

WHO'S RESPONSIBLE?

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INTRODUCTION

I want to share some thoughts with you today. You may not agree with what I have to say. You may not like what I have to say. However, there are some things I believe you need to hear, to discuss and to think about. I am going to talk about responsibilities.

As individuals, each of us is responsible for his or her actions and inactions. If we drink and drive, we can expect to reap the wrath of the courts as a result of our actions. If we do not lock our vehicles, we should not be surprised when their contents disappear as a result of our inaction.

Construction sites, particularly those involving trenching and excavation, are hazardous places to be. Men and women are working in close proximity to heavy equipment. Materials are being handled and moved around. There may be overhead power lines. There may be buried facilities. There is noise. There may be dust or snow or rain. Visibility may be limited or restricted. Unstable soil conditions may develop or be created. There may be more than one company or crew working at the site. Things can happen quickly.

A lump of earth dislodged from ground level will take less than three quarters of a second to fall eight feet to the bottom of a trench and will be moving at fifteen miles per hour when it lands. Think about that. How far can you move in three quarters of a second?

Accidents can happen. Accidents do happen. Accidents will happen. We are all human. We make mistakes. We let our guards down. We let our attention wander. We take risks. We gamble. We even ignore or neglect to follow procedures that have been put in place for our benefit. Sometimes we just don't think. I know I have been guilty of all of the above. Have you?

The dictionary says an accident is a happening that is not expected, foreseen or intended. It also makes a tougher statement that an accident is an unpleasant and unintended happening, sometimes resulting from negligence that results in injury, loss or damage.

If we are lucky, we are able to walk away from an accident saying to ourselves: "I'll never do that again!" If we are not lucky, someone may be carried away from an accident in a box or a bag.

When an accident results in significant property damage, personal injury or death, Officers of the Workplace Health and Safety Compliance Branch of the Workplace Investments Division of Alberta Human Resources and Employment will investigate. They will get out their good book, interview everyone on site and determine who was responsible. They will work with Alberta Justice to determine if charges are warranted as a result of an investigation.

THE COSTS OF BEING HELD RESPONSIBLE

Many of us have a nodding acquaintance with the Occupational Health and Safety Code and its requirements. Fewer of us may be familiar with the Occupational Health and Safety Act or the Occupational Health and Safety Regulation. It makes scary reading. I urge you to go through it to see for yourselves what is required of a person.

I am a person. You are a person. The City of Edmonton is a person. ABC Contracting Ltd. is a person. As far as the courts are concerned any legal entity is a person. Under the Act, any person who contravenes the Act, the Regulation or the Code is liable to a fine of up to \$500,000 and/or a jail term of up to 6 months for a first offense. If the offense is

continuing in nature a further fine up to \$30,000 per day may be applied. The penalties can double for a second or subsequent offense. I don't have \$500,000 in loose change in my jeans. Do you?

REHABILITATION COSTS

If a particular accident involved personal injury or death the Workers' Compensation Board will become involved. Any costs incurred will be charged to the injured worker's employer's account. If the employer does not have an account, it will be charged to whomever the employee was working for. If the employer was working for you as a sub-contractor, you could get a nasty surprise.

That is why people who hire contractors demand WCB clearances before work starts and after work is completed. If you are hiring a contractor, make sure his WCB account is in good standing throughout the period of time he is working for you.

WCB assessments are based on an individual company's compensation experience within that company's industry classification. A company with a higher compensation experience will not be able to be as competitive as one with a better record. Sometimes we neglect to consider the effects of these costs.

EMPLOYERS

The Occupational Health and Safety Act defines an employer as a person who is self employed, a person who employs one or more workers, a person designated by an employer as his representative or a director or officer of a corporation who oversees the occupational health and safety of the corporation's workers.

I read that to say that the Mayor of Calgary is an employer under the Act unless he has specifically delegated health and safety concerns to someone else. More about delegation later.

Under the Act, every employer has the obligation to ensure, as far as it is reasonably practical for him to do so, the health and safety of both his and any other workers at the site and that his workers are aware of their responsibilities and duties.

We could spend the rest of the week discussing interpretations of the Act, the Regulation and the Code and probably still not agree. An employer has many obligations or responsibilities. Here are some that are critical.

1. He must identify and assess all existing and potential hazards at the work site.
2. He must bring those hazards to the attention of any workers who may be exposed to them.
3. He must take action to eliminate, control or reduce the hazards.
4. He must develop and communicate to his workers appropriate and adequate safe working procedures.
5. He must ensure his workers have appropriate and adequate resources, equipment and

tools to undertake the work activity in a safe manner.

6. He must ensure his workers are adequately trained in the use and limitations of equipment and tools and in the established safe working procedures.
7. He must ensure his workers are aware of their responsibilities and duties under the Act, the Regulation and the Code.
8. He must ensure that there are adequate and appropriate facilities and procedures for a prompt response in the event of an injury.

When Workplace Health and Safety investigates an accident, they will require more than just your word that something was or was not done. Responses such as: "Yes, he knew he wasn't supposed to do it that way." or: "Sure, we have procedures for doing that kind of work." just won't satisfy the investigation. Someone is going to say: "Show me." Documentation is required.

DOCUMENTATION

We all know that work sites involve hazards and that many routine tasks performed by our employees contain elements of hazard. Have you identified the potential hazards associated with each job function and task within your organization's scope of activity? Have you documented them? Have you established procedures for dealing with these potential hazards? Have you documented them? Have you trained your employees to recognize these potential hazards? Have you documented the training? Have you trained your employees in the proper procedures for dealing with the potential hazards? Has this training been documented?

What about contractors working for you? Do they do their own thing or must they follow your procedures? What documentation do you have for sub-contractors?

You are saying: "Aha, we need a safety program." If you think of a safety program as a separate package, as an add-on to your work load, then think about what will happen when times get tough, competition gets keen or a project gets behind schedule. If a safety program is an add-on, it will become a take-off and fall by the wayside.

I am not talking about a safety program. I am talking about how you do your business on a daily basis. I am talking about standards. A standard describes a condition that will exist when something is done in an acceptable manner. Standards must be specific, reasonable, clearly communicated, applicable to everyone and achievable.

Do we need a large procedural manual? I doubt it. The bigger they are the less likely they are to be read and the less likely they are to be kept up to date. Safe working procedures related to cable backhoes are not very appropriate to hydraulic backhoes. How many procedural manuals are the biggest binder on the shelf - the one with all the dust on it? Procedures, to be usable and effective, must be kept brief and simple.

Who should prepare procedures? Why go out and hire a \$400 a day consultant in a three piece suit to write procedures for you when you have the best talent right on your staff? Look at procedures as training documents. Who better to train a cat operator than the best operator you

have. If she doesn't know safe working procedures and the potential hazards related to cat work, who will? If she is not comfortable writing out procedures, take notes from her verbal comments. Use her words and get her agreement and approval before the document is officially blessed. What a way to get employee input, to make them feel wanted and important and to get them to buy into accepting and following procedures.

TRAINING

What is adequate training? When push comes to shove, the courts will determine whether or not training is or was adequate. The objective of training is to improve competency. Training may be to government established standards such as compulsory trades certification, to industry developed standards such as published best practices or industry recommended practices or to individual company developed standards. From a diligence perspective, the adequacy of training will be judged against the standard of your industry not against some hypothetical ideal.

Training is not a one shot situation. It must be on-going. Rather than send employees to time consuming and often expensive seminars consider using individual employees or groups of employees as a resource to put on short, perhaps tailgate, training sessions for their fellow workers. Rather than saying "thou shalt," consider encouraging employee input and discussion toward the desired objectives.

Regardless of the training approaches or methods you choose to use, documentation that the training took place is very important. Sign in sheets showing the date and topic discussed could serve you well if you are required to prove that an employee did receive training.

SUB-CONTRACTORS

Whether you are an owner, prime contractor or contractor, a company performing work for you should follow your procedures. After all you are paying them. Would it not be most appropriate to make adherence to your procedures part of the contractual agreement?

Keep in mind that all employers, regardless of whether they are an owner, a prime contractor, a contractor or a sub-contractor are obliged to ensure the health and safety of their workers. If you require a sub-contractor to adhere to your procedures you should make sure that you are not transferring that obligation to ensure the health and safety of his workers from him to you.

Consider the message you would be giving your employees if a sub-contractor is allowed to follow less stringent procedures on your work site. Double standards are counter productive to the achievement of objectives. They foster a "them and us" attitude.

How many of you have a shop or maintenance area within a building with a "hard hat area" sign on the door? Who goes in there without a hard hat? Right - the office staff. Do shirts and ties make heads less susceptible to damage than coveralls? That is a double standard. A standard must apply to everyone.

DELEGATION

In any organization, the ultimate authority rests with the top man. It might be the mayor, the president, the chief executive officer or the owner. Hand in hand with authority goes responsibility. We may call it accountability rather than responsibility. You cannot have responsibility without authority and vice versa.

If you, as the head honcho, do not want to be held accountable or responsible for the workplace health and safety of your workers you may delegate that responsibility to someone else. However, to protect yourself, you had better document that delegation and the corresponding authority. What authority? - The authority to establish procedures, to train workers, to use corporate resources for tools and equipment that will allow work tasks to be done safely and efficiently.

Would you accept responsibility, knowing the costs of being found responsible, without being given the authority and resources to achieve the objectives? I think not.

Documented delegation, by itself, is probably not adequate. To further protect yourself, you need to be able to demonstrate that you regularly audit that person's performance with respect to regulatory compliance and solicit feedback from him

DISCIPLINE

What do you do about the employee who won't follow your safe working procedures? Let's consider two different situations.

In the first, an employee out and out refuses to follow procedures, jeopardizing the safety, not only of himself but of his fellow workers. One way of dealing with this situation is to have your ducks in a row beforehand. You have the authority to make adherence to your safe working procedures a condition of employment. A new employee can be required to sign an agreement to the effect that failure to follow the procedures shall be cause for dismissal. But you had better be prepared to enforce that agreement consistently. If you don't, and you allow an infraction to go unchallenged, you are condoning the infraction and in effect establishing a new procedure.

In the second, an employee forgets to follow procedures or does something without considering the consequences first. Don't ignore the situation or let it pass. You should make the employee aware of his lapse, reinforce the correct procedure, inform the employee that you will note the lapse in your diary and do so. Should the employee make the same mistake again you will have documentation in your diary that the problem has been addressed before which will allow and justify further disciplinary action.

Somewhere in your procedures you must cover what will happen if procedures are not followed. Do not make empty threats. Procedures are standards applicable to everyone. You must be vigilant and ensure that they are followed consistently.

There used to be a very interesting and appropriate sign in the Edmonton Municipal Airport that put procedures in perspective. It said "You don't have to go through security." then added "You don't have to fly."

Don't forget that you cannot discipline an employee who refuses to undertake a task because he

believes it will place him or other workers in imminent danger.

EMPLOYEES

Every worker has some significant obligations and responsibilities.

1. He must take reasonable care to protect his health and safety that of his fellow workers while he is working.
2. He must cooperate with his employer to protect his health and safety and that of his fellow workers and anyone else on the site.
3. He must not carry out any work if, on reasonable and probable grounds, he believes there is or will be an imminent danger to himself or any other worker at the site and shall so notify his employer.

Who has the ultimate decision as to whether or not a work task is done? The worker, the individual who is going to do the work has the right and the obligation to make that decision. The Act covers the procedures to be followed by both the worker and the employer when a worker refuses to undertake a task because of his reasonable belief of its being dangerous.

Workers are not just warm bodies with strong backs and weak minds. They are expected to think and to be responsible for their actions. When they perceive a work task to present a risk to their health and safety or that of other workers, they should expect their concerns to be taken seriously.

COMPETENCY

Workers are considered to be either competent or not competent. The term incompetent is not used. A competent worker is a worker who is adequately qualified, suitably trained and has sufficient experience to perform the work required without or with only a minimal degree of supervision.

Where work is to be done which may pose a danger to any worker it shall be done only by a competent worker or a worker who is not competent working under the direct supervision of a competent worker.

Direct supervision requires personal and continuous visual supervision with the capability of easy and clear communications.

WORDS

Accidents involving personal injury or death often lead to charges under the Occupational Health and Safety Act and someone ends up having to defend his actions or inactions. The legal profession enjoys its own language. We need not understand all the subtleties of the words lawyers use but a basic understanding is necessary.

Diligence is the degree of attention or care expected of a person in a given situation.

Negligence is the failure to use a reasonable amount of care when such failure results in injury or

damage to another.

Something that is **practical** is usable, workable, useful and sensible or, concerned with or dealing realistically and sensibly with everyday activities or work.

Practicable means feasible or possible.

Something that is **probable** is likely to occur or can reasonably but not certainly be expected.

Someone who is **prudent** is capable of exercising sound judgement in practical matters especially those concerning his own interests, is cautious or discreet and not rash.

Reasonable implies using or showing reason or sound judgement, being sensible or just and not being extreme, immoderate or excessive.

ATTITUDES

Some people differentiate between attitude and behaviour. If attitude is considered to be the way an individual chooses to respond to all the stimuli encountered in daily life, there is little to choose between the two words.

Consider the waterworks foreman who says he doesn't have time to use a trench box when he has to repair a leaking valve. He has probably supervised many such repairs without using a trench box without accident. However, one day the excavation caves in killing a worker. The foreman didn't have time!

Let's think about time in this situation:

- How many man days will be lost to attend the worker's funeral?
- How many man days will be lost while other workers are counselled and come to accept their near deaths?
- How many man days will be lost to soul searching by the foreman?
- How many man days will be lost while the incident is investigated?
- How many man days will be lost to hearings and court proceedings?
- How many man days will be lost for the dead worker and his family?

The foreman didn't have time! There are no rewards for placing lives on the line. Think about your attitudes.

JUDGEMENTS

In the January 1994 issue of Occupational Health and Safety Magazine, there was an article in the Perspective column by Charalee Graydon, a lawyer, on "Sentencing Offenders in Alberta for

Occupational Health and Safety Offenses".

The article is well worth reading. The Alberta Court of Queen's Bench has indicated that the following matters are to be considered in determining sentences:

"The Offense: *What duty was imposed upon the accused - under what circumstances did the accused fail to carry out the duty imposed? What knowledge did the accused have - was the operation of the employer a high risk operation or a low risk operation? Consider all aspects of the offense and its commission to assess and weigh the negligence of the accused as simple or gross or something in between. Gross negligence should attract a higher fine - less, a lower."*

"The Injuries: *It is often argued that one should punish for the offence not the consequences of the offense. There is logic in that argument but the life of the law remains experience not logic. A breach of the Regulations which results in no injury to anyone will obviously not attract the same punishment as a breach of the Regulations which results in a workman's death. So the second factor is a consideration of the injuries sustained. Minor injuries need not lead to heavy fines nor custodial sentences. Death and serious and permanent injury ought to attract heavy fines and in appropriate circumstances, (perhaps second offenses) custodial terms."*

"The Purpose of the Occupational Health and Safety Act: *The purpose of the Act is to protect the worker in the work place. The punishment meted out for offenses under the Act will advance or detract from that purpose. In short, punishments under the Act will have a deterrent effect upon the person punished and on all engaged in similar activity. This is not to say that other factors such as rehabilitation of the accused, the attitude of the public to this kind of crime, etc., ought not to be taken into account. But, the factor of deterrence is the factor in sentencing which deserves the greatest emphasis in offenses under the Occupational Health and Safety Act."*

Ms. Graydon also provides examples of factors likely to result in significant fines and/or imprisonment.

- The victim was particularly vulnerable.
- The victim did not contribute to his or her own injuries.
- The injuries led to the victim's death or were serious and possibly permanent.
- The offender knew of the risk or danger, yet did not take steps to prevent the incident.
- The offender did not take steps to inform himself, herself or itself fully of the possible hazards.
- The corporation was willfully blind to the danger of its workers, placing profits ahead of safety.
- The corporation had no safety procedure manual or no safety training program.
- There were previous convictions.
- The corporation or offender has not shown remorse.

- The corporation or offender has gained an advantage over its competitors as a result of non-compliance with the Act or Regulations.

WHO'S RESPONSIBLE?

You will be if you have done nothing.

You might be if you have done only part of the job.

You will not be if you have been diligent and prudent and have done everything that can be reasonably expected.

When you leave this seminar and return to your work place, look at yourselves in the mirror and ask yourselves if you are satisfied that you personally and your organization have done and are doing everything reasonable to address your responsibilities.

Give some thought to how you conduct your business on a daily basis.

Make safety a way of life - make it your way of life.