

# Must Employer Disclose Ergonomics Assessment to JHSC?



## SITUATION

A worker for a government employer suffers disabling work-related injuries. So the employer hires a private consultant to perform an ergonomics assessment of the workplace. The ergonomics assessment report, which recommends strategies to avoid recurrence of such injuries, contains information about the worker, including her injury, absenteeism record, medical history, accommodations for her return to work and physical appearance. The OHS law requires employers to provide the JHSC with *any* report on workplace hazards, including hazard assessments. The employer doesn't forward the report to the JHSC, however, believing the privacy laws prevent its disclosure because the report includes the worker's personal information. A Health and Safety officer says the employer's violating the OHS law and must disclose the report to the committee. The employer appeals the Safety Officer's order.

## QUESTION

**Must the employer give the report to the JHSC'**

- A) No, because disclosure would violate the privacy laws.
- B) No, because a private, outside consultant prepared the report, not the employer.
- C) Yes, because the report discloses the results of a hazard assessment.
- D) Yes, because the JHSC has a right to all safety-related information.

## ANSWER

**C. The employer must disclose this report, which is a hazard assessment, to the JHSC.**

## EXPLANATION

This hypothetical is based on a decision by the OHS Tribunal Canada in which it declared that a report following a worker's injury was a hazard assessment that must be disclosed to the JHSC. The tribunal noted that the employer, which was regulated by federal OHS law, ordered the ergonomics assessment in response to the worker's injury. The tribunal explained that the *Canada Labour Code* required disclosure to the JHSC of *any* report on hazards in the workplace, including hazard assessments. It didn't matter that the employer didn't control the design or contents of the report or that a private third party consultant conducted the assessment. Additionally, although the report contained information about the worker's injury and medical history, it wasn't a medical record exempt from disclosure because that information wasn't collected by a doctor in the course of a doctor-patient relationship. And even if it contained personal information, the *Privacy Act* allowed disclosure of personal information when required by an act of Parliament, such as the *Canada Labour Code*, noted the tribunal. Thus, the employer had to give the report to the JHSC.

## WHY THE WRONG ANSWERS ARE WRONG

**A is wrong** because privacy laws preventing disclosure of a worker's personal information aren't without exceptions. For example, one exception allows disclosure without a worker's consent when another law requires that disclosure. In this case, the OHS law required disclosure of workplace hazard assessments to the JHSC in order to protect all workers from health and safety hazards. Therefore, giving the ergonomics assessment report to the JHSC to comply with this disclosure obligation is an exception to the privacy law restrictions.

**B is wrong** because an employer can't escape the obligation to share workplace hazard assessments by hiring a third party to perform the assessment. Many OHS laws require disclosure of hazard assessment reports to JHSCs so they're informed of all workplace hazards and can do their job to help protect workers from those hazards. Who actually completes such reports is irrelevant. Here, the employer hired the consultant to assess the workplace for hazards in response to a worker's injury. The fact that the employer didn't handle the assessment internally doesn't affect its obligation to share the report with the JHSC.

**D is wrong** because a JHSC doesn't have unlimited rights to safety-related information under OHS law. Other laws can prevent disclosure of certain information. As discussed above, privacy laws can prevent disclosure of medical records prepared by a physician for purposes of treating a worker. Additionally, documents protected by attorney-client privilege could be exempt from disclosure requirements. For example, if an employer sought an attorney's legal advice regarding a specific safety issue, a memo containing the lawyer's advice to the employer may be protected from disclosure to the JHSC by attorney-client privilege. In fact, widely disseminating such a document could waive that privilege. So the document shouldn't be shared with the JHSC or else a prosecutor could argue that the employer waived the privilege. (For more information about attorney-client privilege, see 'Using 'Privilege' to Keep Incident Investigation Reports Confidential.')

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*Alliance of Canada*, [2013] OHSTC 17, May 6, 2013