Professional Impacts and Opportunities

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As was described in the previous presentation by Sabrina Virdis, Barrister & Solicitor, Case Officer Investigations Division Workers Compensation Board of British Columbia (in absentia)

... the Law, with respect to duty of care, has changed substantively, applying not just to the traditional workplace parties ...

and: the amendments dispose of the “directing minds” doctrine ... a corporation can therefore be held accountable for the actions of someone who is not necessarily the “directing mind” of the corporation (Bittle)
The first prosecution …

• just weeks after the law came into effect
• regional police laid criminal charges against the supervisor in a fatal trench collapse
• not at all the intended use of this amendment – upper management had been the intended target
• charges were resolved 2005.03.03
OK, so the CCoC’s got the CEO’s attention …

• How can we leverage this into a more consistently- and effectively- protective occupational hygiene function?
• How do the CCoC amendments impact on Occupational Hygiene practice?
• Let’s start with a synoptic retro- and prospective on the evolution of employer “duty”, and the recognition of OH accreditation in Ontario
1. First, there was the “general duty” clause

- OH&S Act, RSO 1980 (i.e. 1st consolidation)
- employer … shall take every precaution reasonable in the circumstances for the protection of a worker (25.2.h.)
- e.g. of use: MoL 2003.03.03: roofing contractor fined $10,000 and ordered jailed for 90 days
- “reasonable”, by inference / practice, included TLV®s as a standard, and ACGIH stipulation of their use only by those trained
- MoL has increasingly referenced CIH / ROH in writing orders
2. “due diligence” defence

- originated with R. v. Bata Industries
- VP was convicted of environmental violation, despite absence from site, because (according to the judge) “he … selected the substantially cheaper quote, without inquiring into why … thus failing to make an informed business decision”.
- accordingly, there was hereafter an expectation in law, that a company engage the services of someone duly / demonstrably qualified to do the work
3. engineers – societal expectation of a higher “duty of care” from professionals

• OH&S Act amendment:
• an engineer ... contravenes this Act if, as a result of his or her advice that is given ... negligently or incompetently, a worker is endangered." [s. 31(2).]
• Accordingly, the engineer is liable to a personal fine of $25,000 and / or imprisonment for 1 year; if a corporation, the maximum fine is $500,000.
“Engineering”?
4. Reg’n resp’g exposure

R.R.O. 1990, REGULATION 833 *Amended to O. Reg. 16/05*

- exposure assessment “ … in accordance with *recognized* … *hygiene practice* …
- i.e. withstand the scrutiny, and enjoy the endorsement, of recognized experts in occupational hygiene, as accepted by the Court
Corporate liability from incompetent / negligent OH work

if a hygienist or other person, with a mandate from the company, establishes policies and procedures that, when implemented, lead to “bodily harm”, the Crim. Code amendments provide for prosecution at a range of levels in the company…
“... wanton and reckless disregard ... bodily harm ...”

Bodily harm:
any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature
(Criminal Code of Canada)

wanton: gratuitously malicious; capricious
reckless: heedless, careless, rash
Due diligence defence …
Company had every reason to believe that OH was qualified and competent ‘cause:

- they were accredited by an IOHA-Recognized organization / process
- they are held to several / specific Codes of Ethics
- they maintain themselves up to date through professional development
- &c
Effectiveness of work by ROH/T

- has the requisite knowledge to “do the right thing”; knowledge includes recognizing their own limitations
- has demonstrated competence; accredited by professional organization
- appreciates the risk trade-offs between over- and under- protection
- optimizes workplace environment
Accredited OH, Health Canada

Accordingly, it is in everyone's best interests if those performing occupational hygiene functions are before-the-fact demonstrably qualified, based on a review by a recognized Board (see below).

<http://www.hc-sc.gc.ca/hecs-sesc/ehas/publications.canadian_handbook/volume3/chapter_h.htm#1>
Ineffectiveness of work of an OH “dabbler”

- unfamiliar with approach and content of a comprehensive OH survey
- may “miss the obvious”
- unsure of risk factors, and protection offered by available controls
- recommends excessive / unnecessary levels of control “just in case”
- results in frivolous / wasteful costs: monetary, physiological, psychological
e.g. 1: Hospital S, 1

- 2+ asbestos surveys conducted; extensive removals conducted throughout
- “missed” (e.g.) front foyer (1000s ft\(^2\), largely chrysotile, delaminating):
Consultant conducted air sampling for asbestos:

- analysis by PCM
- found levels “< 0.0000003 f/cc” (with a 276 L air sample)
- calculation error: detection limit actually over 5 orders of magnitude (i.e. 100,000 times) greater.
e.g. 1: Hospital S, 3

- engineer introducing ventilation system for toluene use area, based on odour complaints
- LEV / area was to be “explosion proof”
- simple mass balance suggested “overkill”
- max measured vapour levels (“worst-case” conditions): 20% of OEL, i.e. << LEL
- concept air flow would not have addressed odour complaints
- saved $100Ks, while actually improving AQ
e.g. 1: Hospital S, 4

- introduced use of RPDs during SARS
- NIOSH-approved
- based selection on HCW preference - they liked what looked familiar
- (later) fit-testing, after one-on-one fitting:
  - > 40% failure rate
“Directing” the work of others – OH liabilities?:

• setting the PPE requirements of a task?
• setting a work-rest regimen for heat stress prevention?
• setting an administrative control schedule?
• approving confined space entry?
• &c
O₂ in steel mill

The cause of their deaths has not been established, but officials are focussing on lack of oxygen.

Air tests taken at 10.15 a.m., shortly before the men entered the tank to perform maintenance work, showed an oxygen level of about 21 per cent, said Moira McIntyre, spokesperson for the Ministry of Labour. That's the normal oxygen content of air.

Tests taken at 11 a.m., after the accident, revealed a level of 8.5 per cent and "that was dangerously low," she said.

How the first air tests were done and by whom is a focus of the ministry's probe.

"That's a major query for us ... that's why we're investigating," Ms McIntyre said.

Dofasco Inc. spokesman Bill Gair confirmed tests after the accident for workers showed levels of "8 to 9 percent,"
e.g.s of w&rd ... 1

What happened at Westray?

"... a mosaic of actions, omissions, mistakes, incompetence, apathy, cynicism, stupidity and neglect ..."

— Westray Inquiry, December 1997
e.g.s of w&rd … n

• hospital CEO / Board? – if assign “masks” as RPDs, and 1+ HCWs become sick / die
Let’s be innovative … communicate the message … and then celebrate!