

THE TURNING POINT

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The Vision of the Turning Point

This newsletter is to inform you of recent changes and trends regarding health and safety. The Turning Point is a monthly newsletter covering topics from various industries and sectors. The Turning Point will respond to your inquiries and inform you of current services and updates regarding Raising the Standard Consulting Inc. (RTSC).

WHO IS A SUPERVISOR UNDER THE OHSA? THE LATEST WORD FROM THE COURTS

*An Article by Ryan J. Conlin from Stringer Brisbin
Humphrey's Electronic Newsletter, July 6, 2009*

Imagine if an incident occurred at your facility on the night shift and the Ministry of Labour inspector arrives to investigate. There are no supervisors present at the time of the incident and the facility is under the control of a lead hand who reports to an operations manager on the day shift.

If an inspector asked this lead hand if he was personally responsible for complying with the Occupational Health and Safety Act (OHSA)'s "supervisor" duties, what do you think the answer would be? What if the inspector asked the same question to the operations manager?

Could the employer advance a due diligence defence if the lead hand told the inspector he was not a "supervisor" because he was not a member of the management team?

The question of which employees qualify as a supervisor

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MINISTRY OF LABOUR UPDATES

Toronto, Ont. - SNC-Lavalin Power Ontario Inc., was fined \$300,000 for a violation under the OHSA after a worker was killed.

The company was building an electrical plant and it had subcontracted another firm to provide carpentry, electrical and plumbing services. An apprentice electrician employed by the subcontractor was working with two journeyman electricians to install temporary lighting when the apprentice removed the inside cover panel of a live 600-volt transformer and contacted the taps within. The apprentice was electrocuted. A Ministry of Labour investigation found that the electrical panel was not tagged or locked out. Inspectors also found that the company and subcontractor both had lockout policies in place and SNC-Lavalin had conducted an orientation for subcontractors. However, records did not show the electrical crew had been given detailed training or a copy of either company's policy. The SNC-Lavalin site-specific policy was also not fully implemented at the time of the incident. SNC-Lavalin Power Ontario Inc. pleaded guilty under the OHSA to failing, as a constructor, to ensure that its subcontractor implemented a tag out and/or lockout procedure to ensure workers were protected from shocks & burns.

Kitchener, Ont. - 1604945 Ontario Inc., a Cambridge-based owner of commercial property for rent, was fined \$60,000 for a violation under the OHSA after workers were put in danger of asbestos inhalation. Company director Krishan Judge was fined \$10,000 in relation to the incident. In June 2007, the company was renovating its building on Duke St. in Kitchener with the help of a contractor. On June 26, 2007, the Ministry of Labour received a complaint that workers at the building were not aware they were handling asbestos. A ministry investigator saw that the mechanical insulation appeared compromised and disturbed and requested an asbestos survey for the building. The company could not produce one because it had failed to conduct the survey. Tests completed on July 5, 2007, confirmed that the mechanical insulation and dust contained asbestos. 1604945 Ontario Inc. pleaded guilty under the OHSA to failing to determine whether any designated substances were present at the project site and failing to prepare a list of all designated substances present before the beginning of a project. Krishan Judge pleaded guilty under the OHSA to failing to take all reasonable care to ensure the company complied with the Act and its regulations.

RAISING THE STANDARD CONSULTING INC.

P.O. Box 41514, 230 Sandalwood Pkwy. ~ Brampton ~ L6Z 4R1 ~ 905-840-1918 ~ Fax: 905-840-3135 ~ rtsc@rtscconsulting.com ~ rtscconsulting.com

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within the meaning of the act has been controversial in OHS circles for many years. Section 1 (1) of the act, defines a supervisor as “a person who has charge of a workplace or authority over a worker.” It is a common misconception that OHS “supervisor” duties apply only to members of management who have front-line authority over a worker.

Are lead hands considered “supervisors”?

Many employers have made the mistake of assuming that the traditional labour relations test for determining whether an individual is a “supervisor” is fully applicable in the context of OHS. In labour relations cases, decision-makers generally focus on whether an individual has the right to hire, fire, promote, demote, or discipline employees when assessing whether an individual is a supervisor for labour relation’s purposes (see Caledon Hydro Electric Commission, [1979] OLRB Rep. Oct. 926 at paragraph 3).

However, the act’s “supervisor” definition has been interpreted far more broadly. For example, in *R v. Walters* [2004] O.J. No. 5032 (S.C.J.) (Q.L.), a lead hand employed by the City of Toronto appealed OHS convictions arising out of injuries to a worker who was a member of a four-man landscaping crew. The defendant was the lead hand responsible for the crew and argued that he could not be treated as a “supervisor” because he did not have the power to discipline. The court held that assigning work and directing the crew was sufficient to make him a “supervisor” in these circumstances. The court further noted the defendant could make recommendations to his superiors to impose discipline workers on his crew.

The defendant in this case did not appear to have any duties that would differentiate him from similarly situated employees in other workplaces. Consequently, the vast majority of lead hands (and other non-managerial employees with some level of authority over workers) will likely be treated as a supervisor for the purposes of the act.

As a matter of due diligence, employers ought to: 1) identify the people in their facilities who fit into this class of employee (often referred to as “lead hands,” “team leads,” or “sub-foreman”), 2) ensure that they have the training required to ensure compliance with the act.

It is critically important that such employees be aware that they will be treated as supervisors for the purposes of the act, and that they be vested with the level of authority to ensure that worker safety is protected.

How far up do “supervisor” duties extend?

Another question that frequently arises is whether members of management who do not have direct front line managerial responsibilities for worker safety will be treated as supervisors. The act imposes specific duties on directors and officers of corporations but nothing in the act distinguishes front-line

supervisors from more senior managers. It has been my experience that the vast majority of “supervisor” prosecutions involve individuals who have front line responsibility for worker safety.

A court recent clarified that “supervisor” duties extend beyond front-line managers. In *Ontario (Ministry of Labour) v. Bartram* [2009] ONCJ29 (O.C.J.) (CanLII) the defendant was the general superintendent of the Track and Structure Department of the TTC, a senior official of a department with over 400 employees. The charges arose out of allegations that the defendant failed to take reasonable precautions to prevent a serious incident of carbon monoxide exposure in a subway tunnel. The defendant argued that the definition and duties of a supervisor under the act anticipated a “hands-on” relationship with workers and that the “supervisor” duties only apply to front-line managers.

According to the court, the evidence showed that the defendant delegated much of his power and authority for worker safety to others beneath him, but it was the defendant who had ultimate responsibility for worker safety. In other words, the defendant may not have given direct orders to workers related to safety, but the individuals responsible for safety were accountable to him.

The court concluded that an absence of front line responsibility does not relieve an individual from compliance with the duties of a “supervisor” under the act. It should be noted that, although the court found that the defendant was a supervisor for the purposes of the act, the court ultimately acquitted the defendant on the basis that he had exercised the legally required due diligence.

It may come as a wake-up call to a number of members of senior management who do not meet the definitions of officer or director that they are legally responsible for workers as a supervisor within the meaning of the act. It has been my experience that many organizations focus a great deal of attention on OHS training for their front-line supervisors but do not take adequate steps to ensure that more senior managers are equipped to ensure compliance with their OHS obligations.

Compliance strategies

It is critically important that employers be able to prove that each individual subject to supervisor obligations is aware of his or her responsibilities and has received required training. I recommend that job descriptions and employment contracts specifically note that the employee is considered a supervisor within the meaning of the act, and that the employee is expected to comply with all legal obligations. Failing to advise an employee that he or she is considered a supervisor under the act could be fatal to a due diligence

defense.

It would also be prudent to conduct a specific due diligence training for senior managers. Courts have recognized that senior managers exercise due diligence differently than front-line supervisors. Senior managers have to establish that they have taken steps to ensure that those with front-line responsibility for worker safety have taken all steps to ensure compliance.

Establishing a documentary record that the manager regularly reviewed discipline records, joint health and safety committee minutes, safety audit reports, Ministry of Labour inspection reports, and Workplace Safety and Insurance Board statistics are vital to establishing due diligence in the context of senior managers.

For more information please contact:
Ryan Conlin at rconlin@sblawyers.com or 416-862-1616 ext. 370

WEB BASED TRAINING

Raise the safety, health, and productivity of your employees to the top of your agenda and provide training solutions that deliver real results. We provide web-based training programs for the convenience of your organization. Please visit our web-site to register.

Hand Tools and Automotive Lifts

Identify the Hazards and Controls Regarding: Hand Tools, Hoists, Fixed, Power, Electrical and Pneumatic Tools, Guarding, Powered Lifting Equipment, Automotive Lifts.

Joint Health and Safety Committee

Participants will be able to: know the legislative requirements for establishing a JHSC, describe the powers, functions and duties of JHSCs and their members, describe the activities of an effective JHSC, etc.

Machine Safety and Lockout / Tagout Procedure

Learn about Workplace Responsibilities, Machine Guarding and the Law, Understanding Machine Related Hazards Lockout / Tagout, Applicable Legislation, Hazard Identification, Lockout Procedures.

Health, Safety and The Law

Provide participants with a working knowledge of the Occupational Health and Safety Act and related legislation and more.

Manager and Supervisor Safety Orientation

Learn about Management Responsibilities, Right to Refuse, JHSC, Hazard Recognition, Workplace Accidents, Emergency Procedures, New Employee Orientation, Transfer and Promotion, etc.

Material Handling

This course is designed to teach workers about proper material handling techniques. Upon completion of this

course, workers should be able to: describe what factors contribute to back injuries, explain proper lifting techniques, etc.

Accident Investigation

The goal of this module is to ensure you will be able to: recognize the need for an investigation, investigate the scene of the accident, interview victims & witnesses, determine root causes, compile data and prepare reports, make recommendations, etc.

Health Hazards: Recognition, Assessment and Control

The goal of this module is to ensure you will be able to: understand the law pertaining to health and safety hazards, define occupational injury and illness, understand the four types of workplace health hazards, etc.

Workplace Inspection

Provide participants with an understanding of their legal rights and responsibilities with regard to workplace inspections and to prepare them for carrying out effective workplace inspections.

Slips, Trips and Falls

Objective of this training is to: understand the causes and effects of falls in the workplace, to understand legislation relating to slip, trip and fall hazards, to be able to identify potential slip, trip and fall hazards, etc.

WHMIS

Explain how WHMIS is implemented in law, explain how the law defines a controlled product, explain how the law defines hazardous ingredients, identify the exclusions, etc. Register to access the complete training material.

Worker Safety Orientation

Worker Responsibilities, Right to Refuse, Joint Health and Safety Committee, Hazard Recognition, First Aid, Workplace Accidents and more.

PUBLIC TRAINING COURSES

The following is an example of a few of the training courses we offer. For a full list, please contact us.

CRSP Preparation Training Course

\$600.00 +GST – 2-day course
July 29-30, 2009

JHSC Certification Part 1 Training (2-day course)

\$349.00 +GST - 2-day Course
Aug. 4-5, Sept. 2-3, October 5-6

JHSC Certification Part 2 Training (length depends on industry)

Service Sector (office, hotels/restaurants, retail, etc.)
\$245.00 +GST – 1 day:

July 21, Aug. 18, Sept. 15, Oct. 20

Healthcare, Warehouse/Distribution, Manufacturing

\$350.00 +GST – 2 days:

July 21-22, Aug. 18-19, Sept. 15-16, Oct. 20-21

Construction (including 1 day fall Protection)

\$475.00 +GST – 3 days:

July 21-23, Aug. 18-20, Sept. 15-17, Oct. 20-22