

## **BREAKFAST SEMINAR SERIES**

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### **OHS & WSIB Update**

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## **Seminar Overview**

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- Occupational health and safety
- Workplace safety and insurance
- Review of legislative and policy developments
- Review of significant case law developments

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## Occupational Health and Safety

### UPDATE

## Bill 160 Amendments

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- Passed 3<sup>rd</sup> reading May 18, 2011
  - Royal Assent received June 1, 2011
  
- Changes made to *Occupational Health and Safety Act* reflecting the recommendations in the Dean Report
  - Dean Report contained 46 suggested changes to the Act
  - Bill 160 implements many of these suggestions, not all in force

## Bill 160 Amendments

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- **Appointment of Chief Prevention Officer (CPO)**
  - Develop a provincial OHS strategy
  - Prepare annual report on OHS
  - Establish or amend standards for training programs and approve training programs
  - Provide advice to MOL
  - In force June 1, 2011

## Bill 160 Amendments

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- **Creation of the Prevention Council**
  - Advisory body to the MOL and CPO
  - Provide advice on:
    - Prevention of workplace injuries and occupational diseases
    - Provincial OHS strategy and annual report
    - Significant changes to funding and delivery of services
    - Appointment of CPO
  - Composed of trade union representatives, employers, non-unionized workers, WSIB and others with OHS expertise
  - Interim Prevention Council in place since February 2011

## Bill 160 Amendments

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- **Expanded Powers of JHSC Co-Chairs to Make Recommendations**
  - Single co-chair may make written recommendations, directly to employer, even when committee is deadlocked on particular recommendation
  - Co-chair recommendations will trigger the employer's duty to respond within 21 days
  - In force no later than April 1, 2012

## Bill 160 Amendments

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- **Additional Training for Health and Safety Representatives (HSRs)**
  - Employers must ensure HSRs receive training to allow them to effectively exercise their powers and perform their duties
  - CPO has authority to establish training standards and certify those who meet them
  - Passed but not yet proclaimed in force
  - Training standards for HSRs to be prescribed by Regulation

## Bill 160 Amendments

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- **Certification Standards for JHSC Certified Members**
  - Criteria for certification previously set by WSIB
  - Transferred to CPO
  - CPO may amend existing requirements
  - Deemed certified
  - In force no later than April 1, 2012

## Bill 160 Amendments

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- **Ministry of Labour, New Powers and Duties**
  - Promote OHS and prevention measures
  - Promote public awareness of OHS issues
  - Educate employer, workers about OHS
  - Foster a commitment to OHS among employers, workers
  - Make grants to support OHS
  - In force no later than April 1, 2012

## Bill 160 Amendments

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### ▪ Reprisals

- MOL inspector can refer reprisal complaints directly to OLRB, with worker's consent
  - Provided worker has not filed a complaint, or determined by arbitration under a collective agreement
- Employer must prove alleged reprisal was not based on enforcement of OHSA rights
- Ability of OLRB to expedite proceedings

## Reprisal Complaint Assistance

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- New Regulation under the OHSA (O. Reg. 33/12)
- Prescribes functions of Office of the Worker Advisor (OWA) and Office of the Employer Advisor (OEA) with respect to reprisal complaints
  - OWA to educate, advise and represent non-unionized workers in respect of reprisals
  - OEA to educate, advise and represent employers with less than 50 unionized and non-unionized employees about reprisals and referrals to OLRB

## **Mandatory Worker Training**

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- The Dean Panel recommended mandatory health and safety awareness training for all workers and front-line supervisors
- The Ministry created draft worker awareness workbooks and corresponding employer guides
- Consultation by the Ministry ended in February 2012

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## **Bill 168 Developments**

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## **City of Kingston and CUPE (Arbitrator Newman – August 2011)**

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### **Facts:**

- 28-year employee with a long history of disciplinary issues, many related to anger issues
- Terminated for culminating incident, allegedly threatened life of union's Local President

### **Findings**

- Termination upheld
- Threatening language is workplace violence
- Seriousness of incident given greater weight
- Workplace safety additional factor in assessing reasonableness and proportionality of discipline

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## **Application of the *Kingston* decision**

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- Number of other cases have dealt with discipline in conjunction with Bill 168:
  - The factors to be considered regarding appropriate discipline have been upheld
  - Affirmed that threats of violence are grave misconduct
  - Adequacy of the investigation will be considered
  - Just cause is still the standard to be applied in workplace violence cases

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## Practical Implications

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- Employers must react quickly and appropriately where allegations of workplace violence, including threats of violence
- Investigate allegations in thorough and fair manner
- Reasonableness and proportionality in responding to misconduct continue to apply
- Serious discipline, including termination, will often be accepted as appropriate in situations involving threats in the workplace

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## OLRB Defines Scope of Bill 168's Workplace Harassment Obligations

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### OLRB Findings from Recent Decisions

- OHSA's workplace harassment provisions are limited
  - Only require employer to put a workplace policy and program in place and provide further information and instruction to employees as appropriate
- OLRB does not have the authority to adjudicate workplace harassment complaints
  - May be dealt with by grievance procedure or civil actions

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## **OLRB Defines Scope of Bill 168's Workplace Harassment Obligations**

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### **Practical Implications:**

- Only recourse employees have before OLRB is whether employer has put in place workplace harassment policy and program
- Board's decisions do not impact workplace harassment obligations under other legislation, i.e. *Human Rights Code*
- Unlike workplace harassment, OSHA does impose obligations on employers to prevent workplace violence

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## **Bill C-45 and Due Diligence Update**

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## Bill C-45 Criminal Liability

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- **Criminal Code, Section 217.1**
- Enforced and prosecuted separately from OHSA
- Allows officers and directors of corporations to be found criminally responsible for a health and safety violation
- 1 trial conviction and 2 guilty pleas to date
  - All in Quebec
- Cases pending in Ontario and British Columbia

## Due Diligence: Issues to Take Back

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- Which sectors of your business are most likely to be hazardous?
- Employers need to address:
  - Provider and subcontractor standards
  - Hazard identification and standard review
  - Integrating safe practices into jobs
  - Enforcement through discipline of supervisors, employees, providers and subcontractors for violations

## **Disciplining for Safety Violations**

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- Applying progressive discipline for safety violations
  - Front-line supervisors' role
  - Consistent application
  - Integral part of due diligence defence
- A culture of health and safety will assist employer in upholding terminations due to violations
- Demonstrate to employees that safety issues are considered a workplace priority

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## **OHS Significant Case Law Update**

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## **Blue Mountain Resorts Ltd v. Den Bok (Ont. Div. Ct. – 2011)**

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### ▪ **Facts:**

- Guest at an unsupervised resort swimming pool drowned in December, 2007
- OHSa Inspector ordered Blue Mountain to report the death to the MOL under s. 51(1) of the OHSa

### ▪ **Findings**

- “Person” applies to all persons, employees or not
  - The unsupervised pool was a workplace regardless of whether or not a worker was at the site
- Appeal scheduled to be heard September 27, 2012

## **Blue Mountain – Practical Implications**

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- Significant implications for employers who deal with public
- Required to report all critical and fatal injuries in workplace when the incident arises from potential hazards or risks to employees, regardless whether injured person is a worker or member of the public
- Detailed analysis of each situation to determine if worker could have been injured by the risk or hazard
- Err on side of caution and report the injury

## **Ontario (Labour) v. United Independent Operators Limited (Ont. C.A. – 2011)**

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### ▪ **Facts**

- Order issued requiring United to establish a Joint Health and Safety Committee (JHSC)
- United argued they only had 11 full-time employees, rather than the 20 required by the OHS Act before a JHSC was required

### ▪ **Findings**

- Independent contractors considered workers
- “Regularly employed” interpreted generously
- A dispersed workplace and absence of a traditional employment relationship are not reasons to deny workers the benefit of a JHSC

## **United Independent Operators – Practical Implications**

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- Independent contractors now included when determining whether an employer must establish and maintain a JHSC
- Employers who previously were not required to establish a JHSC may have that obligation

## ***Plester v. Polyone Canada Inc.*** **(Ont. S.C.J. – 2011)**

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### ▪ **Facts**

- Plester was an employee with 17 years of service, supervisor for the last 6 years
- He failed to lock out a machine prior to cleaning, which was considered a serious mistake and failed to report the incident
- The employee was terminated following the investigation

### ▪ **Findings**

- Employer acted swiftly in face of the report
  - There were significant flaws in the investigation
  - Considering the contextual approach, dismissal was excessive
- Appeal filed January 23, 2012

## ***Polyone Canada – Practical Implications***

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- Investigations must be properly conducted, with due process given to affected parties
- A health and safety culture will be considered in court
- Consistent discipline is key
- A contextual approach to discipline must be considered when deciding sanctions

## Misconduct during MOL Investigation

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- **The MOL is imposing significant fines for misconduct:**
  - \$26,000 – refusing to answer questions, then lying to inspector
  - \$15,000 – failing to cooperate with Ministry inspectors
  - \$10,000 – forging the expiry date on a Provisional Certification of Qualifications
  - \$9,000 – disturbing an accident scene
  - \$4,000 – providing false information
- All awards are subject to a 25% victim fine surcharge

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## Workplace Safety and Insurance

### UPDATE

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## New WSIB Policies

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- New Work Reintegration (WR) policies introduced, effective July 15, 2011
  - Work Reintegration Principles, Concepts and Definitions (19-02-01)
  - Responsibilities of Workplace Parties in Work Reintegration (19-02-02)
  - Determining Suitable Occupation (19-03-03)
  - Work Transition Plans (19-03-05)
  - Work Transition Expenses (19-03-06)
  - Relocation Services (19-03-11)
- NEER Policy (13-02-02)

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## New WSIB Policies

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- Large scale review of return-to-work policies
- Significant change in approach, WSIB taking a more aggressive and active approach on workplace accommodation
  - Ensure workers are returned to work safely and as early as possible following recovery
- Emphasis on communication, cooperation and efficient return-to-work

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## **NEER Window Increased (Policy No. 13-02-02)**

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- Cost saving measure for the WSIB
  - Changes reflected on December 2011 statement
- NEER review window extended to 4 years, starting with 2008 accident year
- Designed to encourage employers to return employees to work
  - Focus is on return to accident employer, not the general labour market
  - Proactive management of claims required

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## **Work Reintegration – Important Considerations**

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- Responsibility of workplace parties
- Cooperation
  - Penalties for non-compliance – employer and worker
- Communication with WSIB and employee
  - WSIB meets with workplace parties no later than 12 weeks after date of injury if worker has yet to be returned to work
- Active participation
  - Return-to-work
  - Finding suitable occupation
  - Duty to accommodate to point of undue hardship

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## Lost Time Injury

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- Loss of earning (LOE) benefits represent the bulk of a WSIB claim
- Advocate for your own position, do not rely exclusively on what the WSIB says
- Employers should be as proactive and aggressive as necessary to pursue a return-to-work
- Proper NEER management can offset premiums with rebates

## Communication and File Management

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- File management is important
- Open a file for each claim, containing
  - Form 6, Worker's Report of Injury/Disease
  - Form 7, Employer's Report
  - Physical Demands Analysis (PDA)
  - Investigation documents
  - Correspondence with worker, WSIB, health care professionals
  - Functional Abilities Forms (FAF)
  - Written offers of modified work

## **Mandatory Coverage for Construction Sector**

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- Independent operators, sole proprietors, partners in a partnership and executive officers who work in construction required to have a WSIB coverage
  - Requirement begins on January 1, 2013
  
- Pre-registration available now for coverage in 2013
  - Pre-registration is free, no premiums to pay until 2013
  - Those who are already registered with the WSIB need not pre-register

## ***Good Government Act, 2011***

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- Received Royal Assent on March 30, 2011
  
- Four key changes to the WSIA
  - Raise threshold for Loss of Retirement Income (LRI) payment as an annuity
  - LRI documents are available to the surviving beneficiary of a deceased worker
  - All Non-Economic Loss (NEL) benefits are payable as a lump sum
  - NEL assessment reports are no longer automatically sent to employers

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## WSIB Significant Case Law Update

## Traumatic Mental Stress – *Decision No. 483/11 (WSIAT)*

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### Facts

- An education worker was accused of hitting a child
- A subsequent investigation cleared the worker, but she claimed significant psychological harm and an inability to work due to the accusations

### Findings

- The WSIAT set out three requirements for a traumatic event
- No requirement traumatic event be life-threatening triggering event
- Lowers the threshold for entitlement to benefits, shift from previous decisions

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***Questions?***