

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



A safe and bountiful harvest is undoubtedly the hope of every farmer and farming operation in Canada. However, in Ontario, the chill in the autumn air may not be an early frost, but the loss of the exemption by farming operations under Ontario's *Occupational Health and Safety Act (OHSA)*. The Ministry of Labour has announced this will take effect on June 30, 2006. Although this brings Ontario in line with most other provinces, Ontario is much more aggressive in enforcing its *OHSA* through prosecution, increasingly high fines, and occasionally jail terms than any other jurisdiction. Time will tell if farming operations in Ontario will see *OHSA* enforcement by prosecutions.

Across Canada, increased prosecutions continue to make the headlines. We will follow the case of Bernard Dearing, perhaps the first case where an OHS manager is legally blamed in a workplace fatality. Is prosecuting OHS professionals the answer to safer workplaces? In my view, recognition of the ongoing efforts of OHS professionals is a more positive approach than prosecution of the OHS managers who are responsible for implementing OHS programs.

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

Workplace Fatality Leads To Charges Against Safety Manager

By Kathryn Fisher, B.A.Sc.

A safety manager employed at Zoom Developers Ltd., has been charged under Nova Scotia's *Occupational Health and Safety Act (OHSA)* in relation to a workplace fatality. This may be the first case of a staff OHS professional being legally blamed in a workplace fatality. Bernard Dearing, the accused, managed the company's health and safety program at the time of the fatal accident.

The charges allege that Mr. Dearing, acting on behalf of the employer, failed to ensure the worker's health and safety and establish and maintain an effective occupational health and safety program

that is tailored to address the specific hazards of the workplace. If convicted on all counts, he could face a fine of up to \$1.5 million and/or up to two (2) years imprisonment.

Charges against safety professionals under Canadian health and safety legislation are not a common occurrence. Employers, supervisors, and to a lesser extent workers, are often subject to charges. If Mr. Dearing is convicted it could set a precedent for future charges against safety professionals that oversee a company's health and safety program.

The outcome of his court appearance was unavailable at the time this article was written. ■

Occupational Health & Safety Act to Apply to Farming Operations in Ontario

By Elizabeth Rankin, B.A.Sc.

The Ontario Ministry of Labour (MOL) recently announced a new regulation, Ontario Regulation 414/05, that will bring farming operations in Ontario under the authority of the *Occupational Health and Safety Act (OHSA)* on June 30, 2006. The *OHSA* will not apply to a farming operation operated by a self-employed person without any workers. The term worker is defined under the *OHSA* as a person who

performs work or supplies services for monetary compensation.

There is currently no sector specific regulation for farming operations setting out measures and procedures to protect workers, and most regulations made under the *OHSA* will not apply to farming operations. According to Yvonne Slupinski, Senior Policy Advisor at MOL, further consultation will be conducted to develop a more prescriptive regulation

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MOL Announces New Regulation for Ontario Farming Operations

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that appropriately addresses the hazards of the industry, such as exposure to silo gas, manure pits, machine hazards and minimum age of workers.

This new regulation means that farming operators who employ workers, as defined by the *OHSA*, will be considered as employers under the *OHSA* and will be subject to the same legal responsibilities and accountabilities as other employers in Ontario. This includes posting a copy of the *OHSA*, developing an OHS policy and program, appointing competent supervisors, providing information, instruction and supervision to workers to protect their health and safety, providing protective equipment and training, ensuring that measures and procedures as prescribed by the *OHSA* or regulations are followed, and reporting critical and fatal injuries to the MOL. Certain types of farming operations that regularly employ 20 or more workers will be required to establish a joint health and safety committee. Certification training will only be required where the farming operation regularly employs more than 50 workers. All other farming operations employing 5 or more workers will be required to have a health and safety repre-

sentative.

Health and safety representatives or joint health and safety committees will be required to inspect the farm operation for hazards and make recommendations for elimination or control of hazards, to which farm operators must respond. Farm workers will be given the legal right to refuse unsafe work, and certified members of JHSCs will have the power to stop work if they determine that dangerous circumstances exist.

Provisions for toxic substances in the *OHSA* will also apply, requiring farming operators to ensure that controlled substances are labelled, provide material safety data sheets, and provide training to workers on the safe use, handling and storage of toxic substances.

It is unclear as yet how aggressively the MOL intends to enforce compliance with the *OHSA* for farming operations. However, failure to comply with the *OHSA* may result in the issuance of non-compliance or stop work Orders and/or quasi-criminal prosecution. If convicted, an employer is liable to a fine of up to \$500,000 per offence; and an individual convicted of an offence is liable to a fine of up to \$25,000, twelve months in prison, or both. If a person is injured or killed on a

farm there may also be a police investigation with possible Bill C-45 *Criminal Code* charges. If OHS criminal negligence is found, the organization may be liable to an unlimited fine; individuals are liable up to 10 years in prison for an injury, or life in prison for a fatality. The Workplace Safety and Insurance Board (WSIB), allows approximately 1,500 lost time claims each year in the agricultural sector for registered employers.

Gowlings has developed several professional services that can assist farming operations to prepare for the upcoming legal accountability under the *OHSA*. First, the *OHSLAW* Gap Analysis™ (Phase I) is a comprehensive legal compliance audit. Protected by solicitor and client privilege, this audit will identify legal non-conformances or gaps and provide detailed recommendations on how to become legally compliant with the *OHSA*. Second, the *OHSLAW*™ Incident Response Protocol is a customized manual helping employers prepare for and respond to a workplace incident. It contains directions, checklists and forms that all employers need to have and use when an incident occurs. For more information on these and other services, visit the Gowlings website at www.gowlings.com/ohslaw. ■

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Ontario MOL Publishes Health and Safety Guideline for Computer Operators

By Elizabeth Rankin, B.A.Sc.

Only Saskatchewan and British Columbia have included legal ergonomic standards in their OHS regulations. Ontario's Ministry of Labour (MOL) has now published a Health and Safety Guideline urging employers to allow rest breaks for computer users. The guideline recognizes workers who perform continual, intensive computer work for prolonged periods during a shift to be at increased risk of developing various health problems, including visual fatigue, headaches, upper limb musculoskeletal injuries, and back pain. It recommends providing an appropriate work station,

proper lighting, training, and the use of suitable equipment.

While Ontario has no legal requirements governing ergonomics, the MOL could use this guideline for enforcement under the general duty clause, section 25(2)(h) of the *Occupational Health and Safety Act (OHSA)*, which requires employers to do everything reasonable in the circumstances to protect the safety of a worker.

This method of enforcement is becoming increasingly common. Rising workers' compensation claim costs for musculoskeletal injuries for computer users can be controlled through active implementation of such guidelines. ■

Saskatchewan Increases OHS Prosecutions in 2005

By David Marchione, B.A.

Saskatchewan has increased both the number of prosecutions and the average amount of fines levied for convictions under its *Occupational Health and Safety Act (OHS)*. Under Saskatchewan's *OHS*, the maximum penalty for an offence that does not cause, but is likely to cause, death or serious injury of a worker is \$50,000. The maximum penalty for an offence that causes death or serious injury of a worker is \$300,000 and two years imprisonment.

Saskatchewan's Occupational Health and Safety Division intends to conduct 4,500 workplace inspections in 2005 - an increase of 50 per cent over the previous year. The Saskatchewan Labour 2003-2004 Annual Report indicated that 10 prosecutions were initiated for serious non-compliance with standards. By contrast, a July

2005 news release noted that in the spring of 2005, sixteen charges had already been laid under the *OHS*. To date in 2005, there had been nine convictions "dealing with the failure by employers, contractors, workers and self-employed persons to use proper fall and head protection at work-sites."

During July and August of 2005, Saskatchewan Labour has received convictions for employers, suppliers, owners and workers for offences resulting in serious injury or death to workers. Fines levied by the courts have ranged from \$2,500 to \$34,000 for individuals. Sye Rosin, owner of Sye Rosin Snow Removal of Regina, was fined a total of \$34,000 for failing to provide and maintain a safe work environment.

Companies have been fined from \$10,000 to \$78,000. Gilles Power Tongs

Ltd. was convicted, as a supplier, of failing to ensure that a lifting device was properly designed, constructed, maintained and operated. They were fined a total of \$10,000. Pen West Petroleum Ltd. was convicted of failing to ensure, insofar as is reasonably practicable, the health, safety and welfare of a worker, after a worker was found dead in an equipment building, having been overcome by hydrogen sulphide gas. The company was fined \$60,000 plus a victim fine surcharge of \$18,000.

According to Occupational Health and Safety Division Director Allan Walker, Saskatchewan Labour continues to emphasize an educational approach with workplaces that are committed to safety. Mr. Walker stated, "Enforcement measures are needed to curb non-compliance on worksites neglecting safety and risking lives." ■

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New Labour Minister Appointed in Ontario

By Adam Neave, B.A.Sc.

In July 2005, Premier Dalton McGuinty appointed a new Minister of Labour, Steve Peters, to take over the helm at the Ministry of Labour (MOL) from predecessor Chris Bentley. Peters takes over as Minister in the midst of the MOL's promise to reduce the number of workplace accidents by 20% over the next four years, in part, by recruiting 200 new MOL Inspectors to crack down on Ontario's most dangerous workplaces. "Since being elected, our government has made tremendous strides in bringing

fairness and balance back to Ontario workplaces," said Peters. He further stated that he plans "to continue this work to ensure positive results for the province and its people." According to MOL enforcement statistics, the number of prosecutions in recent years has been on the rise - from 287 in 2001 to 459 in 2002 to 618 in 2003 - an increase of 215% during those years.

In Peters' first appearance in his new position, he returned to St. Thomas to address young workers and employers at the Elgin Labour Temple to emphasize the importance of young worker safety. ■

Investigation by Alberta's WCB Leads to Criminal Charges

By Elizabeth Rankin, B.A.Sc.

A Workers' Compensation Board (WCB) investigation in Alberta has resulted in criminal charges being filed against individuals in two separate cases on August 17, 2005. Both cases involve funds believed to have been stolen by two claimants and their case managers. In the first case, the WCB claims to have gathered evidence of payment transactions and claims documents dating back to 1992, resulting in an estimated loss to the WCB of approxi-

mately \$800,000. The second case, dating back to 1996, was discovered with the assistance from the office of the Auditor General. In that case, a former claimant, now deceased, and his case manager and the case manager's brother are accused of abusing the system in the amount of approximately \$1.2 million. Fraud over \$5,000 is an indictable offence and is turned over to the WCB's Special Prosecutor with Alberta Justice. If convicted, these individuals face maximum penalties of up to 10 years in prison. ■

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Ask the OHS Legal Expert

Let Norm Keith and his team of OHS consultants and lawyers provide you with the legal answers you need.

Email your questions to Norm Keith at:

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Select questions and answers will be posted on our website at
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