

ALBERTA OCCUPATIONAL HEALTH AND SAFETY UPDATE THE IMPORTANCE OF BEING PRO-ACTIVE



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ALBERTA OCCUPATIONAL HEALTH AND SAFETY UPDATE – THE IMPORTANCE OF BEING PRO-ACTIVE

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You are not alone if occupational health and safety (“OHS”) issues took a back seat to more pressing priorities during the first half of 2009. But if you have not kept track of what has been going on in Alberta’s OHS arena, you have missed a lot. Do not be left in the dark. What follows is a summary review of what has been happening.

Although record low injury rates were reported for 2008, there were 11 more occupational deaths last year than there were in 2007, bringing the total number of work-related fatalities in Alberta to 165. This is the second year in a row that Alberta has seen a sharp spike in the number of occupational fatalities, as there were 124 deaths in 2006. As of May 19, 2009, the total number of workplace incident fatalities investigated was 10, five of which fell within the mining and petroleum development industry sector.

“There are still far too many workers in Alberta getting killed on the job,” said Hector Goudreau, Minister of Alberta Employment and Immigration (“AEI”), in an April 24, 2009 press release.

The Construction and Construction Trade Services industry sector has tallied 35% of Alberta’s 709 fatalities since 2004.

Fines levied under Alberta’s *Occupational Health and Safety Act* (“OHS Act”) reached unprecedented numbers in 2008 – a trend that is likely to continue in the coming years as a result of the alarming number of fatalities. The number of completed prosecutions in 2008 almost doubled to 22 from only 12 in 2007, while the total fines increased almost 300% in that same period (from \$1,720,000 to \$5,083,000).

These prosecution statistics demonstrate a strong commitment by AEI to strict enforcement of Alberta’s OHS laws. In fact, it is expected that AEI will be increasing the OHS budget by more than \$5 million for additional enforcement during the 2009/2010 fiscal year.

To go along with unprecedented enforcement of Alberta’s OHS laws, AEI is expected to continue its Targeted Employer Program thanks to its success since 2002.

The Targeted Employer Program is designed to improve workplace safety through increased awareness and follow up aimed at reducing the number of incidents in industries where employers typically experience higher injury rates; approximately 2.5 times the provincial average. In 2009/2010, 550 employers with disabling injury rates of about 9.7 and greater, as recorded for the previous calendar year, will be targeted in the following industries: Commercial/Industrial Construction, Residential Construction and Oil and Gas. Small employers (between 40 and 59 full-time employees) will be subject to at least two inspections by an OHS Officer; while large employers (60 or more full-time employees) will undergo at least five inspections over a twelve month period. While OHS Officers will focus on different types of contraventions in each targeted industry, it appears that the common focus will be in relation to fall hazards and fire and explosion hazards. These hazards are covered by Parts 9 and 10 of the *OHS Code*, respectively.

The likely result of targeted inspections is the issuance of orders. Orders can be issued against prime contractors, owners, contractors, employers, suppliers and workers. An order identifies a legal contravention of Alberta’s OHS laws and may indicate an increased possibility of prosecution.

Pursuant to the *OHSA*, a failure to comply with an order is an offence which may result in a fine, a period of imprisonment, or both. A further reason to pay careful attention to orders was emphasized by a recent decision by the Ontario Court of Justice. In *R. v. Reid & DeLeye Contractors Ltd.*, 2008 CarswellOnt 7663 (Ont.C.J.), the defendant received an order under the *Ontario Occupational Health and Safety Act* following a workplace incident. While the defendant did not necessarily agree with the contents and basis for the order, it did not appeal the order. Subsequently, the defendant faced a prosecution in relation to the workplace incident. The Crown sought to ask the workplace inspector about the order, which named the defendant as a constructor, and whether such order was appealed. The defendant objected to any such questions. A.J. Child J.P. confirmed that an order cannot be collaterally challenged in a penal court as to its validity where the party wishing to challenge such order did not avail itself of the applicable appeal procedure (per *R. v. Consolidated Maybrun Mines Ltd.*, [1998] S.C.J. No. 32 (S.C.C.)). Moreover, the court decided that evidence relating to the order issued, and the fact that it was not appealed, was relevant for the purposes of the issues arising in relation to the prosecution before it. In other words, if an order is given by an OHS Officer, careful consideration must be given to not only the short term requirements and their impact, but also the potential long term impact it might have.

To compound the human and economic risks posed by an alarming number of fatalities and unprecedented enforcement of Alberta's OHS laws, AEI recently announced changes to Alberta's *OHS Code*. After extensive public consultation the 2009 version of the *OHS Code* was released on April 17, 2009 and employers will have until July 1, 2009 to comply with the new requirements.

The *OHS Code* first came into force on April 30, 2004 when it amalgamated the previous eleven OHS Regulations. A commitment by AEI to update the *OHS Code* every two years has, for the most part, been on schedule. The first revision of the *OHS Code* came into force on February 1, 2007. As it stands now, the *OHS Code* has a total of 41 parts. Parts 1-29 are applicable to all employers in all industries. Parts 30-41 are only applicable to employers in specific industries (i.e. Oil and Gas Wells, Mining, Demolition). Some of the highlights of the 2009 revisions are:

- Part 5 *Confined Spaces* now distinguishes between a "confined space" and a "restricted space";
- Part 14 *Lifting and Handling Loads* has several new requirements regarding patient/client/resident handling with respect to health care facilities, aimed at preventing musculoskeletal injuries; and
- Part 18 *Personal Protective Equipment* provides new requirements for respiratory protection against airborne bio-hazardous material.

Among the most significant changes are those to Part 9 *Fall Protection*, which introduces more 'new requirements' than any other revised part of the *OHS Code*. In particular, Part 9 now prescribes a list of topics that must be addressed during fall protection training.

"This will hopefully be the end of the 4-hour fall protection training class," says Jason Laurie of Vertigo Solutions for Work at Height, a leading fall protection expert and the primary architect of the changes to Part 9 of the *OHS Code*.

As AEI expands its efforts to enforce Alberta's OHS laws as a result of an increase in the number of work-related fatalities in the Province it is more important than ever to ensure that your organization and its subcontractors are in compliance with the minimum requirements of Alberta's OHS laws. The difficulty of this challenge is amplified by the recent changes to Alberta's *OHS Code*. However, given that the average fine under the *OHSA* is in the range of approximately \$240,000, and the average cost of a work-related fatality falls within the approximate range of \$1,000,000, it is clear that making a pro-active investment in workplace health and safety will have a tremendous benefit. Responsible employers focus some of their attention and resources on the development, implementation and maintenance of an effective OHS management system

that is capable of demonstrating due diligence. Not only will this commitment assist in preventing the human, economic and legal costs associated with work-related injuries and fatalities, it will help put OHS issues back on the front burner where they deserve to be.

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