

Are you OHSA Compliant? Could You Mount a Due Diligence Defence?

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Due Diligence...What does it Mean?

- In the context of Occupational health and safety, due diligence means:
 - Taking every reasonable precaution in the circumstances to avoid risk to public health or safety
 - Giving consideration to what a reasonable person would have done in the circumstances
- If your organization is charged with an offence under the OHSA, you want to be able to mount a due diligence defence

Strict Liability Offences

- Crown must prove beyond a reasonable doubt the actus reus of the offence (the action or lack of action by the defendant)
- If Crown meets its burden, onus shifts to defendant
- Defendant must establish due diligence defence on a balance of probabilities
- Meaning, it is more probable than not that the defendant took every reasonable precaution in the circumstances
- At a minimum - comply with Regs

How Do We Establish the Defence?

- *Cooper Construction, Kenaiden* - 2 key cases
 - Diligent and Proactive Directing Mind of the Corporation
 - Comprehensive Health and Safety Policy
 - Competent, well-trained Supervisor
 - Use of outside safety consultant
 - Establishment of Committees and health and safety representatives as set out in the Act
 - How selected?
 - Certified?
 - Proper, documented site inspections

Example #1



Example #2



Industrial Context

- Employer primary responsibility
- competent supervision
- Training on all equipment
- Monthly inspections
- Health and Safety Representatives and Committee
 - Selection
 - Certification
- Know the Regulations!!!! [Reg. 851]

Compliance with the Act

- A Key Element to Establishing Due Diligence
- Important Aspects
 - JHSC
 - Training
 - Health and Safety Policy
 - Workplace Violence and Harassment Policy
- Regulations
 - More detailed requirements
 - Having the proper committees, training, processes in place will help keep you in compliance with regs

WHIMIS

- Federal legislation focuses on suppliers
- Provincial legislation focused on identifying key information and passing it on to employees
- Part IV OHSA and Regulation 860
- An employer in charge of a worksite where controlled products are used has 3 duties:
 - to ensure that controlled products are labelled or identified,
 - to obtain material safety data sheets for controlled products, and
 - to educate workers

Joint Health and Safety Committees

- Under Ontario's *Occupational Health and Safety Act (OHSA)*, the following workplaces are required to establish Joint Health and Safety Committees (JHSC):
 - (1) Any workplace that regularly employs ≥ 20 workers;
 - (2) Construction projects on which ≥ 20 workers are regularly employed and are expected to last 3 months or more;
 - (3) Any workplace (other than construction projects) to which a regulation concerning a designated substance applies (even if fewer than 20 workers are regularly employed there);
 - (4) Any workplace where an order has been issued under section 33 of the *OHSA* (even if fewer than 20 workers regularly employed);
and
 - (5) Any workplace where the Minister of Labour orders a committee to be established

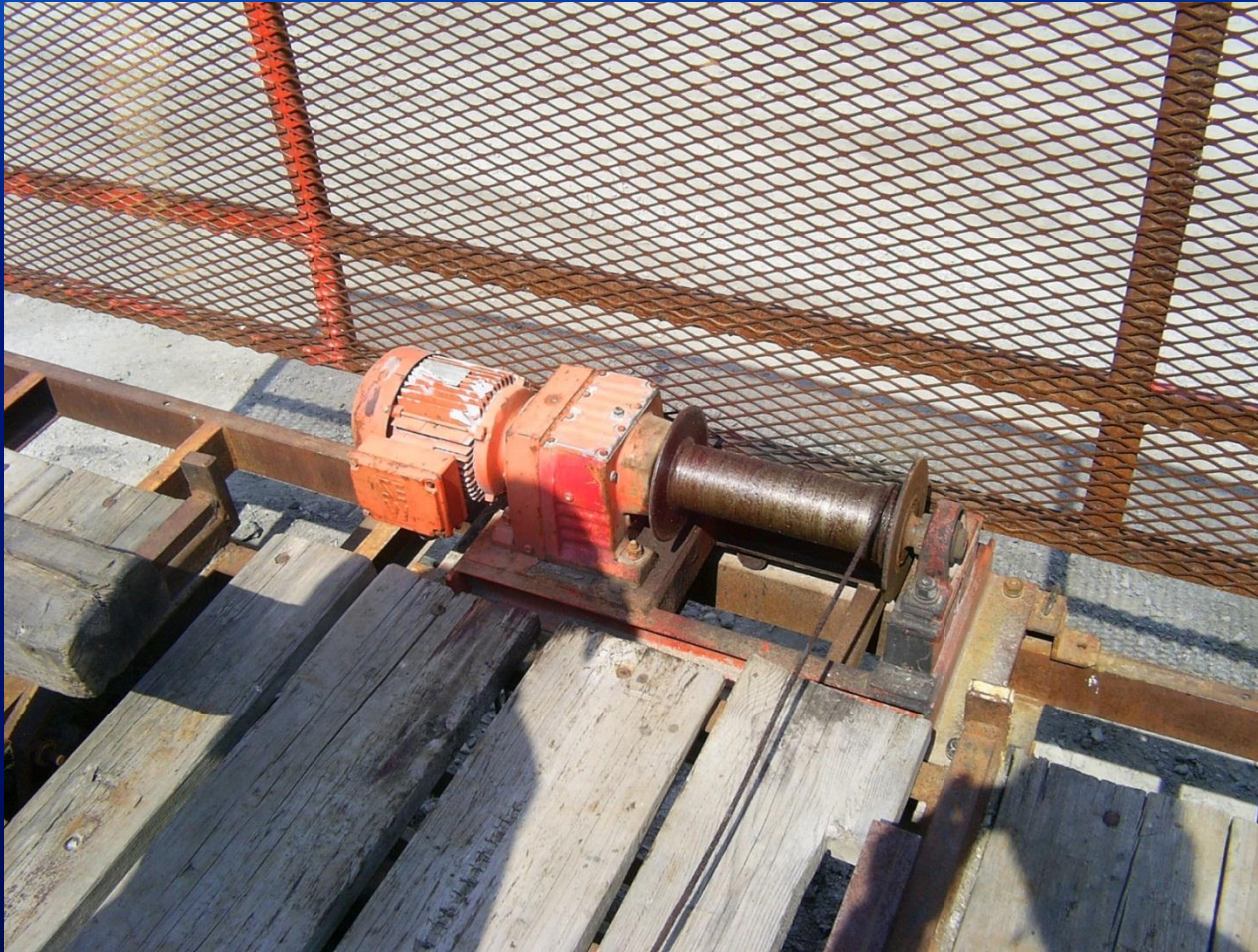
Under 20 workers?

- A project or workplace that doesn't require a committee must select at least one health and safety representative from among the workers
- Note - workplaces with 5 or fewer workers are exempt
- Workers (or union if applicable) to select
- Health and Safety Representative must have sufficient training to effectively perform the role











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JHSC Composition

- Workplaces with 50 or more workers are required to have a committee consisting of 4 members (minimum)
- (Workplaces with less than 50 workers to have committee of at least 2)
- Less than 20 workers - require a Health & Safety Rep
- At least half of the committee members must be worker members
 - non-management employees who are selected by their co-workers; or
 - selected by their union if applicable
- The remaining members are management selected and carry out managerial functions

JHSC Composition cont.

- Suggested term is at least one year
- Membership terms to be staggered
- One worker member and one management member to be certified
- MOL recommends that if possible, committees represent the health and safety concerns of the entire workplace. For example, if a workplace has a plant, office, laboratory and warehouse, each of these areas should be represented on the committee

Certification of JHSC Members

- This responsibility for certification and training have shifted from the WSIB to the Chief Prevention Officer (CPO)
- The CPO certifies members once they complete the Parts 1 and 2 of mandatory training: Basic Certification and Workplace-Specific Hazard Training
- MOL has approved list of Basic Certification Providers: http://www.labour.gov.on.ca/english/hs/cert_providers.php
- Hazard Training can be through Health and Safety Ontario, the Workers Health and Safety Centre, other health and safety professionals, or through in-house training

Certification Cont.

- Basic Certification - provides an overall knowledge of health and safety that applies to all workplaces
- Workplace-Specific Hazard Training - focuses on significant hazards in your workplace, how to assess those hazards and ways to control and/or eliminate them
- Complete a Workplace-Specific Hazard Training Confirmation to MOL form (3189A)

JHSC Meetings

- Committee members are required to meet at the workplace at least every 3 months
- Both worker members and management members elect a co-chair to run meetings
- Minutes of each meeting must be recorded and available for review by a Ministry of Labour inspector
- In addition to these meetings, one designated worker member (preferably a “certified” member) must conduct an inspection of the physical condition of the workplace once monthly

Function of the JHSC

- Committees have 4 principal functions:
 - (1) Identify potential hazards;
 - (2) Evaluate these potential hazards;
 - (3) Recommend corrective actions; and
 - (4) Follow up on implemented recommendations
- Where the JHSC is unable to reach a consensus with respect to its recommendations, either co-chair is empowered to make written recommendations
- *OHS*A requires employers to provide a written response to their JHSC within 21 days of receiving recommendations

Workplace Violence and Harassment Policy

- Written policy with respect to both workplace violence and harassment required
- Important elements that should be included:
 - (1) Clear definitions of key terms;
 - (2) Identify the responsibilities of the employer, its management/supervisors and employees;
 - (3) Articulate the process for making complaints and for dealing with reprisals after a complaint is made; and
 - (4) Articulate the process for the investigation of a complaint

Workplace Violence Risk Assessment

- Employer required to conduct an assessment (and ongoing reassessments) of the risks of violence in a workplace
- Reassessments must take place at least annually
- We also suggest a reassessment:
 - (1) After an incident of violence at the workplace;
 - (2) After an incident of violence at a company with a similar workplace environment;
 - (3) Upon hearing about an incident of violence occurring at a company carrying on similar business; or
 - (4) After changes to the workplace environment
- Results must be provided to the JHSC

Implementing Workplace Violence and Harassment Policies

- A program must be developed in order to implement the policies relating to both workplace violence and harassment
- These programs should establish:
 - (1) Measures and procedures to control perceived risks;
 - (2) Measures and procedures for the reporting of incidents and investigations;
 - (3) Protocol to obtain emergency assistance when required; and
 - (4) Special procedures for taking all reasonable precautions for the protection of a worker where domestic violence is an issue
- Must ensure that all employees have the required information and instruction regarding both the policies and their respective programs
- Remember: Familiarity breeds contempt, or at least complacency
- Look with fresh eyes!!