

The Diaries of an OHS Inspector: The Case of the Warrantless Warrant Appeal



July 9: The Drive-By Inspection

I decided to take a different route driving to work this morning to check out this new donut place that my colleague has been raving about. Verdict: The glazed is good but not worth the detour. At least that's what I'm thinking, when I suddenly spot a big worksite along the side of the road marked with a big blue and white sign. "Wreck Less Construction." On a hunch, I pull over, walk past the orange cones, and take a look.

The first thing I see is a backhoe digging a trench about 18 feet deep and 6 feet wide. I walk over to get a closer look when I see a worker at the bottom of the trench. There's no ladder, no trench box. After a few minutes, the guy climbs up one of the walls to exit and causes a pile of loose dirt to fall back into the trench.

Just then, a tall, husky gentleman wearing dark glasses and a scowl walks up to me.

"Can I help you?"

"I'm Inspector Nick O'Shay from the OHS Division regional office. And you are?"

“Lou Skannon,” he says as he looks over the credentials I hand him, “superintendent for the project. To what do we owe this pleasure, Inspector O’Shay?”

Sarcasm isn’t the way to get on my good side. So, my reply is terse: “Mr. Skannon. This is an unplanned, impromptu inspection. I happened to notice your site as I was driving by. And in the 10 minutes I’ve been here, I’ve observed several – what appear to be significant – trenching violations.”

Anyway, we hold the opening conference OHS inspectors have with the employer before actually inspecting the facility, do the grand tour, and I end up citing the contractor for 3 high-risk violations, including allowing a worker to work in an unsupported trench. The fine? \$65,000.

July 24: The Appeal

A couple of weeks later, Donna Tellow, my AAD (Associate Area Director) calls me into her office.

“Nick, remember that surprise inspection you did over at the Wreck Less site the other day?”

“Sure. The excavation nightmare. What about it?”

“They’re appealing.”

I’m totally flabbergasted. “How? Why? I observed those violations with my own eyes. They didn’t even try to deny them.”

“Yeah, but they’re claiming that you had no right to do the inspection without a search warrant.”

I’m shaking my head in disbelief. Were they right? Did I really need a search warrant to do the inspection?

The lawyers soon put my mind at ease. “Don’t worry, Nick. You

didn't do anything wrong. They don't have a case."

Thankfully, the lawyers were right. But it takes over a year for that "non-case" to run its course. First, the adjudicator rules against them. So, they appeal. The Labour Board upholds the adjudicator's ruling, and the company finally calls off the dogs and pays the fine.

Explanation

The basic rule is that OHS officials don't need a search warrant to conduct an OHS inspection but do need one to conduct an investigation. Of course, it's not always easy to tell the difference between an investigation and inspection. But it turns out to be a moot point since I wouldn't have needed a warrant even if I had been doing an investigation.

The first reason has to do with the location of the site. The whole point of making government officials get a search warrant is to protect the privacy of the person being inspected. But the Wreck Less site was on public property and open to public view. So, the Board said the site owner had no "expectation of privacy" and couldn't insist on my getting a search warrant.

But even if the contractor did have an expectation of privacy, the fact is that nobody objected to my doing the tour without a search warrant. In effect, by not asking me not to do what they claimed was an investigation without a search warrant, the contractor voluntarily gave up or "waived" any protections they might have had against a warrantless investigation.

The Moral

Okay, I know I just hit you with some legal mumbo jumbo, but the moral is this: If you think an OHS inspector needs to get a warrant, you better speak up right away before the walk-through begins. Also, remember this: asking for a warrant

won't make us go away. If we think there's a dangerous safety situation going on, we'll just get the warrant and come back.

I'm not saying you shouldn't ask for a warrant, especially if your lawyer advises you to. Just understand that once we return with the warrant we're probably going to inspect even more closely just to make sure you didn't use the extra time you bought to cover up hazards at your site.

Be careful out there and remember, I'll be watching you.

By Nick O'Shay, (Fictional) OHS Inspector

Editor's Note: *Inspector Nick O'Shay doesn't really exist. So, his "true stories" are fictional. But they're based on actual cases.*