

# Occupational Health & Safety Bulletin

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### We're on the Web!

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## Due Diligence... A STANDARD OF PERFECTION?

As we present our services to help employers with a defense system to defend themselves in the event of a charge under the Occupational Health and Safety Act, the question always comes up "How can we possibly prevent every circumstance under the sun".

Well the bottom line is that we do not! The standard of Due Diligence does not impose a requirement to prevent every possible accident or anticipate every possible circumstance. What is required is to exercise reasonable precaution under the circumstances.

I can only repeat what has been said before by Carswell and their authors, EHSO 2009, Rel.1.

**"Where an employer or a constructor has in place a detailed and thorough health and safety system, and that system is functioning properly, and despite the assistance of that functioning system an accident nevertheless occurs, the party is not held responsible."**



The courts have acknowledged that employers and/or constructors should not be held responsible "for the isolated act of carelessness of a single workman...occurring despite an extensive system of competent supervision and well organized and ongoing program of safety instruction for workers..."

If an accident happens, and the accident is totally an unanticipated act, and is also contrary to company policy, procedures and training, then charges should not be levied on investigation or dismissed when presented to the courts.

To conceive that employers are expected to create an environment of perfection is unrealistic, if not impossible. Due diligence is not a standard

of perfection. An accused is not expected to take ALL conceivable steps to avoid an accident, but to take reasonable precautions to prevent an accident.

Again, to quote Carswell "The courts have acknowledged that decisions respecting matters, which may have led to an accident or contravention, are matters of judgment, which equally competent people may exercise differently. The fact that a prosecutor can present evidence of one expert to suggest that judgment could have been exercised differently, does not always lead to the conclusion that a corporation failed to use due diligence".

I personally believe that in the event of an investigation, the investigator is looking for fault. It is important to satisfy all the requirements of due diligence at this level as opposed to letting it go further.

(.... continued on Page 2)

*“Due diligence is a company’s only DEFENSE against fines and other penalties brought against it as a result of not adhering to the Occupational Health & Safety Act.”*



## Due Diligence...A Standard of Perfection?

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Also, in order to defend one’s self, employers should be aware of what information was provided on a Form 7 (WSIB Report of Accident or

Investigation Claim Form) and what to provide to investigators in the first place.

In subsequent newsletters,

we will address accident documentation and investigation forms including the WSIB Form 7. In particular, what’s privileged and what isn’t and how this could affect your outcome.

## Ministry of Labour Update

### Court Bulletin - Constructor, electrical contractor and supervisor fined a total of \$100,000 after worker killed

BURLINGTON, ON, Jan. 28, 2009 /CNW/ - Pomico Holdings Inc., P & M Electric (2000) Inc. and Vlado Kolich were fined a total of \$100,000 under the Occupational Health and Safety Act (OHS) on January 20, 2009 after a worker was electrocuted.

Separate investigations by the Ministry of Labour and the Electrical Safety Authority found that a 600 volt cable was improperly buried and connected without authorization at a construction site on Harvester Road in Burlington. A worker from another company, working on cleanup of the site, was electrocuted and killed when the worker touched a dumpster bin that had made contact with the improperly buried cable.

Pomico Holdings Inc., the constructor on the site, P & M Electric, the electrical contractor for the project, and Vlado Kolich, part owner and supervisor for P & M Electric, all pleaded guilty to failing to ensure that a warning sign was posted to warn workers of the hazard of an underground electrical cable, as prescribed by section 44(1) of Ontario Regulation 213/91. In the case of Pomico, this was contrary to section 23(1) (a) of the OHS) and it was fined \$70,000. P & M Electric violated section 25(1) (c) and was fined \$22,500. Mr. Kolich pleaded guilty under section 27(1) (a) and was fined \$7,500.

The case was a joint prosecution by the Ministry of Labour and the Electrical Safety Authority. P & M Electric was also fined \$60,000 and Vlado Kolich \$10,000 under the Electricity Act.

The fines were imposed by Justice of the Peace J. Woloschuk in the Ontario Court of Justice, Burlington. In addition to the fine, the court imposed a 25-per-cent victim fine surcharge on the total, as required by the Provincial Offences Act. The surcharge is credited to a special provincial government fund to assist victims of crime.

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