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## OCCUPATIONAL HEALTH & SAFETY UPDATE

### Who is a Supervisor under the OHSA?

#### The latest word from the courts

RYAN J. CONLIN

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

If an inspector asked this lead hand if he was personally responsible for complying with the Occupational Health and Safety Act (OHSA)'s "supervisor" duties, what do you think the answer would be? What if the inspector asked the same question to the operations manager? Could the employer advance a due diligence defence if the lead hand told the inspector he was not a "supervisor" because he was not a member of the management team?

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

#### Are lead hands considered "supervisors"?

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

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

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

As a matter of due diligence, employers ought to

- identify the people in their facilities who fit into this class of employee (often referred to as “lead hands,” “team leads,” or “sub-foreman”)
- ensure that they have the training required to ensure compliance with the act

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

### **How far up do “supervisor” duties extend?**

Another question that frequently arises is whether members of management who do not have direct front line managerial responsibilities for worker safety will be treated as supervisors. The act imposes specific duties on directors and officers of corporations but nothing in the act distinguishes front-line supervisors from more senior managers. It has been my experience that the vast majority of “supervisor” prosecutions involve individuals who have front line responsibility for worker safety.

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

According to the court, the evidence showed that the defendant delegated much of his power and authority for worker safety to others beneath him, but it was the defendant who had ultimate responsibility for worker safety. In other words, the defendant may not have given direct orders to workers related to safety, but the individuals responsible for safety were accountable to him. The court concluded that an absence of front line responsibility does not relieve an individual from compliance with the duties of a “supervisor” under the act. It should be noted that, although the court found that the defendant was a supervisor for the purposes of the act, the court ultimately acquitted the defendant on the basis that he had exercised the legally required due diligence.

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

## Compliance strategies

It is critically important that employers be able to prove that each individual subject to supervisor obligations is aware of his or her responsibilities and has received required training.

I recommend that job descriptions and employment contracts specifically note that the employee is considered a supervisor within the meaning of the act, and that the employee is expected to comply with all legal obligations. Failing to advise an employee that he or she is considered a supervisor under the act could be fatal to a due diligence defence.

It would also be prudent to conduct a specific due diligence training for senior managers. Courts have recognized that senior managers exercise due diligence differently than front-line supervisors. Senior managers have to establish that they have taken steps to ensure that those with front-line responsibility for worker safety have taken all steps to ensure compliance. Establishing a documentary record that the manager regularly reviewed discipline records, joint health and safety committee minutes, safety audit reports, Ministry of Labour inspection reports, and Workplace Safety and Insurance Board statistics are vital to establishing due diligence in the context of senior managers.

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## How To Manage Claims And Cut Costs In An Era Of Unprecedented Surcharges

Presenter: Ryan Conlin

Half Day Seminar  
Tuesday, September 15, 2009  
9:00 a.m. – 12:30 p.m.  
Check-In and Breakfast 8:30 a.m.  
Delta Toronto Airport, Mississauga  
5444 Dixie Road  
\$350 including GST  
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The WSIB made dramatic changes to the NEER program in 2006, which resulted in unprecedented reductions in refunds and greater surcharges than ever before. In light of this stark new reality, it is more important than ever to know how to manage claims to improve your organization's lost time and record, and realize potential savings.

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- Investigate accidents and report claims
- Deal with doctors
- Develop and implement Early and Safe Return to Work policies, including problems with:
  - Absent, ambiguous and dubious medical information
  - Self imposed physical restrictions
  - Refusal to work scheduled hours
  - Handle permanent disability, re-employment and increasingly stringent accommodation obligations
  - Conclude claims and manage legal hurdles to termination

### The Program Will Cover:

- Investigating the Accident and Filing the Form 7
- Early and Safe Return-to-Work Plans (ESRTW Plans)
- How to Prepare them, what goes in them, how they should be documented
- Typical ESRTW Plan Problems (Part I) – Medical Information
- Typical ESRTW Plan Problems (Part II) – Worker Non-Cooperation
- Permanency, Re-Employment, and Accommodation
- Closure – Ending the Employment Relationship

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