational Health and Safety Act* (the "Act") be amended whereby it would require a "competent person" to not only be familiar with the Act and relevant regulations, but to be trained and certified in the relevant industry sector.

The Jury also recommended that the WSIB, Safe Workplace Associations, and the Ministry of Labour make efforts to ensure that employers are provided with a support system to assist in meeting their obligations under the Act and regulations. Government and other organizations are not required to implement recommendations of a Coroner's Jury. ■

WSIB Sharpening its Teeth

By Elizabeth Rankin, B.A.Sc.

The Workplace Safety and Insurance Board ("WSIB") in Ontario is adding serious bite to its bark, with higher fines and the first ever jail term for a contravention of the *Workplace Safety and Insurance Act* ("WSIA").

On September 23, 2005, fines totalling \$505,000, including the victim fine surcharge, were imposed in relation to contraventions under section 149(1) of the WSIA, for knowingly making false statements to the WSIB in connection with workers' injuries. The company, Potvin Construction, was fined a total of \$375,000 for eight counts. Its Health and Safety Officer was fined \$18,000 for six counts and the former Health and Safety Director was fined \$11,000 for his involvement in three of the counts.

In an unrelated case, a worker was convicted on October 20, 2005, for failing to notify the WSIB within 10 days of a materi-

al change with respect to his benefit entitlement. He was sentenced to serve 30 days in jail.

The WSIB is becoming more aggressive in enforcing the Act in line with its zero tolerance policy on fraud. Contraventions of the WSIA are serious matters and carry a maximum penalty of up to \$100,000 for non-individuals (ie. companies) and up to \$25,000, six months in prison, or both for individuals.

Employers should have in place a written WSIB compliance program to ensure its policies, procedures and expectations for compliance are set out and carried out consistently. Part of this compliance program should include measurement of the program to ensure it is operating effectively. This will identify any gaps in compliance so they can be addressed in a timely manner, and may significantly reduce the organization's WSIB related costs and exposure to significant financial liability. ■

New Asbestos Regulation in Place

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12 months imprisonment for individuals. Corporations face a maximum penalty of \$500,000 per count. Employers should review their Asbestos Control Program in order to ensure compliance with the new regulation. Gowlings' OHS Consultants

are available to assist with Asbestos Control Program reviews or to assist in program development.

For more information please contact Olga Jordache, OHS Practice Coordinator at 1-866-862-5787 ext. 83580 or olga.jordache@gowlings.com. ■

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- Workplace Accident Investigation

Visit our website for course descriptions, fees, dates and locations, and to register

www.gowlings.com/ohslaw

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