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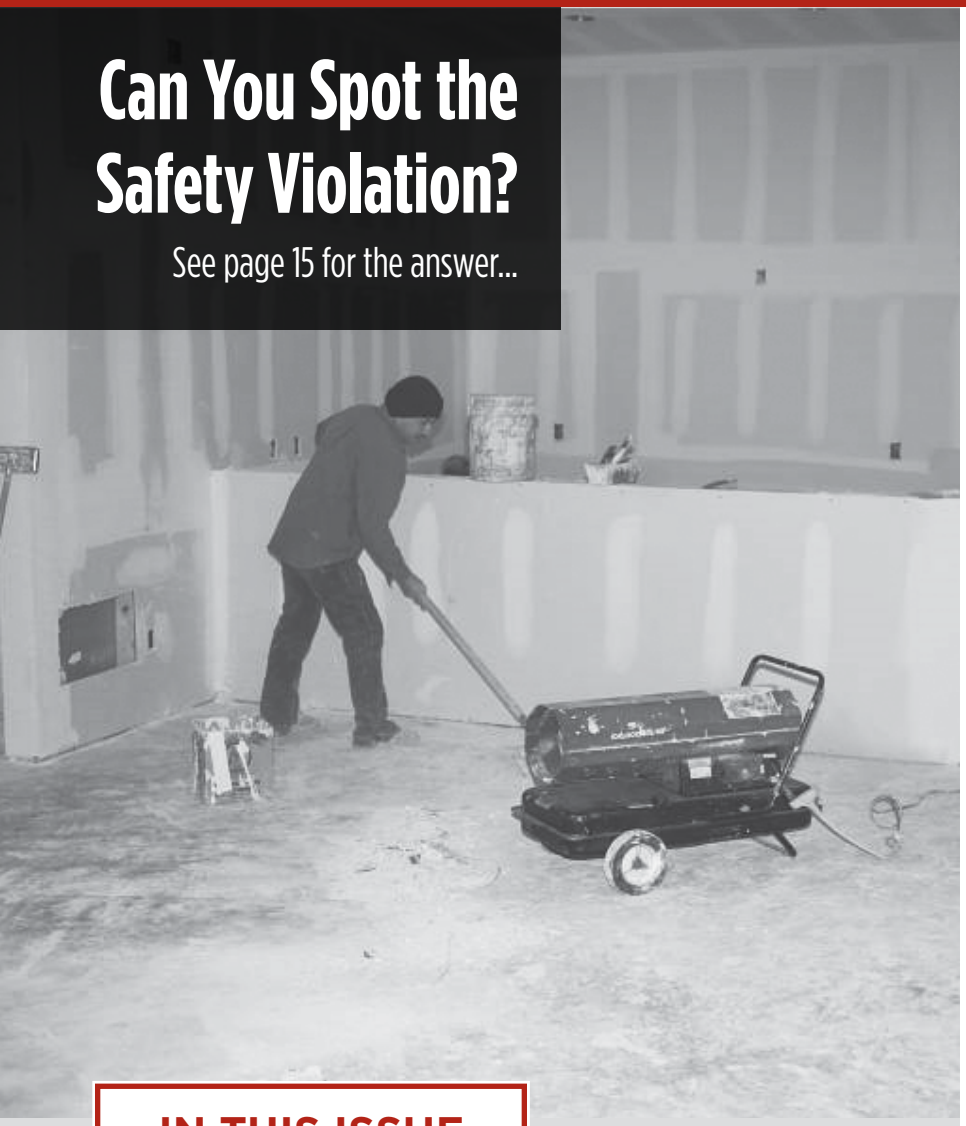
Can You Spot the Safety Violation?

See page 15 for the answer...



IN THIS ISSUE

THE *INSIDER*'S 11th DUE DILIGENCE SCORECARD:

Our Annual Look at Recent Due Diligence Cases

At this time each year, we focus on due diligence. Why do we give so much attention to this concept? Because understanding the due diligence defense is critical to understanding compliance with the OHS laws. If you have a solid understanding of the factors courts consider when deciding whether a company or individual exercised due diligence and how they analyze those factors, you're more likely to implement an OHS program that ensures you take all reasonable steps to protect workers' health and safety and comply with the OHS acts and regulations.

For the 11th year, the *Insider*'s annual Due Diligence Scorecard includes reported safety cases involving the due diligence defence from across Canada. This year's version includes cases decided since Sept. 2014. We'll start by reviewing the key facts about due diligence and then look at the facts and decisions in the cases. The Scorecard itself begins on page 2.

DUE DILIGENCE BASICS

Here are the basic facts about the due diligence defence:

- There are two kinds of due diligence: reasonable steps—the type most commonly argued—and reasonable mistake of fact;
- Due diligence is a defence that must be proven by a company or individual charged with an OHS violation on a balance of probabilities once the prosecution has proven that violation beyond a reasonable doubt;
- Anyone charged with a violation of the OHS laws, including organizations, government agencies or companies and individuals such as corporate officers, owners, supervisors and workers, can raise a due diligence defence;
- The due diligence defence applies to violations of not only the OHS laws but also environmental and other so-called "regulatory" laws, such as traffic safety laws. It may also apply when a company has been issued an administrative penalty or safety compliance direction;

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- Courts consider various factors when evaluating a due diligence defence, most notably foreseeability, preventability, control and degree of harm; and
- Although due diligence isn't technically a defence to criminal negligence or so-called "C-45" or Westray charges, proving that you exercised due diligence makes it essentially impossible to be convicted of criminal negligence.

***Insider* Says:**
Go to the OHS Insider's Due Diligence Compliance Centre for more information on this concept, including:

- Answers to 6 FAQs about due diligence;
- Understanding the reasonable mistake of fact form of the defence;
- 10 due diligence traps to avoid; and
- Industry standards and due diligence.

THE SCORECARD

This year, we found 14 safety prosecutions decided since Sept. 2014 involving a company's or individual's due diligence defence. (Last year's Scorecard had 21 cases.) Note that the Scorecard doesn't reflect all of the safety prosecutions in a given period of time. Most prosecutions of OHS violations are resolved when the company or individual pleads guilty. So the due diligence defence is never raised and analyzed in those cases. And many court decisions in safety prosecutions that do go to trial aren't reported or published.

In this year's Scorecard, the defendant:

- Won in 3 cases from Fed and ON; and
- Lost in 11 cases from AB, BC, NL, NS and ON.

For each of the cases in this year's Scorecard, we tell you what happened, whether the company/individual won or lost and how the court or tribunal analyzed the due diligence defence. In Part 2, we'll explain the lessons you can learn from these cases and use to evaluate and improve your OHS program.

Here's a synopsis of 14 cases decided since Sept. 2014 in which a court or tribunal had to evaluate a company's/individual's due diligence defence.

COMPANY WINS

ON: *Magna Seating*

What Happened: Within four months, two car seats fell forward while on an assembly line in a plant, striking workers. One suffered a cut lip and didn't miss any work; the other got a soft tissue injury to the chest and only missed one day of work. Both incidents occurred at the same workstation. As a result, the plant was charged with falling to ensure that materials don't fall and a guarding violation.

Ruling: The Ontario Court of Justice dismissed the charges, ruling that the Crown hadn't proven them beyond a reasonable doubt and that the plant had exercised due diligence.

Analysis: The court noted that nearly two million seats had been built at the plant, with only two falling. And the injuries caused by these falls were minor. So although the JHSC and the plant's management were aware of this safety hazard and did assess it, they reasonably didn't consider the hazard to be a high priority given the very low possibility of recurrence and low potential for grave injury to a worker. Thus, it was reasonable for the JHSC not to act more promptly in addressing the hazard at this work station after the first incident occurred. In addition, the cause of the falls wasn't reasonably foreseeable. So the court concluded that the plant had taken all reasonable care under the circumstances.

Ontario (Ministry of Labour) v. Magna Seating Inc., [2015] ONCJ 7 (CanLII), Jan. 9, 2015

FED: *Macdonald Cartier*

What Happened: An airline employee was standing on the apron at an airport gate completing paperwork when he was struck in the back by an empty baggage cart as it and other attached empty carts were being towed away from the

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airplane. He suffered contusions on his upper and lower left leg, and bruises to his left thigh and lower back. At the time, the area around the plane was covered in packed snow on top of ice and was slippery, which contributed to the incident. A federal Health and Safety Officer concluded that the airport was in violation of OHS law for allowing an accumulation of ice and snow and issued it a compliance direction. The airport appealed, arguing that it had exercised due diligence in its snow removal operations.

Ruling: The federal OHS Tribunal rescinded the compliance direction.

Analysis: Snow and ice removal was a cooperative procedure requiring coordination between the airlines and the airport, noted the Tribunal. The evidence showed that the airport had a Winter Maintenance Plan that complied with industry standards, and snow and ice removal procedures in place. In addition to regular snow and ice removal, airlines were expected to make specific service requests when there was an immediate need for removal. But the airline didn't make such a request for this gate and so failed to bring the snow/ice issue in the area to the airport's attention. In addition, the airline's flight operations and the associated movement around this gate continued despite the prevailing weather. The Tribunal concluded that the weather conditions and the continuation of flights on the apron at the gate inhibited access to the area for the airport's snow clearance crews without instructions and directions from the airline. So the Tribunal rescinded the direction because the airport wasn't aware of the safety hazard posed by the snow or ice at this particular gate and had exercised due diligence as to snow and ice removal.

Macdonald Cartier International Airport Authority, [2015] OHSTC 5 (CanLII), March 5, 2015

ON: *ABS Machining*

What Happened: A relatively inexperienced worker for a manufacturer was assigned by his supervisor to make modifications to a very large spindle weighing about 10,000 pounds. The spindle was laying horizontal on two stands. But it had to be flipped so the worker could make the necessary changes. In violation of his safety training, he used an overhead crane to rotate the spindle. As he was doing so, it fell off its stands and onto his foot, which had to be amputated. The manufacturer was charged with two OHS violations.

Ruling: The Ontario Court of Justice acquitted the manufacturer, ruling that it had exercised due diligence.

Analysis: The court explained that the issue was whether a reasonable employer would've foreseen that the worker would try to rotate the spindle on his own and in the manner he used. It concluded that this worker's actions weren't foreseeable. He tried to rotate the very large spindle by himself and using an overhead crane in violation of his training and using a tool (rebar) that wasn't intended for that purpose. And he did so without knowing the spindle's weight or the load capacity of the devices he was using. The manufacturer had taken all reasonable precautions to prevent an incident such as this one, including providing the worker with a safety orientation and overhead crane training and implementing a protocol for the movement of large new pieces by junior workers, concluded the court.

R. v. ABS Machining Inc., [2015] ONCJ 213 (CanLII), April 10, 2015

COMPANY/INDIVIDUAL LOSES

BC: *WCAT-2014-02837*

What Happened: An officer was on his way to inspect a worksite when he saw a truck bearing the employer's logo being driven by the employer's superintendent, who was using a hand-held device at the time and speeding. When the officer arrived at the site, he saw four workers in an excavation deeper than four feet and a spoil pile immediately to the south of the excavation. In addition, the excavation didn't have benching. As a result, the employer was issued administrative penalties for three OHS violations, including failing to provide instruction, training and supervision. It appealed.

Ruling: The BC Workers' Compensation Appeals Tribunal upheld the penalty, ruling that the employer hadn't exercised due diligence.

Analysis: At the worksite, the officer had asked the workers and the foreman questions about the requirements for excavations, including how far back the spoil pile should be and when a trench required benching or other protection. None of them knew the correct answers. The superintendent also argued that the excavation didn't need shoring or sloping. So despite the employer's claims that it held regular safety meetings and had an effective OHS program, the Tribunal found that its employees' lack of knowledge was "indicative of a lack of adequate training," especially given that the employer's main business was excavations. And adequate training, instruction and information are all components of due diligence.

WCAT-2014-02837 (Re), [2014] CanLII 91436 (BC WCAT), Sept. 25, 2014

BC: *WCAT-2014-03205*

What Happened: The Board got an anonymous tip about smouldering fire in the dust removal system at a furniture manufacturer's factory. A Board officer went to the factory to investigate and found various safety violations, including the use of a forklift to elevate workers on a non-compliant platform, and failures to educate workers and to provide an adequate number of first aid attendants. The manufacturer was issued an administrative penalty and appealed.

Ruling: The BC Workers' Compensation Appeals Tribunal upheld the penalty, ruling that the manufacturer hadn't exercised due diligence.

Analysis: Smoking embers were common in the factory due to excessive sanding of hardwoods. So in such circumstances, a reasonably prudent employer would prepare workers and train them on how to deal with smoking materials in the dust extractor ducting, explained the Tribunal. But there was no evidence the manufacturer provided such training. In addition, when the officers advised the manufacturer that it required a level 2 first aid attendant onsite, it should've secured a qualified worker immediately. Instead, the factory was without the appropriate level of first aid for several weeks. Fortunately, this understaffing didn't result in serious consequences, said the Tribunal, but it did demonstrate that the manufacturer's compliance efforts fell "well short of the due diligence standard."

WCAT-2014-03205 (Re), [2014] CanLII 91988 (BC WCAT), Oct. 30, 2014

NL: *Department of Transportation*

What Happened: Several employees of an oil company, city and government agency made a site visit to a section of road to inspect the asphalt for degradation. An on-coming driver didn't notice the slowing traffic in the area. He braked abruptly, lost control of his car and struck the employees, who were on the median of the road. One employee was killed and two others were injured. As a result, the employers were charged with multiple OHS violations. (The oil company's case was resolved separately.)

Ruling: The Provincial Court of Newfoundland and Labrador convicted the city and government agency, ruling that they hadn't exercised due diligence.

Analysis: The court said the safety hazard faced by these employees while doing the site inspections was foreseeable—the traffic on the roads being inspected. So the employers had a duty to take reasonable steps to protect the employees from passing vehicles. But they failed to do so. For example, safety wasn't discussed in the pre-inspection meeting. The employees were neither offered nor did they request any PPE, such as high-visibility vests. They also weren't trained on conducting roadside inspections. And there wasn't sufficient evidence to determine whether the setup redirecting traffic at the site was reasonable for the hazards presented. The experienced employees, who were all senior employees or supervisors in their organizations, showed "a similar lack of appreciation of the hazard and the need to specifically address worker safety" at this site, added the court. So the court concluded that the employers didn't take all reasonable care under the circumstances.

R. v. Department of Transportation and Works (NL) and City of St. John's, [2014] CanLII 73922 (NL PC), Dec. 9, 2014

BC: *WCAT-2015-00446*

What Happened: During an inspection of work being done on a two-storey house, officers saw two workers working on the roof about 12-14 feet above the ground. There was a concrete driveway directly below where they were working. To facilitate roof access, a ladder had been placed flat on the roof so it could be used like stairs. The ladder's feet were in the gutter to keep it from sliding off the roof. In addition, neither worker was wearing a harness or belt for restraint and there were no other forms of fall protection in place. The employer was issued an administrative penalty for two violations and appealed.

Ruling: The BC Workers' Compensation Appeals Tribunal upheld the penalty, ruling that the employer hadn't exercised due diligence.

Analysis: The employer, which was engaged in the roofing business, should be aware of the hazards and OHS requirements related to this work, said the Tribunal. The employer claimed that it had an extensive training program. But the fact that one of the workers claimed that he'd been told he didn't need to use fall protection for jobs taking less than 15 minutes "reveals an obvious flaw in the employer's training program." In addition, there was no written fall protection plan in place at this job site and there was only sufficient fall protection equipment for one worker—not two. Lastly, the worker said his supervisor almost never checked on him. Thus, the Tribunal concluded that the employer's failure to properly instruct, train and supervise its workers was persuasive evidence of its failure to exercise due diligence.

WCAT-2015-00446 (Re), [2015] CanLII 42715 (BC WCAT), Feb. 6, 2015

BC: *WCAT-2015-00944*

What Happened: An engineering firm provided drawings for a concrete wall form to be used at a large, multi-storey residential construction project. The form, which was about 12 feet high and 20 feet wide, was to be used in the construction of stairwell walls. A concrete company's workers erected the forms and braced them in position on the bottom parking level. Engineers from the firm inspected the forms to ensure they complied with the drawings and issued a compliance certificate. The workers continued to use the forms to build walls on higher floors. But for each level above the bottom parking level, they had to install temporary load blocks to provide a footing for the wall form. On the 30th floor, a worker climbed up the side of the form to guide rebar into place. When the form started to topple over, he jumped clear. But the form fell on and killed another worker. An investigation of the incident determined that the engineering drawings for the wall form were defective in several areas, notably that they didn't provide directions on how to erect the form above the bottom parking level. In

addition, the workers used an improper bracing method that differed from the one in the specifications. The engineering firm was issued an administrative penalty for failing in its safety obligations as to the drawings. It appealed.

Ruling: The BC Workers' Compensation Appeals Tribunal upheld the penalty, ruling that the engineering firm hadn't exercised due diligence.

Analysis: The engineering firm knew the wall forms were going to be used beyond the bottom parking level, where they were supported by the building deck. So it knew or should've known that above that level, some method of supporting the forms would be required. But the firm failed to provide design specifications and directions for erecting the forms beyond the initial level. Thus, the Tribunal concluded that the firm failed to exercise due diligence as to its duty to provide information necessary for the accurate and safe assembly of the formwork. In addition, the firm should've noticed in the pre-pour inspection that the forms had been erected using a different and unsafe bracing method than the one specified in its drawings. Its failure to review and address these "field changes" also reflects its failure to discharge its OHS responsibilities, added the Tribunal.

WCAT-2015-00944 (Re), [2015] CanLII 42040 (BC WCAT), March 23, 2015

ON: *Maple Lodge Farms*

What Happened: A supervisor at a farm sent an electrician and a millwright to fix a large shipping door that wouldn't close. The door was located at a loading dock, an area in which the workers had limited experience. The electrician went under the door and saw a cable hanging down from the top. The door then fell on him, pinning him to the ground. He broke his leg, injured his shoulder and couldn't work for almost a year. As a result, the farm was convicted of two OHS violations and appealed, arguing that it had exercised due diligence.

Ruling: The Ontario Court of Justice upheld the conviction, ruling that the farm hadn't exercised due diligence.

Analysis: The court noted that the electrician and a millwright were sent to an unfamiliar location in the workplace without any supervision. In addition, although the workers may have been trained on the use of blocking in general—training which they vaguely remembered—they weren't trained on "the particular danger at hand," that is, blocking the loading dock door, said the court. Thus, the trial court's decision that the farm didn't exercise due diligence as to providing adequate training, information and supervision was reasonable.

Ontario (Ministry of Labour) v. Maple Lodge Farms, [2015] ONCJ 172 (CanLII), April 7, 2015

ON: *Semple Gooder*

What Happened: At a roofing project on a two-storey building, the roofing company installed a compliant guardrail system on the roof. It also installed a chute with a receptacle at the bottom into which workers would dump garbage. But the receptacle soon filled up. So to keep the project moving, workers built a ramp on a different part of the roof and opened up the guardrail. They'd then manoeuver a motorized buggy full of garbage up the ramp to the opening and dump it into a trailer below. While doing so, a worker's sleeve got caught on the buggy and he fell about 22 feet off the roof and into the trailer. He wasn't wearing fall protection at the time. The worker was hospitalized for two weeks with various injuries. The roofing company was charged with two safety offences.

Ruling: The Ontario Court of Justice convicted the roofing company, ruling that it hadn't exercised due diligence.

Analysis: The court noted that the company had initially complied with the OHS regulations by installing guardrails on the roof and temporary anchor systems, and providing fall protection equipment. And its initial garbage disposal process was also compliant. But there were no set procedures for the second garbage disposal process workers began using. For example, there was no process that covered when workers needed to be tied off and the safe use of buggies on the roof. In addition, workers weren't given any additional instruction or training on the second garbage disposal method. So the court found that the roofing company didn't take all reasonable steps to prevent this incident.

Ontario (Ministry of Labour) v. Semple Gooder Roofing Corp., [2015] ONCJ 183 (CanLII), April 8, 2015

NS: *R.D. Longard*

What Happened: An electrical services company was hired to install electrical service for a retail tenant at a strip mall. The company assigned an experienced electrician, another electrician and an intern to finish tying down an electrical feeder cable in an electrical cabinet. To do this job, the experienced electrician had to lay on the floor under the cabinet while reaching into it from below. He wasn't wearing any protective equipment or clothing. His hand came into contact with energized bus bars in the cabinet, electrocuting him. The company was charged with two OHS violations.

Ruling: The Provincial Court of Nova Scotia convicted the company of both charges, finding that it hadn't exercised due diligence.

Analysis: The court noted that the deceased electrician was very experienced, highly regarded and fully qualified. And there was nothing about the design of the electrical cabinet that made it necessary to work on it live. So it's unclear why the electrician decided to work on it while it was still energized and without wearing any protective equipment. The roofing company argued that it had exercised due diligence and

wasn't responsible for the experienced electrician's lapse in judgment. But the court explained that workplace safety is a shared responsibility between the employer and employees. And the electrician's "tragic miscalculation" doesn't absolve the company of its safety duties. The company didn't have a formal OHS program, safety manual or written safe work practices. It also didn't provide safety training to junior workers. And it took a completely hands-off approach to the electrician's work, providing no supervision at all. Instead, it relied exclusively on the electrician's experience and commitment to safety. Thus, the company didn't take all reasonable precautions for the electrician's safety or to ensure compliance with the OHS laws.

R. v. R.D. Longard Services Ltd., [2015] NSPC 20 (CanLII), April 17, 2015

AB: *Precision Drilling*

What Happened: A group of workers at a well site were engaged in a process in which a drilling pipe is removed from the well and disconnected piece by piece. As a driller was trying to lift the drill stem, the trapped torque was released, causing the equipment to spin and hit a worker in the head. He suffered fatal injuries. As a result, his employer was charged with two OHS violations.

Ruling: The Provincial Court of Alberta convicted the employer, ruling that it hadn't taken all reasonable steps.

Analysis: To prove the due diligence defence, the employer had to prove it took all reasonable steps to avoid this type of incident, explained the court. In determining what constitutes reasonable steps, the Crown argued that the appropriate standard of care required an engineered solution to the problem of table torque induced by the driller. The employer argued that industry practice at the time didn't mandate nor was it reasonable to require an engineered solution given its administrative procedures. But the court explained that the goal of engineered solutions is to avoid the sort of human error that occurred in this incident. And the evidence was clear that an engineered solution to this issue was used by other industry competitors. In fact, the employer itself engineered the same or a similar solution when specifically ordered to do so. Moreover, the solution was cheap, quick and easy—and it was effective. Thus, implementing the engineered solution was a reasonable step the employer should've—but didn't—take.

R. v. Precision Drilling Canada Ltd., [2015] ABPC 115 (CanLII), June 1, 2015

BC: *West Fraser Mills*

What Happened: A tree faller was struck by a section of a rotting dead fir tree and died. At the time, he was logging at a location within the area of a forest license owned by West Fraser Mills. But he wasn't a Mills employee—he was working for a contractor hired by Mills to "trap-tree" fall, a method used to reduce beetle population levels within the licence area. The BC Workers' Compensation Appeals Tribunal imposed an administrative penalty on Mills for safety violations. It appealed, arguing that it couldn't be penalized because it wasn't the faller's employer.

Ruling: The Supreme Court of BC upheld the penalty, ruling that Mills hadn't taken reasonable steps.

Analysis: The court explained that the health and safety of workers isn't exclusively a duty of employers. So a determination that a company may be subject to an administrative penalty for failing—as an owner—to take sufficient precautions for the prevention of work-related injuries at its workplace isn't patently unreasonable. Here, the forestry operation was a workplace under the OHS law. And owners of workplaces have a duty to provide and maintain their workplaces in a manner that ensures the health and safety of persons at or near the workplaces. The Tribunal had reasonably concluded that Mills had breached its obligations as an owner by failing to take sufficient precautions to prevent the faller's death. So an administrative penalty was appropriately imposed, ruled the court.

West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal), [2015] BCSC 1098 (CanLII), June 25, 2015

NS: *McCarthy's Roofing*

What Happened: An OHS inspector saw a worker on a two-storey roof that was more than 7.5 metres above the ground. The roof had a pitch of approximately 9/12, which is important because higher pitched roofs require a greater degree of fall protection. However, the worker wasn't using any fall protection and no supervisor was present. As a result, the roofing company was issued an administrative penalty, which it appealed.

Ruling: The Nova Scotia Labour Board upheld the penalty, ruling that the roofing company hadn't exercised due diligence.

Analysis: The company argued that it had exercised due diligence by training the worker on fall protection and providing adequate fall protection equipment. So it shouldn't be punished for the worker's failure to follow procedure. But the Board explained that the fact the worker may be "most obviously culpable" doesn't relieve the company of its responsibility to ensure compliance with the OHS laws. Penalizing an employer in a situation such as this one delivers the message to all employers that they're "legally at risk when their employees behave foolishly," which will only encourage greater diligence and accountability, explained the court.

McCarthy's Roofing Limited (Re), [2015] NSLB 150 (CanLII), Sept. 2, 2015 ❖

TEST YOUR OHS I.Q.:
Can Employer Change Investigation Standard During Union Boycott of JHSC?

SITUATION

An employer and union agree in the collective agreement that any changes to investigative standards must be agreed to jointly through the JHSC. The JHSC identifies problems relating to the timeliness of workplace inspections and investigations, which are creating a backlog of investigations relating to safety incidents. For unrelated reasons, worker members of the JHSC, who are also union members, begin boycotting committee meetings. During this boycott, the employer JHSC members implement a new standard for investigating minor incidents in an effort to speed investigations and reduce the significant backlog of cases already identified. The union JHSC members then end their boycott and refuse to use the new investigation standard, demanding that the old one be reinstated. The union argues that the employer violated the collective agreement by unilaterally implementing the new standard. The employer argues that the union's boycott of the JHSC violated the collective agreement and forced it to act unilaterally. It further notes that the investigative standard did successfully reduce the backlog and improve the speed of dealing with safety issues.

QUESTION

Must the employer reinstate the old investigative standard?

A. No, because the union breached the collective agreement when its members boycotted JHSC meetings.

B. No, because the JHSC can impose any standard it deems appropriate to protect worker safety.

C. Yes, because the employer is bound by the terms of the collective agreement requiring joint action.

D. Yes, because if there isn't consensus among employer and worker members of a JHSC, the jurisdiction's workers' comp board must intervene.

ANSWER

A. The union boycott breached its obligations under the collective agreement, requiring the employer to act unilaterally to address workplace safety and implement the new investigation standard.

EXPLANATION

This hypothetical is based on a BC arbitration in which the arbitrator upheld a new investigative standard unilaterally imposed by the employer while union members were engaged in a boycott of JHSC meetings. The arbitrator explained that under both the applicable OHS law and the collective agreement, the employer was ultimately responsible for ensuring worker health and safety, and retained its management rights to ensure that it complied with the OHS law. Workers also have OHS duties and the JHSC requirements make health and safety a "shared responsibility." So the union's boycott of committee meetings violated both the OHS law and the collective agreement. And because of this violation, the employer was not only permitted to take steps to address the investigative backlog but also legally required to do so, concluded the arbitrator. In addition, the new investigative standard, which was effective and consistent with the OHS law and agreement, had to be implemented quickly to address a backlog of investigations and to avoid danger to workers, added the arbitrator. Rescinding the new standard and reinstating the old one would be inconsistent with the law and collective agreement.

WHY WRONG ANSWERS ARE WRONG

B is wrong because the JHSC doesn't have unlimited freedom to impose any standards or measures it chooses under the guise of safety. In fact, JHSCs don't actually have the power to impose safety standards. Generally, under the OHS law, employers have the duty and authority to implement safety measures. A JHSC has several functions, including to make reasonable safety recommendations to an employer, which must consider but isn't required to implement those recommendations unless the recommended action is required by law. So although in this case in particular, the collective agreement required the union and employer to jointly agree to safety policies and programs through the JHSC, it's the employer that ultimately imposes the agreed upon safety standards.

***Insider* Says:** For more information about JHSCs, visit the Joint Health & Safety Committee Compliance Centre.

C is wrong because although the collective agreement did require both parties to jointly agree to safety standards, the union violated the agreement by boycotting committee meetings. That breach relieved the employer from the agreement's requirement that both parties agree to changes in safety standards, such as the investigative standard. More importantly, however, no agreement can trump the obligations imposed under OHS law, which require the employer to ensure workers' health and safety. The backlog of investigations and delays needed to be addressed and the new investigative standard addressed the problem successfully. If the employer didn't act on its own, it could be in violation of the OHS law and thus, its actions were justified.

D is wrong because it simply isn't true that the workers' comp board must step in when worker and employer members of a JHSC can't reach agreement. If a JHSC is unable to resolve a disagreement, it may ask the worker's comp board for assistance in reaching an agreement. But the board isn't required to intervene. Further, in this case, it wasn't that the union and employer members couldn't reach an agreement—the union refused to participate in JHSC meetings at all.

SHOW YOUR LAWYER

Rio Tinto Alcan Inc. v. Unifor, Local 2301 (Grievance 300-1625 OHS Program), [2014] B.C.C.A.A.A. No. 111, Oct. 9, 2014 ❖

CASE OF THE MONTH

Ontario Arbitrator Rules Against Hospital's Vaccinate or Mask Flu Policy

Employers have a duty under the OHS laws to take reasonable steps to ensure the health and safety of their workers. In fulfilling this duty, employers must be careful, however, not to infringe on workers' rights. This issue often arises in the context of religion, such as when a company tries to compel a worker to shave his beard in violation of his religious beliefs so he may wear a respirator with the proper fit. But the conflict between workplace safety and workers' rights can arise in other contexts, too. For example, a recent case in Ontario considered whether a hospital could force nurses to either get a flu shot or wear a mask during flu season. Here's a look at the decision in that case.

THE CASE

What Happened: A hospital imposed a "Vaccinate or Mask" (VOM) policy that required healthcare workers to wear surgical masks during the five to six months of flu season if they hadn't gotten a flu shot. The hospital claimed the goal of the policy was to prevent hospital-acquired influenza by increasing immunization rates among employees. The nurses' union challenged the policy as an unreasonable exercise of management's rights and a violation of workers' rights.

What the Arbitrator Decided: An Ontario arbitrator ruled that the VOM policy was unreasonable.

The Arbitrator's Reasoning: The arbitrator acknowledged that the hospital's goal of preventing hospital-acquired influenza by increasing immunization rates was laudable. But the weight of the scientific evidence to support the VOM policy on patient safety grounds was insufficient to warrant the imposition of a mask-wearing requirement for up to six months of the year. For example, the arbitrator found scant scientific evidence of the use of masks in reducing the transmission of influenza virus to patients. And without sufficient scientific support, the arbitrator concluded that the policy operated to coerce nurses into getting the flu vaccine, undermining their right under the collective agreement to refuse vaccination. Wearing masks was treated as a "consequence" of failing to get vaccinated. And doing so for six months, all shift, virtually everywhere is "most unpleasant," observed the arbitrator. In addition, there was no evidence as to why current hospital policies were inadequate and couldn't be amended, if needed, to improve patient safety. Lastly, the arbitrator wasn't convinced the policy would actually encourage "truly voluntary" vaccinations [*Sault Area Hospital v. Ontario Nurses' Association*, [2015] CanLII 55643 (ON LA), Sept. 8, 2015].

ANALYSIS

The *Sault Area Hospital* decision is 136 pages, a lot of which focuses on a discussion and analysis of the various medical opinions and scientific evidence regarding the effectiveness of flu vaccines, masking, how the flu is transmitted, etc. (Note that other arbitrators have reached different decisions on similar flu policies. For example, a BC arbitrator ruled that such a policy was reasonable because it gave workers a choice between getting immunized, wearing a mask or taking anti-viral medications during a flu outbreak.) Yes, the primary purpose of the VOM policy was *patient* safety, that is, preventing patients from catching the flu from hospital workers. But it impacted *worker* safety as well because the idea was to prevent workers from getting the flu in the first place and then spreading it. Thus, the decision is relevant in an OHS context. *Bottom line:* Safety—whether of workers, patients or others—may be a valid justification for many company policies. But employers can't impose unnecessary, intrusive or otherwise inappropriate policies and justify them by simply invoking the word "safety." Achieving safety goals must be balanced against intruding on individual rights.

What *can* employers do to prevent workers from getting and spreading influenza this flu season? Go to the Flu & Pandemic Planning Compliance Centre for information, resources and tools, such as a workplace flu clinic checklist and a model pandemic flu policy. ❖

Month in Review

FEDERAL

LAWS & ANNOUNCEMENTS

Aug. 27: CNSC Updated Document on Administrative Monetary Penalties

The Canadian Nuclear Safety Commission updated Sec. 3.3 of the REGDOC-3.5.2, *Compliance and Enforcement: Administrative Monetary Penalties*, which covers the "right to request a review." The Commission Secretariat now has a form available to assist persons wishing to request a review of an issued notice of violation. The document describes how and where AMPs fit into the CNSC's approach to compliance, and provides an overview of how they're administered.

Sept. 3: New Edition of CSA Standard for Machinery Noise

The CSA released the second edition of Z107.58 – Noise Emissions Declarations for Machinery to help manufacturers provide standardized information on noise levels from machines and equipment. The first step in protecting workers' hearing is to determine the level of noise emitted from equipment. High levels mean efforts must be made to control noise emissions and select quieter equipment.

CASES

Worker's Refusal Was Justified as Using Hands, Not Wands, Was a Danger

A worker for a rail company refused to work because he was required to use his hands to install metal tie plates under track suspended by a power jack rather than using the safety wands installed on the power jack for this purpose. He was afraid his hands or fingers would be crushed. A health and safety officer investigated the work refusal and sided with the worker. The rail company appealed. The OHS Tribunal ruled that operating the power jack without using the provided wands was a "danger" under the OHS law. There had been several near misses in which workers almost injured their fingers adjusting the plates with their hands and one instance in which a worker's fingers were actually crushed. So the rail company's procedure wasn't "equally as safe" as using the safety wands, said the Tribunal [*Sersa Total Track Ltd.*, [2015] OHSTC 12, June 30, 2015].

OK to Fire Truck Driver for Four Infractions in a Year

An employer fired a truck driver for cause after five separate infractions over about one year, including failing a safety inspection and speeding. An arbitrator upheld his dismissal. The employer's industry was highly regulated and safety-sensitive. The driver's efforts to downplay his infractions wasn't convincing. Four of the five incidents warranted some form of discipline. He'd been warned that his performance was unsatisfactory and that he could be fired for further infractions. And the employer didn't condone his violations. Thus, the employer had just cause to fire the driver, concluded the arbitrator [*Reale v. Light Speed Logictics Inc.*, [2015] C.L.A.D. No. 189, Aug. 11, 2015].

ALBERTA

LAWS & ANNOUNCEMENTS

Aug. 29: Explosion and Fire at Oilsands Site

There was an explosion at a Syncrude oilsands processing site near Fort McMurray. No workers were injured, no product was released and no offsite odours were detected. The resulting fire was put out by Syncrude firefighters. So far there's no word on the incident's cause.

Sept. 10: Testing Shows Poor Air Quality in the Province

Results from a national testing program indicate that Alberta is on track to have the worst air quality in Canada. The results show that the Red Deer region has exceeded levels for fine particulate matter, which form in the presence of sulphur and nitrogen dioxides. Four other regions are approaching the same levels seen around Red Deer.

CASES

Workers' Comp Covered Worker's Blisters Caused by Wearing Safety Boots

A worker was required by OHS regulations to wear safety boots on the job, which involved a lot of walking. While breaking in new boots, he developed blisters on his feet, which later got infected. His workers' comp claim was accepted, but the employer challenged it. The Appeals Commission upheld the worker's claim, rejecting the employer's argument that his wrongdoing caused the blisters. The Commission found that his blisters were caused by the safety boots he was required to wear at work. Given the amount of walking the worker had to do, there was a risk that he'd develop blisters and that they could get infected. So his injury was work-related and covered by worker's comp [*2015-0671 (Re)*, [2015] CanLII 52412 (AB WCAC), Aug. 24, 2015].

Ill-Fitting Mask Exposed Worker to Silica Dust & Caused Compensable Illness

A worker claimed that he breathed in concrete dust containing silica due to an ill-fitting, broken face mask and thus developed acute bronchitis and reactive airway disease. His workers' comp claim was ultimately denied, so he appealed. The Appeals Commission found that, based on the evidence, both the silica dust and the ill-fitting mask were hazards of the worker's employment. An accident occurred in that the worker was exposed to silica dust in the course of that employment and, as a result, he developed respiratory conditions. Thus, he was entitled to workers' comp for those conditions, concluded the Commission [*2015-0563 (Re)*, [2015] CanLII 56073 (AB WCAC), Sept. 10, 2015].

BRITISH COLUMBIA

LAWS & ANNOUNCEMENTS

Sept. 15: Certain OHS Changes in Bill 9 Took Effect

The following changes in Bill 9, the *Workers Compensation Amendment Act, 2015*, took effect on Sept. 15, 2015:

- Compliance agreements
- Employer citations
- Shorter times for requests for reviews
- Additional members of WorkSafeBC Board of Directors.

Sept. 15: New WHMIS Booklet Available

WorkSafeBC released a new booklet, WHMIS 2015 at Work, that summarizes key changes from the original WHMIS 1988, describes the three main elements of WHMIS 2015 and outlines the responsibilities of suppliers, employers and workers.

Aug. 27: Guide on Emergency Preparedness in Schools Released

The Ministry of Education released its new Emergency Management Planning Guide, the first comprehensive document for dealing with natural disasters, human-caused events, and technological and biological hazards in schools. It takes an all-hazards approach, focusing on five basic responses: drop-cover-hold on, evacuate, lockdown, lockout and shelter in place. The guide also defines the roles and responsibilities for public and independent school teachers, students, parents, principals and superintendents and spells out a 10-step process for developing a school emergency management plan.

CASES

Not Discriminatory to Refuse to Reemploy Worker in Safety-Sensitive Position

A worker at a lime-processing plant suffered a non-work-related head injury, which impaired his cognitive function. The position he held—process operator—was hazardous and safety-sensitive. When the worker indicated that he wanted to return to that position, the employer asked for additional information on his condition, abilities and limits. Based on that information, it concluded that it couldn't return the worker to that or any other safety-sensitive position but offered him a labourer position. The worker filed a disability discrimination complaint, which the Human Rights Tribunal dismissed. The employer's return to work process was reasonable and necessary in light of the circumstances, and the safety-sensitivity of the workplace and the worker's prior position. It wasn't discriminatory not to offer him that position given the possible safety consequences if he lost concentration while at the controls of the kiln. In addition, the employer *did* offer him a graduated return to work in a non-safety-sensitive position, which he rejected [*Fenton v. Graymont Western Canada Inc.*, [2015] B.C.H.R.T.D. No. 136, Aug. 26, 2015].

MANITOBA

LAWS & ANNOUNCEMENTS

Aug. 20: New Chief Prevention Officer Appointed

Dennis Nikkel was appointed as Manitoba's new chief prevention officer. He'll be responsible for providing advice to the government on the prevention of workplace injury and illness, and for:

- Overseeing the continued implementation of the province's injury and illness prevention strategy;
- Ensuring public awareness and prevention activities promote understanding of and compliance with OHS enforcement efforts; and
- Ensuring delivery of effective public awareness programs and prevention activities.

Month in Review

Sept. 8: New Safety Association for Trucking to Be Created
The Manitoba Trucking Association announced that it'll establish a safety association to help reduce worker injury and illness in the commercial transportation industry. The new safety association will promote sound safety and health practices, and provide leadership in advancing a culture of safety in this industry. It'll also develop and deliver OHS training, programs and services for trucking companies.

NEW BRUNSWICK

LAWS & ANNOUNCEMENTS

Sept. 1: Safe Waste Collection Initiative Began
WorkSafeNB announced Safe Waste Collection, a two-year initiative designed to improve safety culture, and reduce the frequency and severity of injuries for workers in the industry. The initiative has several components, including increased education and focused compliance activities. WorkSafeNB consultants will also meet waste collection employers one-on-one to help them improve their OHS practices.

CASES

Employer Didn't Reach Point of Undue Hardship as to Alcoholic Worker
After a co-worker reported seeing beer cans in a worker's cubbyhole and smelling alcohol on him, the employer suspended the worker for 30 days. The worker again appeared to be under the influence on the job, i.e., he was red-faced, smelled of alcohol, slurred his words and staggered. So the employer fired him. But an arbitrator found that the worker had a disability—alcoholism. His conduct did warrant discipline because a disability isn't a free pass. However, the employer was aware of his disability and didn't accommodate him to the point of undue hardship. So the arbitrator imposed a 30-day suspension without pay followed by a leave of absence without pay for 16 months so the worker could complete a rehab program. In addition, his return to work would be subject to a last chance agreement [*Canadian Union of Public Employees, Local 1252 v. Facilicorpnb*, [2015] CanLII 54715 (NB LA), Aug. 15, 2015].

NEWFOUNDLAND & LABRADOR

LAWS & ANNOUNCEMENTS

Sept. 2: Plan Ahead when Working near Electrical Equipment
NL's Electrical Contact Prevention Working Group expressed concern over the number of contacts with electrical equipment and infrastructure. Newfoundland Power and Newfoundland and Labrador Hydro recorded more than 120 public incidents over the last two years, most of which involved contractors using equipment such as booms, cranes, tractor trailers, excavators, snow clearing equipment, dump trucks, scaffolds and ladders. The Working Group reminds contractors and the general public that working around electricity requires planning and their complete and undivided attention.

NORTHWEST TERRITORIES

LAWS & ANNOUNCEMENTS

Sept. 17: Discussion on Fracking Regulations to Continue
Discussions on proposed hydraulic fracturing ("fracking") filing regulations will continue in the next Legislative Assembly. Draft regulations setting out filing requirements for proposed oil and gas projects were developed earlier this year. Between April and June 2015, the government conducted 14 public engagement sessions in 12 communities throughout the territory, getting input from residents, businesses and industry on the proposed regulations.

NOVA SCOTIA

LAWS & ANNOUNCEMENTS

Sept. 1: 2016 Workers' Comp Rates Announced
The average employer assessment rate for workplace injury insurance will hold steady in 2016. The average rate of $2.65 per $100 of assessment remains unchanged, as it has for the past 12 years. But although the average rate remains unchanged, most employers will see their rates rise or fall, based on their industry and company claims experience.

CASES

Former Shop Owner Charged with Criminal Negligence in Mechanic's Death
A mechanic was welding under a car when it caught fire and became engulfed in flames. He died the next day. The government claims that the autobody shop didn't provide flashback arrestors between the torch and the fuel supply to prevent reverse flow and stop a flame from burning back into the supply lines. The former owner of the shop was charged with criminal negligence causing death. The RCMP says the charge is the first against a Nova Scotia employer under so-called Bill C-45 (also known as the Westray law). The former owner is also facing 12 charges under the provincial OHS law [*Elie Hoyeck*, Sept. 11, 2015].

Worker's Serious Head Injury Results in OHS Charges Against Shipbuilder
At a shipyard, a wire-rope loop attached to a ship's cradle broke as it was being pulled by a winch, striking a worker in the head. He suffered a fractured skull and brain injury. As a result, the shipbuilder is facing four OHS charges, including, among other things, that it failed to ensure that the operator of a machine or tool was competent and to take every reasonable precaution to ensure the health and safety of people at or near the workplace [*Irving Shipbuilding*, Aug. 26, 2015].

NUNAVUT

LAWS & ANNOUNCEMENTS

Oct. 30: Deadline for Submitting Management Practices Questionnaire
This year's Management Practices Questionnaire (MPQ) for Safe Advantage employers has some new features. The questionnaire now automatically tallies your results as you complete each question, so you know your score when you're ready to submit, which you can now do online. Note that the deadline for submitting the MPQ was Oct. 30, 2015.

ONTARIO

LAWS & ANNOUNCEMENTS

Sept. 1: New Road Safety Rules as to Tow Trucks Take Effect
Effective Sept. 1, Ontario drivers must slow down and move over when there are tow trucks on the side of the highway with their amber lights flashing. Drivers are already required to slow down and move over for emergency vehicles with red or red and blue flashing lights. The changes to the *Highway Traffic Act* stipulate that violators will face a minimum fine of $490 and three demerit points.

Sept. 18: No Criminal Charges in Death of Firefighter in Training Exercise
A 30-year-old firefighter died after getting trapped under ice in fast-flowing water during a training exercise for ice and water rescue certification being conducted by a private firm. Police investigated the fatality and concluded that there are no reasonable grounds to lay criminal charges. A 51-year-old man died during a similar training exercise in 2010.

CASES

Former Employee Found Not Criminally Responsible for Workplace Stabbings
A man who went on a bloody stabbing rampage at a Toronto office when he was fired was found not criminally responsible for his actions. The former employee was charged with three counts of attempted murder, four counts of aggravated assault and four counts of assault with a weapon. Four people were taken to the hospital, two with life-threatening injuries. Evidence was presented at his trial that he suffered from a mental illness at the time and had been carrying knives with him before the incident because he thought he was being watched by "an organization" that was out to get him. The judge said, "I am satisfied on a balance of probabilities that Mr. Li was not criminally responsible by reason of mental disorder—but by a very narrow margin" [*Chuang Li*, Sept. 8, 2015].

Unjust to Fire Corrections Officer for Failing to Promptly Report Arrest
A corrections officer was arrested for impaired driving while operating her own car off-duty. She failed to report her arrest promptly to her employer as required and didn't do so until two years later when she pleaded guilty to those charges. The employer fired her. The union filed a grievance. The Board concluded that the officer's dismissal was a disproportionate response to her admitted misconduct. The officer was dishonest in not reporting her arrest to her employer when it happened. Had she promptly reported it, she likely would've been treated like other officers who'd been arrested for the same charges and permitted to continue work with

Month in Review

accommodations for her not being allowed to drive. However, she did eventually come forward on her own. In short, the officer made an understandable error in judgment but one that didn't break the bond of trust with the employer. So firing her was disproportionately harsh, said the Board, which substituted a 20-day unpaid suspension [*Ontario Public Service Employees Union v. Ontario (Ministry of Community Safety and Correctional Services) (Lunario Grievance)*, [2015] O.G.S.B.A. No. 130, Aug. 31, 2015].

Contractor Fined $120,000 for Death of Worker Hit by Formwork Panel
As part of a road construction project, a contractor's six-member crew was installing and removing pre-manufactured heavy steel panels used to form and hold concrete in place until the concrete has cured. While one panel was being hoisted away by a crane, an adjacent panel separated from the wall and fell on one of the workers. He suffered fatal crushing injuries. The MOL investigation determined that the training provided to the workers was insufficient. In addition, the panel manufacturer's manual specified that the final tie rods shouldn't be removed before the panel is hooked to the crane, which wasn't done in this incident. This manual wasn't on site and the workers hadn't been trained on it. The contractor pleaded guilty to a training violation and was fined $120,000 [*1256458 Ontario Ltd.*, Govt. News Release, Sept. 18, 2015].

Manufacturer Fined $100,000 for Guarding Violation that Killed Temp
A temporary worker was removing plastic bottles from the end of a blow mould machine at a plastic bottle manufacturer's facility. The machine had a moving part that should've been guarded. But the guard had broken and was missing while it underwent repairs. The temp came into contact with the moving part and was fatally injured. The manufacturer pleaded guilty to a guarding violation and was fined $100,000 [*CRS Plastics Ltd.*, Govt. News Release, Aug. 19, 2015].

Arc Flash Burns Workers & Results in $80,000 Fine
Two workers for a utility contractor were instructed by their supervisor to enter an electrical vault to begin preparing termination of conductors that had been pulled into the vault, which contained various energized electrical equipment. The handle on one of the switch gears was in an open position with a blue tag attached, indicating that there was work being conducted on the unit. Neither worker was aware that the switch gear was energized. So they didn't wear rubber gloves or use barriers. As they began work, there was an arc flash within the switch gear unit and both workers were seriously burned. The contractor pleaded guilty to a LOTO violation. The court fined it $80,000 [*Powerline Plus Ltd.*, Govt. News Release, Sept. 15, 2015].

Worker's Hand Injury While Repairing Machine Results in $75,000 Fine
A worker was repairing a napkin-folding machine. He tested it by looking at the sensing pressure and using one hand to check if the tension arm had any vibration or heat. While pulling his hand off the tension arm, it got caught at a pinch point on the driving belt system. He sustained a broken finger and lost part of another. The company pleaded guilty to failing to provide the worker with information, instruction and supervision on how to safely perform maintenance on and/or test the operation of a machine. The court fined it $75,000 [*Metro Paper Industries Inc.*, Govt. News Release, Aug. 20, 2015].

Grocery Store Fined $60,000 after Worker's Injured by Meat Grinder
A grocery store worker was instructed by a supervisor to grind chicken using a meat grinder, which came equipped with a barrier guard that prevents a user's fingers from entering into the inlet area. But at the time, the guard wasn't in place. The worker began feeding the meat directly into the inlet area by hand and made contact with the moving auger, resulting in a critical injury. An MOL investigation found that the guard that would've prevented contact with the auger had been missing from the grinder for an unknown period of time. The store pleaded guilty to failing to ensure that the grinder was guarded by a guard or other device as prescribed and was fined $60,000 [*Nations Fresh Foods*, Govt. News Release, Sept. 1, 2015].

PRINCE EDWARD ISLAND

LAWS & ANNOUNCEMENTS

Sept. 22: GHG Emissions Declining in Atlantic Canada
The Atlantic Provinces Economic Council's report card, *Declining Greenhouse Gas Emissions in Atlantic Canada*, shows that GHG emissions dropped 26% since 2004 in the Atlantic region compared to a 4% drop nationally. PEI highlights from the report:

- A 19% decline in emissions over the period due to lower direct soil emissions
- The province's installed wind capacity is up to 204 megawatts
- Close to 10,000 Island homes and businesses have conducted energy audits and/or complete energy retrofits to reduce their energy consumption.

QUÉBEC

LAWS & ANNOUNCEMENTS

Nov. 1: Deadline for Verification of GHG Emissions
Just a reminder that, under Québec's cap-and-trade system, regulated emitters have until Nov. 1, 2015, to ensure that their verified GHG emissions don't exceed their emission allowances. Failure by regulated entities to cover their GHG emissions with a sufficient number of allowances can result in severe penalties.

Aug. 25: Results of Joint Carbon Market with California Released
The government announced the results of the Aug. 18, 2015, auction of GHG emission credits, which was held jointly with California. Overall, 73,429,360 current vintage emissions units (2015) were sold at a unit price of $16.39 CA ($12.52 US) and 10,431,500 future emissions units (2018) were sold at a unit price of $16.10 CA ($12.30 US). The auction generated gross revenue for Québec in the amount of $205 million (CA), which goes to the Green Fund and is reinvested in the implementation of measures in the 2013-2020 Climate Change Action Plan.

SASKATCHEWAN

LAWS & ANNOUNCEMENTS

Sept.–Nov.: OHS Division Conducting Manufacturing Inspections
From September through November, Saskatchewan's OHS Division is conducting inspections of manufacturers in Regina, Saskatoon and a number of rural locations. The inspections are part of an injury prevention project between WorkSafe Saskatchewan, the Safety Association of Saskatchewan Manufacturers and the Saskatchewan Association of Chiropractors.

Sept. 10: New Young Worker Training Course Available
An updated Young Worker Readiness Certificate Course in a new, interactive format is now available online. This job readiness course, which is mandatory for fourteen- and fifteen-year-olds, teaches young workers about their rights and responsibilities that relate to health, safety and employment standards in the workplace.

Aug. 24: Flagger Hit by Vehicle in Construction Zone
A flagger was hurt in a collision involving two vehicles in a highway construction zone. One vehicle was stopped at the construction zone when it was rear-ended by another vehicle. The driver of the stopped vehicle and the flagger were taken to the hospital.

Aug. 31: Ban on Pruning Elm Trees Ends
Residents may prune their elm trees again to help keep them healthy, as Saskatchewan's annual ban on elm tree pruning ended Aug. 31. Pruning elm trees is barred from April 1 to Aug. 31 each year to reduce the risk of Dutch elm disease. But regular pruning, when permitted, helps keep elm trees healthy and better able to resist all types of disease. And early fall is a good time for tree maintenance.

YUKON TERRITORY

LAWS & ANNOUNCEMENTS

Sept. 14: New WHMIS 2015 Information Released
The WCHSB published a new page, All about WHMIS Labels, and revised and republished the following pages on WHMIS 2015:

- About WHMIS 2015
- What Is WHMIS?
- About the Pictures on the Hazardous Material Labels
- All about Safety Data Sheets
- Get WHMIS Training.
- What do the pictures on hazardous material labels mean?

For more of these jurisdictions' laws & announcements and cases, please visit **www.ohsinsider.com.**

AROUND THE PROVINCES:

Implementation of WHMIS 2015 Across Canada

On Feb. 11, 2015, the federal government published the final *Hazardous Products Regulations* (HPR), which implement the UN's Globally Harmonized System (GHS) for classifying and labelling chemicals. The new WHMIS, called "WHMIS 2015," is based on the requirements contained in the HPR and the *Hazardous Products Act*, as amended in 2014. These new regulations directly impact manufacturers, importers and distributors of hazardous products as well as federally-regulated employers. But in terms of workplace safety, most employers in Canada are regulated by their provincial or territorial OHS laws. So until those jurisdictions amend their OHS statutes and/or regulations to reflect WHMIS 2015, those employers are still bound by the requirements under WHMIS 1988 (as the "old" WHMIS is now being called). This chart tracks the progress in each jurisdiction on making such changes and will be regularly updated online.

IMPLEMENTATION OF WHMIS 2015 ACROSS CANADA

Jurisdiction	Draft regulations released?	Deadline for comments?	Final regulations released?	Key compliance dates for employers
FED			Feb. 11, 2015	**Dec. 1, 2018:** Employers must comply with all requirements (but they may use WHMIS 1988 compliant products until May 31, 2019) **June 1, 2019:** All hazardous products in federally-regulated workplaces must comply with WHMIS 2015
AB	Nov. 3, 2014 (*based on the draft HPR)	Jan. 31, 2015		
BC	Feb. 13, 2015	Feb. 20, 2015	Feb. 25, 2015 (see, approved changes to OHS Regulation)	**Aug. 4, 2015:** The amendments took effect **Until Nov. 30, 2018:** Employers may have both WHMIS 1988 and WHMIS 2015 compliant labels and (M)SDSs in the workplace, provided they comply with both systems concurrently as to education and training **Dec. 1, 2018:** Employers must comply with WHMIS 2015 and have only WHMIS 2015-compliant labels and SDSs in the workplace
MB			July 31, 2015: amendments to *Workplace Safety and Health Regulation* take effect immediately	**July 31, 2015:** Employers must ensure that hazardous products received have the corresponding label and MSDS/SDS and that workers are trained for the version(s) of WHMIS they're using in their workplaces **July 2017 to Dec. 2018:** Labels and MSDSs compliant with WHMIS 1988 are gradually phased out, starting with manufacturers and importers and working through to distributors, with full compliance with WHMIS 2015 at the workplace level by Dec. 2018
NB				
NL				
NS				
NT/NU				
ON	Nov. 3, 2014: (see, proposed changes, which are based on the draft HPR) April 2, 2015: proposed changes to the *OHS Act* passed first reading (Bill 85, Schedule 4) May 14, 2015: Bill 85 had second reading Sept. 15 & 17: additional debate on Bill 85			
PE				
QC			June 3, 2015: Bill 43 received Royal Assent	**Dec. 1, 2018:** Until Dec. 1, 2018 when the transition period ends, employers may have in their possession, in the workplace, products whose labelling complies with the WHMIS 1988 requirements
SK	Yes (see GHS Consultation Guide for proposed changes)	April 15, 2015		
YK	Yes	March 13, 2015	July 14, 2015: New WHMIS regulations took effect	**Dec. 1, 2018:** Employers have three years to be fully compliant with WHMIS 2015, which will be in full effect as of Dec. 1, 2018. But if a hazardous product labelled in accordance with WHMIS 2015 is received in the workplace, the employer must immediately comply with the worker education and training requirements.

Last Updated: Sept. 29, 2015

MAKING THE BUSINESS CASE FOR SAFETY:
The Value of Setting Long-Term EHS Goals

It's easy to get focused on immediate safety goals in your workplace, such as giving safety orientations to workers you've just hired, complying with new requirements in the OHS laws that are about to take effect and simply keeping the OHS program operating effectively. But setting long-term environmental, health and safety (EHS) goals can have a much bigger impact on your workplace's overall safety performance and culture. For example, in 1995, Dow Chemical set EHS goals it wanted to attain by 2005. The company drastically improved its EHS performance and attained nearly all of these goals. The initiative not only contributed billions to Dow's bottom line, but also improved employee morale, enhanced the company's industry standing and helped it attract and retain top talent. Here's a look at a case study from the Campbell Institute on Dow's approach and its success as well as how it followed up those initial goals.

Dow Chemical's 2005 Long-Term Goals

Dow Chemical is a multinational corporation with core global businesses manufacturing plastics, chemicals, agro-science products, and hydrocarbons and energy. By 2005, Dow had 42,000 employees worldwide and manufactured more than 5,000 products at 156 manufacturing sites in 37 countries.

In setting its 2005 goals, Dow's first step was to select a guiding philosophy. Company leadership chose to create a culture predicated on environment, health and safety. They then set breakthrough goals that would challenge employee imagination and capabilities, revolutionize the way it addressed EHS performance and make its EHS program a model for industry best practices. But they also made sure these goals were feasible, knowing that Dow's management systems and attitude would need to change significantly to reach the goals.

In 1996, Dow publicly committed to comprehensive 2005 EHS goals, agreeing to aggressively improve performance across key EHS metrics. The goals were broken into three groups:

Prevent EHS incidents. The goals in this group include valuing—above all things—the safety of employees and communities; continuously improving Dow's performance to protect the environment, health and safety of its workforce, neighbours and the public; working with distributors, customers and suppliers to continuously improve the way they handle, transport and use Dow's products; and significantly improving Dow's EHS performance by reducing:

- Injuries and illness per 200,000 work hours by 90%;
- Loss of primary containment (LOPC) incidents (such as leaks, breaks and spills) by 90%;
- Transportation incidents per 10,000 shipments by 90%;

- Process safety incidents (such as fires, explosions and significant chemical releases) by 90%; and
- Motor vehicle incidents per 1 million miles by 50%.

Increase resource productivity. In this area, Dow aimed to continuously enhance resource productivity to reduce risk and minimize its impact on the environment and health, and increase global competitiveness through greater efficiency; emphasize pollution prevention in processes; and transfer and use the best available technology to build the most environmentally sound and safe facilities. The company also set specific goals of further reducing air and water emissions of priority compounds by 75% and chemical emissions by 50%. And it set a goal of reducing:

- Dioxin emissions by 90%;
- The amount of waste and wastewater generated per pound of production by 50%; and
- Energy use per pound of production by 20%.

Business accountability. Dow decreed that its eight global business groups were directly accountable for their own EHS performance, in addition to profit and loss. In fact, many businesses tie a portion of their variable pay directly to the achievement of EHS goals. By hardwiring EHS into the business, it put ownership and accountability into the hands of every Dow employee.

To implement these EHS objectives, Dow executives focused on both the "soft" and "hard" characteristics of the initiative. The soft side focused on human behaviours, while the hard side focused on the companywide operating disciplines, processes and tools. Management believed the soft side was especially important; it wanted to make safe behaviours a habit. But it's more difficult to drive behavioural change.

Integration was critical to the initiative's success. That is, EHS has to be infused into the company's strategy, management systems and metrics, and fully integrated into the day-to-day operations. Other critical success factors included:

- Endorsing EHS as the top priority at the company's highest levels;
- Increasing accountability among leaders, employees and contractors;
- Transparency in reporting EHS progress publicly against key metrics;
- Active leadership commitment and engagement; and
- Requiring employees to include EHS in their individual goals.

The results: Dow invested $1 billion to achieve the 2005 EHS goals, which resulted in an overall value of more than $6.5 billion. Notably:

- The Injury/Illness Rate (IIR) was reduced by 84%;
- LOPC incidents and process safety incidents decreased by more than 70%;
- Emissions of priority chemicals went down by 84%;
- Solid waste was reduced by 1.6 billion pounds;
- Water use was reduced by 183 billion pounds; and
- 900 trillion BTUs of energy were saved.

Goals for 2015

Dow didn't rest on its laurels. Instead, it set new 10-year goals to be achieved by 2015. The new goals captured the gains the company achieved with the 2005 goals and reflected new commitments in the following areas:

- Local protection of human health and the environment;
- Sustainable chemistry;
- Breakthroughs to world challenges;
- Product safety leadership;
- Contributing to community success;
- Energy efficiency and conservation; and
- Addressing climate change.

The specific 2015 goals that focused on local protection of human health and the environment focused on these areas:

IIR. Achieve an IIR of 0.12 per 200,000 hours of work, including injuries to both Dow employees and contractors.

Severity rate. Reduce the injury severity rate by 75%. (The severity rate is similar to the injury and illness rate, but it weighs incidents by the severity of the injury to focus injury and illness prevention efforts on minimizing the *impacts* of injuries rather than the number of injuries.)

Severe motor vehicle accident rate. Reduce the rate of motor vehicle accidents causing or having high potential to cause injuries to 0.28 incidents per million miles driven.

LOPC. Reduce LOPC incidents to fewer than 130 incidents at *all* sites.

Transportation incidents. Decrease the number of hazardous material transportation LOPC incidents by 75% and eliminate highly hazardous material releases, such as those posing a toxic inhalation hazard or involving flammable gas.

Process safety incidents. Reduce process safety incidents by 75% and the severity rate by 95% at all sites, according to the 2005 baseline.

Environmental releases. Decrease companywide emissions of volatile organic compounds, nitrogen oxide compounds and priority compounds by 30%. In addition, reuse 300 million pounds of by-products instead of disposing as waste.

Preliminary results: Seven years into the new EHS plan, Dow's achievements were shaping up to be just as impressive as those made under the 2005 goals. For example:

- The 2015 target was to drive the IIR to no more than 0.12 incidents per 200,000 hours. The IIR in 2011 was 0.30 per 200,000 hours, representing a 42% reduction;
- The 2011 severe motor vehicle accident rate of 0.17 per million miles driven was already less than the 2015 goal of 0.28 per million miles driven;
- The number of process safety incidents in 2011 was 74% lower, compared to a reduction target of 75%; and
- Dow's goal was to reduce LOPC incidents 90% by 2015 and by 2011 there had been an 80% reduction.

BOTTOM LINE

EHS improvements continued to pay off for Dow. The company realized more than $4 billion in additional savings from reductions in energy use, wastewater and chemical emissions, and an additional $100 million from reductions in injuries, LOPCs and process safety incidents.

Projects to reduce and reuse waste in new and innovative ways returned a net present value of more than $2 billion per year to the company, which were especially critical to the company's bottom line during the 2008 financial crisis. The tangible benefits included reductions in workers' comp premiums, which fell by 75% between 2005 and 2009. As a safety or EHS coordinator, show this case study to senior management as proof that a serious commitment to long-term EHS goals can result in significant benefits for workers and the environment—as well as the company's bottom line.

INSIDER SOURCE

"The Dow Chemical Company: The Inseparability of Safety and Business Success" and Epilogue: 2005-2012, The Campbell Institute, Jan. 31, 2013 ❖

SPOT THE SAFETY VIOLATION:

Don't Trade Warmth for Toxic Gases

This worker should be warm while he works. But is he exposing himself to another safety hazard besides cold stress?

Working in the winter—even inside—may expose workers to the risk of cold stress. So taking steps to keep workers warm is not only reasonable but necessary. Providing portable heaters is a reasonable step to take—but only if they're used safely.

In this picture from elCOSH, the portable heater is being used indoors and it's unclear whether there's adequate ventilation in the space. As a result, the worker could be exposing himself to carbon monoxide (CO) poisoning.

Depending on the level of exposure to CO, workers can suffer from:

- Mild to severe headaches
- Weakness, dizziness, nausea and fainting
- An increased or irregular heart beat
- Loss of consciousness
- Death.

For example, WorkSafeBC issued a hazard alert on three construction workers who had to be treated for CO poisoning as the result of the improper use of a gas-powered heater they were using to warm a building that was under construction.

Those workers were lucky but others weren't so fortunate:

- Abrasive blaster dies of carbon monoxide poisoning
- Farm worker dies of carbon monoxide poisoning.

10 STEPS TO PROTECT WORKERS FROM CO POISONING

Employers should do the following to protect workers from CO poisoning:

1. Install and properly maintain an effective ventilation system that will remove CO from work areas or require workers to use appropriate respiratory protection.
2. Maintain equipment and appliances that can produce CO, including not only space heaters but also water heaters and cooking ranges, in good working condition to promote their safe operation and to reduce the formation of CO.
3. Always install and use equipment according to the manufacturer's instructions.
4. Consider switching from gasoline-powered equipment to equipment powered by electricity, batteries or compressed air if it can be used safely.
5. Bar the use of gasoline- or propane-powered equipment in poorly ventilated areas.
6. If workers are working in confined spaces where the presence of CO is suspected, ensure that they test for oxygen sufficiency *before* entering.
7. Monitor the air in areas where CO may be present, including confined spaces, to ensure that CO levels remain within occupational exposure limits.
8. Install CO monitors with audible alarms.
9. Also, provide workers with personal CO monitors with audible alarms if potential exposure to CO exists.
10. Educate workers about the sources and conditions that may result in CO poisoning as well as the symptoms and control of CO exposure.

Also, make sure you comply with the portable heater requirements in the OHS regulations in your jurisdiction. For example, don't place space heaters by flammable or explosive materials.

Go to Safety Smart to download a safety talk on portable heaters.

At OHSInsider.com, you can download a PDF or Word version of this Spot the Safety Violation, which you can print out and use to train workers.

On the Spot the Safety Violation page, you'll find dozens of these unique training tools on topics ranging from confined spaces and fall protection to ladder safety and respiratory protection. And you can download a special report of the 10 most popular Spot the Safety Violations from 2014. ❖

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DOS & DON'TS:

Don't Ignore Near Misses

Near misses—such as incidents in which a worker could've been injured but wasn't—aren't occasions in which you should breathe a sigh of relief and then continue business as usual. Near misses are opportunities to address or eliminate safety hazards *before* someone gets hurt. Ignoring a near miss and failing to identify and address its causes can result in an actual safety incident—and liability for any underlying OHS violations.

That's the lesson a factory in Australia learned. An experienced worker operated an automatic core cutter, which cuts paper roll cores to length. While wearing a glove on her left hand to prevent blisters, the glove got caught under a spinning rod and her arm was dragged into the machinery. The worker's lower left arm had to be amputated as a result of the incident. About four years earlier, the same worker had been involved in a near miss in which her glove got caught by the shaft of the core cutter, but she was able to pull away in time and so didn't suffer any injuries. A supervisor was present during this prior incident and was aware that the worker's glove had gotten entangled in the shaft.

Despite the near miss, the factory didn't take any proactive steps to learn from the incident and prevent similar occurrences, such as barring the wearing of gloves while using this equipment and developing a safe work procedure for operation of the core cutter. In addition, the worker continued to wear a glove while operating the cutter. As a result, the factory was charged with and pleaded guilty to a safety violation. In fining the factory $42,000, the Industrial

Magistrate noted that it was significant that the factory "failed to prohibit the use of a glove even after the earlier incident, which highlighted the serious risks associated with operating" the cutter while wearing gloves [*Russell v. Leonhard Kurz (Aust) Pty Ltd.*, [2015] SAIRC 13, May 20, 2015]. ❖

***Insider* Says:**

OHS Insider has additional resources to help you properly respond to and manage near misses, including:

- 8 Steps for Effective Near Miss Management
- 10 Tips for Encouraging Near Miss Reporting by Workers
- Answers to 8 FAQs about Near Misses
- A model near miss reporting form
- A recorded webinar on developing a near miss reporting culture in your workplace.