



BULLETIN

Supervisory "due diligence"

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by RACHEL NOTLEY



Does "due diligence" under the revised *Workers' Compensation Act* increase supervisory responsibility or liability?



Due diligence is a legal defence offered to employers and supervisors in the event that someone experiences damages in some way as a result of their action (or inaction).

If someone being held responsible for damages experienced by another, the first person can defend themselves by saying they diligently *tried* to prevent the event or accident from occurring. Due diligence has always been a factor considered in the enforcement of health and safety standards.

Many of the new sections contained in the revised *Workers Compensation Act* reflect long-standing obligations of employers and supervisors.

Nonetheless, the inclusion of "due diligence" language, along with new legislative reference to supervisory responsibility, has somehow created the impression that supervisory liability has been significantly increased under the new legislation. This supposition is inaccurate. Rather, because the new legislation gives a clear description of specific employer obligations, it is probably the case that there is a growing awareness of long-standing health and safety obligations that have been in place for years.

Prior to the proclamation of Bill 14 (*An Act to Amend the Workers Compensation Act of BC*), supervisory liability was described under the previous section 77 of the *Workers Compensation Act*. This section stated that where a "corporation" failed to comply with an order or a regulation, a director, officer, manager or supervisor could be held liable.

Under the *Regulation*, supervisors were responsible for ensuring that necessary corrective action was taken immediately when a report of a hazard was received. They were responsible for ensuring equipment and materials were maintained and operated safely. Finally, every supervisor was responsible for the proper instruction of workers under the supervisors direction, and for ensuring their work was performed without undue risk and in compliance with the regulation.

The new language contained in Bill 14 essentially sets out the same obligations, although it is organized differently in the new *Act* and *Regulations*. Section 117 of the *Act* specifically sets out supervisory duties, and includes:

- the obligation to be knowledgeable about the *Act* and *Regulations*,
- ensuring that workers are aware of the hazards in their work area, co-operate with the worksite committee and the WCB, and
- to ensuring worker compliance with the *Act* and the *Regulations*.

One very important supervisory responsibility is found in the "right to refuse" section. Section 3.12 of the *Regulations* states that "A person may not . . . cause to be carried out any [action] if to do so would create an undue hazard to the health and safety of any person." This obligation to prohibit employees from doing unsafe work is long-standing and is an integral component of supervisory due diligence when it comes to health and safety.

What does this mean for supervisors? It means that they must take reasonable care and follow the necessary precautions to ensure the safety of the workers under their supervision. However, they are not expected to be responsible for those things that are outside of their control (i.e. that require significant resource commitment). While the failure to commit the resources may well render the employer liable under the *Act*, the supervisor cannot be held responsible for something that is not within his or her power to direct.

The statutes governing health and safety require the supervisor to know his or her responsibilities, instruct and assess workers in the performance of safe work procedures on a regular basis, and ensure worker compliance with the *Regulations*. Supervisors must also ensure equipment and materials are properly handled, stored and maintained, communicate hazard information to workers, implement prevention measures, and generally correct unsafe conditions. In the event that any of these responsibilities cannot be met because of circumstances beyond the control of the supervisor, senior management should be notified. Having notified the employer of these problems, the supervisor has demonstrated due diligence.

Education materials developed by the WCB that address the issue of what constitutes due diligence make note that the standard of due diligence is one that must be assessed on a situation by situation basis. They state that the issues that are relevant to the consideration include the gravity of the potential harm, the likelihood of it occurring, the degree of knowledge or expertise to be expected and the degree of control over the situation.

Generally speaking, the WCB will consider the issue of whether an employer has properly implemented a health and safety program (as defined under section 3.3 of the *Regulations*) and the degree to which the supervisor has complied with and/or encouraged the employer to adopt a program. Ultimately, shortcomings in the program that relate to appropriate resource allocation (i.e. time for staff training, staffing levels, technical expertise required for risk assessments and development of safe written work procedures, resources for adequate equipment maintenance and/or replacement) are the responsibility of the employer not the supervisor.

Supervisors should be familiar with the health and safety legislation and regulations that apply to them. However, if these resource shortages are compromising worker safety, the supervisor must first advise the employer and then ensure that employees under his or her supervision are not allowed to perform unsafe tasks or operate unsafe equipment.

If the *Act* and *Regulations* are not currently available at your worksite, they can be obtained by calling the WCB at 276-3068 or toll free at 1800 661-2112, local 3068.

Rachel Notley is HSAs Occupational Health and Safety Officer.

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180 East Columbia
New Westminster, BC V3L 0G7

Website
www.hsabc.org

Telephone 604-517-0994
1-800-663-2017