

Introduction by

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The Occupational Health and Safety Act which came into law in 1979 has gone through major revisions in the last 20 years. Major changes were made with the passage of Bill 208 in 1990, the Economic Development and Workplace Democracy Act in 1999, and the passage of Bill 57 – the Omnibus Efficiency Act in 2001. This edition of OPSEU’s “A Worker’s Guide to the Occupational Health and Safety Act” includes these most recent changes to the Act.

The Guide provides you with basic information and interpretation of the Act. It answers questions about your rights and your employer’s legal obligations. References to the relevant articles of the Act are highlighted after each section. We have included a section on health and safety case law that provides you with some of the major rulings on various appeals and reprisal complaints that further clarify the application of the Act.

Thousands of Canadian workers are killed or injured on the job every year. They are the reason our union must be deeply committed to strengthening laws that govern health and safety in the workplace.

The protections of the health and safety law will not come automatically. Change will not come about when the experts decide that something must be done. It will only come when workers and their union refuse to be poisoned and maimed on the job. Only your dedicated efforts can make sure that the law is enforced to protect the health and safety of workers. It’s a matter of survival. That’s why you need to learn your rights outlined in this book and actively participate as a health and safety

representative or on a joint health and safety committee in your workplace. In turn – your efforts to improve health and safety in Ontario workplaces show employers, policy makers, and governments that safe workplaces are a priority, and that Ontario laws need to be strengthened – not weakened, to protect the lives of Ontario workers. Your union is committed to help – this Guide has been prepared to assist workers in these efforts.

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A Worker's Guide to the Occupational Health and Safety Act

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PART A:

Application Of The Act

Who is covered by the law?

- The Occupational Health and Safety Act, as amended in 1990 by Bill 208, now covers almost all workplaces in Ontario. A workplace is wherever a worker performs work. The Act applies to workers, employers, supervisors, contractors, owners of premises and suppliers of materials and equipment.
- It also covers people who hold logging licenses under the Crown Timbers Act, and self-employed workers.
- Public school and university teachers are also covered by the Act with the enactment of *Regulations 191 and 307*.

Who is not covered by the Act?

- The Act does not apply to farming operations and work performed by an owner/occupant or domestic servants in a private residence.
Sec. 3, Sub. 1 and 2
- The Act does not apply to workplaces under jurisdiction of the federal government of Canada, such as post offices, airlines and airports, the telecommunications sector and inter-provincial transportation services.

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PART B:

Duties And Responsibilities

What are the duties of the employer?

The employer must:

- Take all reasonable precautions for the protection of workers. This includes taking appropriate measures to protect susceptible or disabled workers
Sec. 25, Sub. 2 (h)
(see Part L: Case #6, #7).
- Provide information, instruction and supervision for the protection of workers.
Sec.25,Sub. 2(a)
- Ensure that all supervisors have a working knowledge of the Act and regulations as well as any actual or potential hazards at the workplace.
Sec. 25, Sub. 2 (c) (d)
- Ensure all equipment required by the Act or regulations is provided, maintained in good condition and used properly by workers.
Sec. 25, Sub. 1 (a) (b) (d)
- Develop and review annually a written health and safety policy, post it in the workplace, and maintain a program for its implementation.
Sec. 25, Sub. 2(j) (k)
- Ensure that work practices required by the Act and regulations are carried out.
Sec. 25, Sub. 1 (c) (d)
- Ensure that health and safety committees and representatives are selected as required.
Sec. 8, Sub. 1 and Sec. 9, Sub. 4

The employer must include a timetable for implementation or reasons for not agreeing with the recommendations

- Cooperate and afford assistance to the joint committee and its members, and health and safety representatives in carrying out their duties.
Sec. 25, Sub. 2 (e)

- Give a written response to joint committee recommendations within 21 days. This must include a timetable for implementation or reasons for not agreeing with the recommendations.
Sec. 9. Sub. 20 and 21

- Provide joint committees and health and safety representatives with any health and safety reports in his possession.
Sec. 25, Sub. 2 (l)

- Advise workers of the results of any health and safety reports in his possession and make copies available upon request.
Sec. 25, Sub. 2(m)

- Provide a medical surveillance program for workers where required by regulation, pay for all medical tests and travel expenses, and provide paid time off work.
Sec. 26, Sub. 1 (h) (i) and Sub. 3

- Carry out training programs for workers, supervisors and committee members where required by regulation.
Sec. 26, Sub. 1(1)

- Provide written notices within 48 hours to the Ministry of Labour, joint committee, health and safety representative and the trade union when workers are killed or critically injured.
Sec. 51, Sub 1

- Provide written notice to the Ministry of Labour, joint committee, health and safety representative and the trade union when workers are disabled or require medical attention as a result of an accident, fire or explosion.
Sec. 52, Sub. 1

The employer must ensure that all supervisors have a working knowledge of the Act and regulations as well as any hazards at the workplace.

- Give written notice of any occupational illness of current and former employees to the joint committee, the union and the director within four days of being advised of such an illness or where a WSIB claim has been filed for such an illness.
Sec. 52, Sub. 2 and 3
- Post inspectors' orders in the workplace and provide joint committees and health and safety representative with copies of these.
Sec. 57, Sub. 10

What are the duties of supervisors?

A supervisor must:

The supervisor is responsible to ensure that workers follow all safety procedures.

- Ensure that workers comply with the Act and regulations.
Sec. 27, Sub. 1(a)
- Ensure that workers wear or use required protective equipment, and follow all required measures and procedures.
Sec. 27, Sub. 1(b)
- Advise workers of all existing and potential hazards.
Sec. 27, Sub. 2(a)
- Provide written instruction to workers on measures and procedures to be taken where required.
Sec. 27, Sub. 2(b)
- Take all precautions reasonable in the circumstance for the protection of workers.
Sec. 27, Sub. 2(c)
- The supervisor is responsible to ensure that workers follow all safety procedures. It is not enough to warn workers about dangers or safety rules, and then turn a blind eye to violations. They must tell workers about the hazards and ensure that they follow the safety procedures.

What are the duties of workers?

- Workers must work in compliance with the Act and regulations.

Sec. 28 Sub. 1 (a)

- Workers are not required to participate in medical surveillance programs unless they consent to do so. However, under *Section 26, Sub. 1 (j)* an employer cannot permit a worker to work unless the worker has undergone medical examinations or tests required by a regulation and is found fit to work.

Sec. 28, Sub. 3

NOTE: In order to protect a worker's right not to be forced to take medical examinations, Ontario's regulations will have to be changed.

- Workers must follow all required procedures and wear or use all required protective equipment.

Sec. 28, Sub. 1(a) and (b)

- Workers must report all safety defects in equipment or any hazard to the supervisor or employer.

Sec. 28, Sub. 1(c) and (d)

- Workers must not remove any required protective devices.

Sec. 28, Sub. 2(a)

- Workers must report all violations of the Act and regulations and hazards to the supervisor or employer.

Sec. 28, Sub. 1(d)

- Workers must not work in a manner or use defective equipment that might endanger the worker and others. In this instance a worker has a legal obligation to refuse work.

Sec. 28, Sub. 2(b) (c)

Workers must report all violations of the Act and regulations and hazards to the supervisor or employer.

What are the duties of owners and constructors?

- An owner must determine if there is a designated substance on site, prepare a list of the substances and provide this list as part of any tendering information and ensure that constructors receive a copy before entering into a contract. The constructor must ensure that all contractors or subcontractors receive a copy before entering into a contract.

Sec. 30, Sub. 1,2, 3,4

- A constructor must give written notice to the Ministry of Labour, joint committee or health and safety representative and the trade union of any accident or unexpected event that occurs on a project even if no one is injured.

Sec. 53

What are the duties of architects and engineers?

- Architects and engineers are now liable to prosecution if their advice or certification of a structure endangers workers.

Sec. 31, Sub. 2

What are the duties of directors and officers of corporations?

- Officers and directors are legally liable to ensure that there is compliance with the Act and the regulations.

Sec. 32(a)

PART C:

Your Right To Participate

Where are joint health and safety committees required?

Joint committees are required in the following workplaces:

- All workplaces where 20 or more workers are regularly employed.
Sec. 9, Sub. 2
- All construction projects with 20 or more workers and lasting more than three months.
Sec. 9, Sub.1(a) and 2(a)
- With the exception of construction projects, in those workplaces where designated substances such as asbestos, lead, etc., are present.
Sec. 9, Sub.2(c)
- In any workplace where an order has been issued under section 33 of the Act to control toxic substances.
Sec.9, Sub.2(b)

A joint committee is required in all workplaces where 20 or more workers are employed

How do you calculate the number of workers?

- To determine the number of workers in your workplace, the total number of all full-time and part-time workers on all shifts must be included. A worker does not have to be on the worksite for a full eight hours to be counted, as long as there is a consistent pattern of employment.

Negotiated safety committee systems may go beyond the provisions of the Act, such as committees that comprise numerous workplaces.

What workplaces are excluded from having joint committees?

- A construction project lasting less than three months.
Sec. 9, Sub. 1(a)
- All workplaces with fewer than 20 workers.
Sec. 9, Sub.2(a)
- All workplaces that may be exempted by special regulation.
Sec. 9, Sub. 1(b)

Can joint committees be requested where they are not required?

- Yes. The Minister of Labour has the power to order the establishment of a committee after considering a request by any party and the extent of hazard in the workplace.
Sec. 9, Sub.3 and 5
- Negotiated safety committee systems may go beyond the provisions of the Act, such as area-wide, ministry-wide, agency or campus committees that comprise numerous workplaces. It is vital that these be legally sanctioned by the minister under *Sec. 9, Sub 3, 3.1, 4, and 5*. The minister will usually sanction these where a joint request is made by both union and employer.

What about workplaces with more than one location?

- In the case of an employer with several work locations, the requirement for a joint committee applies to each workplace, not to the employer's entire operation, unless the worksites are close to

one another and carry out related work under a common set of managers.

- Some work operations have scattered work locations where no single worksite has more than 20 workers, but the whole operation may have over 20 or over 50 employees.

In this case, no one worksite meets the criteria for the establishment of a joint committee, and your employer may not feel compelled to form a committee.

In these circumstances, the following options are available for the establishment of a joint committee:

- 1.) A complaint to a Ministry of Labour health and safety inspector about the absence of a joint committee might result in an order from the inspector for the establishment of a joint committee that covers the entire operation; or failing this,
- 2.) Under Sections 9 (3) and (5) workers can request that the Minister of Labour order your employer to establish a joint committee that covers the entire operation. When dealing with the union's request, the Minister or his/her designee (usually the regional director) must consider the following:
 - the nature of the work, eg. how hazardous it is;
 - the frequency of illness and injury in the operation or the sector;
 - the existence of health and safety programs and practices;
 - whether the request is made jointly or just by the union.

The success of your effort will depend on the local union making a strong case for the committee's establishment. The union will have

to show that workers face serious hazards and need an avenue to raise and address them with the employer.

To do this, your local union will have to gather information about the employer's health and safety record. Under Sections 51 and 52, the employer is required to give the union written notification of all injuries, fatalities and occupational illnesses. The union is also entitled to request and receive an annual summary of occupational injury and illness data for that workplace from the WSIB.

Sec. 12, Sub. 1,2

Can you have one joint committee cover multiple worksites where a joint committee is required at each?

In some cases the employer's operation may have multiple worksites where a joint committee is required at each site. However, Section 9 (3.1) gives the Minister of Labour the power to issue an order that permits an employer to establish one joint committee for more than one workplace. In this regard, it is important to note the following:

- a single joint committee for multiple worksites is illegal unless ordered by the Minister under Section 9(3.1);
- a submission must be made by the workplace parties which includes a signed agreement between the union and the employer which spells out complete details on how the joint committee is to function;
- the Minister will assess the submission based on the criteria set out in Section 9 (5) as well as any additional criteria that the Minister requires such as location and distance between workplace,

travel and related costs, and the ability of members to perform their duties;

- the process is initiated by a letter and submission to a Regional Director at the Ministry of Labour who has been delegated to consider the request and authorized to issue an order.

What is the minimum size of joint committees?

- All workplaces with 50 or more workers must have at least four committee members; at least one half of them must consist of workers selected by the union.

Sec. 9, Sub. 6(b)

- All workplaces with between 20 and 49 workers must have at least two members; at least one half of these must be workers selected by the union.

Sec. 9, Sub. 6(a)

How large should a committee be to work effectively?

- The Act sets the minimum size of committees. As a rule, it is important to ensure that committees are large enough to represent the concerns of all workers, with representatives from most departments or areas of the workplace.

Sec. 9, Sub. 6

How must committees be composed?

- All committees must have co-chairpersons, one representing workers and one representing the employer.

Sec. 9, Sub. 11

It is important to ensure that committees are large enough to represent the concerns of all workers.

- All committees must have at least one management and one worker member who have been certified by the Workplace Safety and Insurance Board (WSIB) after they have met the certification training requirements established by the WSIB. Rights and duties of certified members are covered later in this Guide.

Sec. 9, Sub. 12, 13, and 14

- Worker members on the committee must come from the workplace, while employer members must come from the workplace to the extent possible.

The committee must be consulted about any health and safety testing being carried out.

How are health and safety committee members and health and safety representatives chosen?

- A health and safety representative is chosen by the workers from among them.

Sec. 8, Sub. 1

- If there is a union, it will select worker representation to the Joint Health and Safety Committee. If there is no union, the workers will select representation.

Sec 9, Sub. 8

What are the rights and duties of joint committees?

- The committee has the power to identify hazards and make recommendations for their correction.

Sec. 9, Sub.18(a)(b)(c)

- The committee has the power to schedule monthly inspections.

Sec. 9, Sub. 26, 27 and 28

- The committee must receive a written response to its recommendations from the employer within 21 days. This would also include a requirement to respond to worker member recommendations in the absence of joint recommendations. The response must contain a timetable for implementation or reasons why the employer disagrees with the recommendation.

Sec. 9, Sub. 20 and 21

- The committee has the power to obtain information from the employer on any actual or potential hazard or any experiences, practices and standards of which the employer is aware.

Sec.9, Sub.18(d)

- The committee must be consulted about any health and safety testing being carried out, and has the right to have a worker member present at the beginning of such testing.

Sec. 9, Sub.18 (f)

- The committee must be consulted about hygiene testing strategies developed by the employers.

Sec. 9, Sub.18 (e)

- The committee must be provided with any health and safety reports in the employer's possession.

Sec. 25, Sub.2 (l)

- The committee and the union must be given notices of all critical or fatal accidents, accidents resulting in injury, and all occupational illnesses.

Sec. 51, Sub. 1; Sec. 52, Sub. 1,2 and 3

- The committee, a worker, the union or an employer has the right to request and receive an annual summary of work-related accident and illness data from the Workplace Safety and Insurance Board. The employer must post a copy of the summary in a conspicuous place in the workplace.

Sec. 12, Sub.1, 2

The committee must be given copies of any reports or orders issued to the employer by an inspector.

It is essential that a written set of operating procedures and committee terms of reference be established through a memorandum of agreement.

- The committee or health and safety representative must be given copies of any reports or orders issued to the employer by the inspector. The worker who made the health and safety complaint must request the report or order from the inspector.

Sec. 57, Sub.10(a)(b)

- The committee must have an opportunity to participate in the development and implementation of worker education and training programs required by the Workplace Hazardous Materials Information System (WHMIS) regulations.

Sec. 42, Sub.1 to 4

- At least one management and one worker member of the committee must become certified after undergoing certification training requirements established by the Workplace Safety and Insurance Board (WSIB).

Sec. 9, Sub. 12, 13 and 14

- A committee is required to meet at least once every three months. But it may be necessary to meet more frequently in workplaces that are particularly hazardous.

Sec. 9, Sub. 33

- The Act requires that minutes of meetings be recorded, maintained and made available for review by an inspector. These should indicate the problems raised, their resolution and what action was to be taken by whom.

Sec. 9, Sub. 22

What happens if a dispute arises over committee requirements?

- The Minister should be notified of the dispute. The Ministry will refer the parties to private

dispute resolution. Should this fail, the Minister will make a ruling.

Sec. 9, Sub. 39

What should workers and unions insist upon before participating in a joint health and safety committee?

- It is essential that a written set of operating procedures and committee terms of reference be established through a memorandum of agreement between the union and the employer.

This memorandum should include the following:

- the composition of the committee;
- the functions and powers;
- the entitlements of worker members;
- procedures for conducting meetings;
- minutes;
- quorum;
- procedures for raising and resolving concerns;
- information entitlements;
- frequency of meetings;
- certification training process;
- health and safety training.
- This memorandum must set out all those procedures, functions, powers and entitlements that are required by the Act as a bare minimum. Additional supports to assist the committee must also be considered. Consult your staff representative for a model agreement to guide your efforts.

What are the rights and duties of worker members of joint committees?

Inspections:

- A worker member selected by the workers on the committee has a right to inspect the workplace at least once a month.
Sec. 9, Sub. 23 and 26
- Where it is not practical to inspect the entire workplace once a month, it must be inspected at least once a year. However, at least part of the workplace must be inspected once in each month in accord with a schedule of inspections that must be established by the committee.
Sec. 9, Sub. 27 and 28
- Inspections do not have to be carried out by the same person. It is possible to select other worker members to conduct inspections.
Sec. 9, Sub. 25
- The worker member conducting inspections must be given information from the employer to assist in the inspection. He or she must report all hazards to the committee. This should be done immediately after the inspection.
Sec. 9, Sub. 29 and 30
 - *The committee must review this reported hazard within a reasonable period of time which may require the committee to meet more frequently than once every three months.*
Sec. 9, Sub. 30

The worker member conducting inspections must be given information from the employer to assist in the inspection.

Investigations:

- A worker member selected by workers has the right to investigate critical or fatal accidents. The worker must report the findings to the committee and the director of the appropriate ministry inspection branch.

*Sec. 9, Sub. 31; Sec. 51, Sub. 2;
Reg. 834 (Critical Injury-defined)*

- Members selected to investigate where workers are killed or critically injured should interview witnesses and collect relevant information. The Act says “investigate.”

Testing for hazards:

- A worker member has the right to be present at the beginning of any health and safety testing, including hygiene testing at the workplace.

Sec. 9, Sub. 18(f) and Sub. 19

- The worker member must ensure that the device or area being tested is representative of actual conditions and that the testing equipment and procedures are appropriate. He or she must be given sufficient time and information to make these determinations.

Worker members must be given at least one hour paid preparation time prior to joint health and safety committee meetings.

Do worker members get paid preparation time?

- Yes. Worker members must be given at least one hour paid preparation time prior to joint health and safety committee meetings.

Sec. 9, Sub. 34(a)

Are worker members entitled to paid time off to perform their duties?

- Yes. Workers must be given time off to attend meetings, carry out their duties to inspect the workplace, investigate accidents, represent workers during refusals, witness tests and accompany inspectors.
Sec. 9, Sub. 34 (b)(c); Sec. 43, Sub. 13; Sec. 54, Sub. 3 to 5
- The Act says that the performance of these duties and rights is considered work time, paid at the worker's regular or premium rate of pay.
Sec. 9, Sub. 35 and 36; Sec. 43, Sub. 13; Sec. 54, Sub. 5

How do designated joint committee members become certified?

- Designated worker and employer members must be certified by the Workplace Safety and Insurance Board after completing the training requirements established by the Board.
Sec. 12 and 36

Who pays for the certification training?

- The employer must pay you during the training and assume all cost including reasonable expenses associated with the delivery of the training.

Sec. 36 and O.Reg. 780/94

Who provides the certification training and what must be taught?

- All certification training providers and their training programs must be approved by the WSIB. Each provider and their training program must satisfy the criteria established by the WSIB. Anyone can provide the training as long as they meet the criteria set out in the WSIB's "Certification Training-Program Standard".

The criteria provide only broad terms of reference for how and what must be taught. It does not give any time requirements or other details about the content. Consequently, training quality and duration can vary greatly.

Because the Act, Regulation and Program Standards are silent on who can choose the provider and how much training time is appropriate, it is important for local unions to negotiate contract language that requires that the training program comes from the labour-based Workers Health and Safety Centre. This is the only way to ensure that workers receive a quality program.

(See OPSEU Health and Safety Policies, P.62)

What are health and safety representatives and where are they required?

- A health and safety representative must be selected by the union in all workplaces where more than five, but fewer than 20 workers are regularly employed.

Sec. 8, Sub.1

- Where a representative is not specifically required by the Act, the Minister of Labour may order that a representative be selected.

Sec. 8, Sub.2

What are the duties and rights of health and safety representatives?

- The health and safety representative has the same powers and rights as the joint committee and its worker members, except that the health and safety representative is not required to become certified. In addition the Act is silent on the matter of paid preparation time for representatives.

Sec. 8, Sub. 6 to 16

- The health and safety representative has a legal obligation to inspect the workplace at least once a month, in accordance with an inspection schedule agreed to by the representative and the employer.

Sec. 8, Sub.6

- A health and safety representative has the power to recommend corrective action to the employer.

Sec. 8, Sub. 10

- He or she must receive a written response from the employer within 21 days to all recommendations. This response must indicate a

timetable for implementation or reasons for not accepting the recommendations.

Sec. 8, Sub. 12 and 13

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Can an employer or supervisor interfere with or obstruct the joint committee or health and safety representative?

- No. The law clearly forbids anyone from interfering, obstructing or providing false information to members of a joint committee or a health and safety representative when they are performing their duties.

Sec. 62, Sub. 5

Complaints should be filed immediately with the inspector should any obstruction occur.

■■■■■

What is a worker trades committee?

- A worker trades committee is composed of workers selected by the unions from each of the trades employed on a construction site to advise the joint committee of the health and safety concerns of the workers in each trade.

Sec. 10, Sub 1,2,3

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When are trades committees required?

- Trades committees are required on all construction sites that have a joint health and safety committee.

Sec.10, Sub. 1

The joint committee determines the amount of paid time off that worker trade committee members are entitled to attend meetings.

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What are the trades committee's entitlements?

- The workers on the trades committee are entitled to time off work to attend meetings and report the concerns of workers to the joint committee. The joint committee determines the amount of paid time off that worker trades committee members are entitled to, in order to attend meetings.

Sec. 10, Sub. 5,6

PART D:

The Right To Refuse Dangerous Work

What is the right to refuse?

- All workers have the right to refuse work they believe may endanger their health and safety.
Sec. 43, Sub. 3

All workers have the right to refuse work they believe may endanger their health and safety.

Are there any restrictions on the right to refuse?

- Police officers, fire fighters or workers who are employed in correctional or health care facilities are prohibited from using this right when the hazard is a normal part of their work, or when the act of their refusal directly endangers another person.

*Sec. 43, Sub. 1 and 2
(See Part L: Case #8, #9, #10, #11, #13)*

Does this mean that these workers cannot refuse in all circumstances?

- Workers have a right to refuse dangerous work, as long as their refusal does not directly endanger another person, and the employer has not taken steps to address hazards that are regularly present.
(See Part L: Case #8, #9, #10, #13)

Correctional officers could refuse to work where normally required precautions to handle unsafe conditions created by overcrowding were absent, and the refusal did not directly endanger another person.

What are some examples of work refusals for these occupations?

Correctional Officers:

- Correctional officers could not refuse to work in what they considered a dangerously overcrowded facility, since overcrowding may occur from time to time as a normal condition of employment.
- However, correctional officers could refuse to work where normally required precautions to handle unsafe conditions created by overcrowding were absent, and the refusal did not directly endanger another person.
- A correctional officer could refuse to deal one-on-one with a violent inmate, when the normal safe work practice requires two or more officers and other special procedures to handle the situation safely.

Ambulance Officers:

- An ambulance officer could not refuse to aid an accident victim because a dangerous circumstance exists at the accident site. The work refusal could directly endanger the health and safety of the accident victim.
- However, an ambulance officer could refuse to go out on a routine transfer or non-urgent call if the ambulance vehicle had a safety defect, or if the officer was not provided with equipment to do the job safely.
- An ambulance officer could also refuse to lift a heavy patient in a routine transfer if proper equipment was not available to lift the patient in a safe manner.

Psychiatric Nurses and Assistants:

- A psychiatric nurse could refuse to deal one-on-one with a violent patient where two or

more people would normally be required to handle the situation safely, and the refusal would not directly endanger another person.

Are teachers restricted from exercising the right to refuse?

- Teachers in elementary and secondary schools cannot exercise the right to refuse when the act of their refusal would place the safety of another person in “imminent jeopardy”.
Reg. 191/84
- Unfortunately, the law does not define “imminent jeopardy”, nor does it say who determines when “imminent jeopardy” exists.
- The supervisor must investigate the circumstances of the teacher’s refusal in the first stage of the refusal. The problem arises when the supervisor investigates and states that the safety of another person is in “imminent jeopardy” if the work refusal continues.
- If the worker continues to refuse because he or she believes that his or her own safety is endangered by returning to work, an inspector must be called in to the workplace to investigate. In this case, the employer has the burden of proving to the inspector that a situation of “imminent jeopardy” exists. (*See Case Law - Case #8. Although Case #8 deals with limited right of hospital workers to refuse, the same principle must be applied to this employer. The employer must bear the burden of proof when seeking to take away the worker’s right to refuse.*)

A worker can refuse to work where he or she has “reason to believe” that a job is likely to endanger health and safety.

A worker can also refuse if the unsafe condition is a result of the employer not taking all reasonable precautions for the protection of workers.

Under what conditions can a worker refuse unsafe work?

- A worker can refuse to work where he or she has “reason to believe” that a job, a work process, a work area, machinery or equipment, or the physical condition is “likely” to endanger health and safety.

Sec.43, Sub. 3(a)(b)

- Workers can also refuse where any of these is in contravention of the Act or regulations, and this contravention endangers their health and safety.

Sec. 43, Sub. 3(c)

- Conditions do not have to be immediately life-threatening for a worker to refuse.
- While the language of the Act does not refer to a person, activity or biological agent that might endanger the worker, a worker could refuse to work on these grounds since they can be considered as part of the physical condition or work process of the worksite.

(See Part L: Case #17, #18, #19, #20)

- A worker can also refuse if the unsafe condition is a result of the employer not taking all reasonable precautions for the protection of workers. This would be a contravention of *Section 25 (2) (h)* of the Act.

What are the procedures for refusing unsafe work?

- Workers, supervisors, employers and inspectors must adhere to the following procedures:

First Stage:

1. The worker must report the circumstances of the refusal to the supervisor. The worker must remain

in a safe place at work during all stages of the refusal and cannot be reassigned during the first stage of the refusal. (See Part L: Case #11)

2. The supervisor must make available a union appointed representative or worker committee member and investigate the circumstances in the presence of the worker and the representative.
3. The supervisor must give the worker an answer as to whether it is safe or unsafe. If the worker is satisfied that the work is safe, then the worker should return to work and the matter is considered resolved.

Second Stage:

1. If the worker has “reasonable grounds” to believe that the work is still unsafe despite the supervisor’s answers or corrective measures, then the worker can continue to refuse and an inspector must be called in to investigate.
Sec. 43, Sub. 6
2. A government inspector must be called in. The inspector must investigate “in consultation” with the worker, the supervisor and the worker’s representative*. Workers should insist that the inspector come to the workplace to investigate.
Sec. 43 Sub. 7
3. After the inspector’s investigation is completed, the inspector must give a written decision as to whether the work is likely to endanger.
Sec. 43 Sub. 8 and 9
4. If the worker disagrees with the inspector’s decision, an appeal can be filed within 30 days with the Ontario Labour Relations Board for a ruling.
Sec. 61

NOTE: Prior to June 2001, inspectors had a legal duty to investigate a work refusal “in the presence” of the worker and her/his

representative. This was also the case with determination as to whether the restrictions in the right to refuse applied to certain categories of workers or whether the refusal met the criteria in Section 43(3). If the inspector refused to investigate at the workplace, then the worker's right to refuse continued and the refusal was deemed to remain at the first stage.

(See part L: Case#9, #13)

Since the legislation changed, OPSEU has challenged inspectors' decisions not to investigate in person but there has not yet been a definitive legal decision.

Workers are advised to demand that the inspector comes to the workplace. If the inspector will not attend, insist that you are present for any telephone conversations between the employer and the inspector. Do not let your employer present their description of the situation without your input.

Can refused work be reassigned to another worker?

- Yes. But the employer must advise this worker that the work has been refused and the reasons for the refusal. This must be done in the presence of a worker member of the joint committee, a health and safety representative or a worker selected by the union. This worker can also refuse, if he or she believes the job is unsafe.

Sec. 43, Sub.11

■

**Does the worker have to be correct?
What does “reason to believe” and
“reasonable grounds to believe” mean?**

- In order to legally refuse to work, the law requires only that a worker have a reasonable belief. A mountain of evidence is not needed.

Sec. 43, Sub. 3

■

**Can a supervisor put off or refuse to
investigate or send the worker home?**

- No. The supervisor must investigate immediately in accordance with the procedure. If the supervisor refuses, workers should call a ministry inspector immediately and indicate what has taken place.

Sec. 43, Sub. 4

■

**Do workers have a right to be paid during an
investigation of a work refusal?**

- Yes. The refusing worker and his representative are entitled to payment during all stages of a refusal.
(See Part L: Case #13)
- During the second stage of the refusal, the law allows the employer to give an undefined “other direction” to the worker should no other work be available. Should this result in any loss of pay, benefits or layoff, the employer must prove that this was not a reprisal which is forbidden by the Act.

Sec. 50

The refusing worker and his representative are entitled to payment during all stages of a refusal.

Can a worker continue to refuse if the inspector rules that the work is not likely to endanger?

- The Act is silent on this question and thus full protection is not clearly provided. However, the Ontario Labour Relations Board has ruled in some cases that since this is not forbidden by the Act, a worker would have the right to continue to refuse to work if the inspector's decision was not knowledgeably and independently based.
(See Part L: Case #12)
- Continuing a work refusal in this circumstance must be carefully considered. Workers are advised to consult their union staff representative on this issue.

Can an injured or susceptible worker refuse to perform unsafe work?

- Yes! The injured or susceptible worker has a right to refuse unsafe work under Section 43 (3) of OHSA. The right to refuse applies to a disabled or susceptible worker and not just the average healthy worker. The employer has a duty to make appropriate safety provisions that address your medical limitations.

(See Part L: Case #6, #7)

NOTE: It is important that injured workers obtain medical documentation in advance about their particular limitations or sensitivities to support these actions.

PART E:

Your Right To Be Free From Reprisals

Can workers be penalized for seeking compliance with the law or exercising their rights under the Act?

- No. The law specifically prohibits employers from penalizing or intimidating workers for seeking compliance or exercising their rights, or for giving evidence with respect to the enforcement of the Act or during a coroner's inquest. This also includes the exercise of a worker's right to refuse unsafe work.

Sec. 50, Sub. 1

The law specifically prohibits employers from penalizing or intimidating workers.

What can be done if an employer engages in a reprisal against a worker?

There are three possible options available to workers:

- The worker can file a complaint to the Ontario Labour Relations Board. In this case the worker must file a special form with the registrar providing the complete details. Once this is filed, the Board will send a labour relations officer to investigate and also attempt a settlement. If no settlement is reached, the Board will hold a hearing and rule on the complaint.
- Since this is a violation of the Act, the worker must immediately file a complaint with an inspector who has the power to order the employer to comply or charge the employer for

violating the Act. However, the Ministry of Labour has been reluctant to do this in most cases, since the Act provides for a complaint to the OLRB. But this should not stop workers from demanding that the inspectors enforce this provision like any other in the Act.

- The worker can also file a grievance in accordance with the procedures in a collective agreement. In this case, the worker still has the option to file a complaint with the OLRB so long as the grievance does not enter the arbitration process.

Sec. 50, Sub. 2

PART F:

Your right to know

Do workers have a right to health and safety information?

- Yes. The employer is obligated to give workers information on the hazards of any chemical, biological and physical agent or any hazards associated with equipment or devices used in the workplace.

Sec. 25, Sub. 2 (a) and (d)

- Under the Workplace Hazardous Materials Information System (WHMIS) provisions of the Act the employer has to provide very specific information on chemical and biological agents by labelling containers, and providing material safety data sheets (MSDS) to workers.

*Sec. 37 to Sec. 42 and Regulation 860,
as amended by Regulation 36/93*

- The employer must advise workers of any health and safety reports in their possession and make these available on request.

Sec. 25, Sub. 2 (m)

The employer must advise workers of any health and safety reports in their possession and make these available on request.

Do workers have a right to be trained in health and safety?

- Yes. The employer must train workers to work in a safe manner. Under WHMIS, the employer must ensure that workers are trained to have a working knowledge of the information provided on MSDS and labels and how to handle any of these hazardous materials in a safe manner. This is set out in Regulation 860, as amended by Regulation 36/93.

Sec. 25, Sub. 2(a) and (d) and Sec. 42

- The Act also obliges the employer to carry out any training programs that might be required by a regulation.

Sec. 26, Sub. 1(l)

- The Act requires that at least one worker member of the joint committee receive certification training.

Sec. 9, Sub. 12

PART G:

Medical right of workers

Do workers have a right to have their personal medical information kept confidential?

- Yes. Employers are prohibited from trying to get access to a worker's medical records without the worker's consent.

*(See Part L: Case #16)
Sec. 63, Sub. 2*

- Members of joint committees and worker representatives are prohibited from revealing any personal medical information that comes into their possession.

Sec. 63, Sub. 1(f)

What rights do workers have regarding medical testing and monitoring?

- Workers are not required to undergo medical tests unless they consent.

Sec. 28, Sub. 3

- Workers consenting to undergo medical tests must be provided with paid time off work as well as all costs of the medical examinations, including reasonable travel expenses.

Sec. 26, Sub. 3

Workers are not required to undergo medical tests unless they consent.

PART H: **The Power To Stop Unsafe Work**

*If both
management
and worker
certified
members
agree that a
danger exists,
they may
order that the
work stop*

What are the powers and rights of certified committee members?

- A worker certified member has the right to investigate a complaint by a worker that danger exists in the workplace.

Sec. 48

- If both management and worker certified members agree that a danger exists, they may order that the work stop.

Sec. 45, Sub. 4

When can the power to stop work be exercised?

- When both certified members agree that a dangerous circumstance exists.

Sec. 45

What is meant by a "dangerous circumstance"?

- A dangerous circumstance means that there has been a contravention of the Act or regulations that poses a danger, and any delay in controlling the danger may seriously endanger a worker.

Sec. 44

What is the procedure for ordering a work stoppage?

1. The certified member requests that the supervisor investigate the dangerous circumstance.
2. The supervisor must investigate immediately in the presence of the certified member.
3. If the certified member is not satisfied with the supervisor's investigation, another certified member is called in to investigate.
4. If both certified members agree that a dangerous circumstance exists, they can order a work stoppage.
5. The employer must follow this order immediately.
6. If the certified members cannot agree, the work cannot be stopped, but an inspector can be called in to investigate.
7. Following the investigation, the inspector will issue a written decision to both certified members.
8. If a certified member does not agree, he or she can appeal to the Ontario Labour Relations Board (OLRB) within 30 days of the decision.

If a certified member does not agree, he or she can appeal to the Ontario Labour Relations Board (OLRB) within 30 days of the decision.

What can be done if the bilateral work stoppage provision is not working to protect workers, or if the employer has bad safety practices?

- A certified member or an inspector can apply to the OLRB for a declaration or recommendation. The OLRB can order that the certified worker member be given the unilateral power to direct a

work stoppage, or recommend that the government assign an inspector to the workplace on a full-time or part-time basis at the employer's expense.

Sec. 46, Sub. 1 to 8

- In considering an application for a declaration the OLRB must do so in accord with the criteria set out in Regulation 243/95. This would include consideration of the employer's safety record (i.e. complaints, convictions, inspection records, etc), injury and illness records, safety policies and practices, pattern of bad faith with the joint committee, etc.
- In addition to having this ordered by the OLRB, unions can negotiate a unilateral stop work provision with the employer. Should the employer agree to such a provision, a worker certified member will have this power when the employer so advises the joint committee.

Sec. 47, Sub. 1(b)

What is the procedure for unilateral work stoppage direction?

- Should a certified member find a dangerous circumstance, he or she can order the employer to stop the work operation in question.

Sec. 47, Sub. 2

- The employer must immediately comply, and immediately investigate.
- After investigating and taking corrective action, the employer may ask the certified member to cancel the order.
- If the employer and certified member cannot agree, then an inspector can be called in to investigate.

- Following the investigation, the inspector will issue a written decision which may include a cancellation of the stop work order.

■
Are certified members subject to any liability under this provision?

- Yes. Anyone can file a complaint with the OLRB within 30 days alleging that a certified member exercised or failed to exercise this power recklessly or in bad faith. The OLRB can take whatever action it considers appropriate, including decertifying the certified member.

Sec. 49

■
Are there any restrictions on the power to order a work stoppage?

- Police, fire fighters and persons employed in correctional facilities are prohibited from exercising this power under any circumstances.

Sec. 44, Sub. 2 (a)

- Workers employed in health care facilities are prohibited from using it in circumstances that would directly endanger another person.

Sec. 44, Sub. 2 (b)

■
Are workers paid during a work stoppage order by certified members?

- There is no guarantee that workers affected by a safety shutdown will be paid.

Anyone can file a complaint with the OLRB within 30 days alleging that a certified member exercised or failed to exercise this power recklessly or in bad faith. The OLRB can take whatever action it considers appropriate, including decertifying the certified member.

PART I:

Appeals And Complaints

Anyone who disagrees with an inspector's decision can file an appeal with the Ontario Labour Relations Board (OLRB) within 30 days of the decision.

Version

40

What can be done if you disagree with an inspector's decision or order?

- Anyone who disagrees with an inspector's decision can file an appeal with the Ontario Labour Relations Board (OLRB) within 30 days of the decision. The Board may affirm or rescind an inspector's orders, or substitute its findings. And the Board's decision is final.

Sec. 61

NOTE: Prior to 1998, appeals under Section 61 were decided by the Health and Safety Adjudicator. The Act was amended to eliminate the office of Adjudicator and gave this function over to the OLRB.

How are appeals processed by the OLRB?

- An appeal must be filed with the Board within 30 days of the inspector's decision on Form A-65.
- The Board will then send a copy of the completed Appeal Form A-65 and a blank "Response to Appeal (Form A-66) to all the responding parties to the appeal. The parties to an appeal usually include, the worker or union, the employer, and the inspector.
- The Board will assign a Labour Relations Officer in an effort to mediate a settlement.
- If the matter is not resolved the case will be set for consultation or hearing, and a "Notice of Consultation or Hearing" will be sent to all the parties.

- The Response to Appeal (Form A-66) must be delivered to the parties and filed with the Board no later than 21 calendar days before the consultation or hearing date.

How are requests for a suspension of an inspector's decision processed by the OLRB?

- Suspension requests will only be processed after an application for appeal has been filed with the Board.
- Once an appeal has been filed, complete form A-67, an application for a suspension of an inspector's decision and filing this with the Board. In giving your reasons for a suspension request, applicants must address the following criteria that were originally set out in the Zehr Market case (*see Part L, Case # 24*):
 - Will the health and safety of the workers be assured if the order is suspended;
 - Will there be any negative impact on the applicant if the decision is not suspended;
 - Is there a good chance of succeeding in your appeal;
 - Is there a good reason to vary the inspector's decision or order before the appeal can be dealt with;
 - And any other information or comment that might be supportive.
- Once Form A-67 has been received by the Board, the Board will circulate the application to all parties, along with a blank copy of Form A-68 which is a response to a suspension request.
- A completed Form A-68 must be delivered to all parties with in 14 calendar days of Confirmation of filing sent by the Board

- Applications for suspensions are usually dealt with through consideration of written submissions only. In certain instances the Board may call for an oral hearing or consultation.

What options can the OLRB take in appeal/suspension applications?

- It could hold formal hearings;
- Limit the presentation of evidence by the parties;
- Issue a decision without holding a hearing after consulting with the parties
- Suspend the inspector's order pending the disposition of the appeal;
- Reconsider any decision or order the Board has made.

How are Section 50 reprisal complaints processed by the OLRB?

- Applications alleging that an employer has violated Section 50 must be made on Form A-53. The applicant must fully describe how Section 50 was violated and provide facts and documents in support of the allegation that the employer imposed an unlawful reprisal on a worker.
- Before filing the application with the Board the worker must deliver an "Application Package" to the employer. This consist of the completed application, a blank response Form A-54, a Notice of Application Form C-26, and a copy of the Board's "Information Bulletin.
- After delivering the "Application Package" to the employer, the worker must file 5 copies of the application with the Board no later than 5 days after delivery. The matter will be terminated if

the application is not filed within 5 days of delivery.

- After receiving the Application Package the employer will have 10 days to respond to the application on Form A-54. The employer must first deliver a copy to the worker, and then file 5 copies of the response to the Board.
- After the response has been filed the Board will assign a Labour Relations Officer who will attempt to mediate a settlement.
- If no settlement is reached a hearing will be held. At the hearing, the employer must establish that it did not impose an unlawful reprisal. Usually, the employer gives its evidence first.

What is the role of the OLRB under the Act?

The Act empowers the Board to hear and decide:

- Appeals of inspectors' orders and decisions.
Sec. 61
- Complaints from certified members or an inspector that the bilateral work stoppage provision does not protect the workers from serious risk to their health and safety.
Sec. 46
- Complaints that a certified member has exercised or failed to exercise the power to stop work recklessly or in bad faith.
Sec. 49
- Complaints that an employer has taken a reprisal against a worker. These are filed on Form A-53 with the OLRB.
Sec. 50

How can an application to the Board under Section 46 assist workers?

- An application places the employer under the close scrutiny of the OLRB.
- The employer is faced with the possibility of having the unilateral shutdown provision imposed or having an inspector assigned on a full-time or part-time basis.

What must you carefully document to build a case against a bad employer?

- obstruction of the internal responsibility system;
- cases where the employer ignores the recommendation of the joint committee;
- cases where the employer fails to correct safety violations;
- the number of orders, repeat orders or charges;
- the incidence of occupational illness and injury;
- Lack of policies, programs, safety procedures and training;
- the number of health and safety reprisals.

(See Regulation 243/95)

PART J:

Legal Enforcement

Who can call an inspector?

- Anyone can call an inspector.

Sec. 43, Sub. 6

*Anyone can
call an
inspector.*

Do workers have a right to accompany an inspector?

- Yes. The Act requires that a designated worker accompany an inspector during a routine inspection.

Sec. 54, Sub. 3

- In addition, worker representatives are required to be present during an inspector's investigation of a work refusal.

Sec. 43, Sub.7

What are the powers of Ministry of Labour inspectors?

Inspectors have the power to:

- Enter any workplace at any time without a warrant.

Sec. 54, Sub. 1(a)

- Must investigate all work refusals and give a written decision.

Sec. 43, Sub. 7,8

- Be accompanied by a person with specialized knowledge during an inspection.

Sec. 54, Sub. 1(g)

- Request any drawings, documents, records, etc, and take these away to copy.

Sec. 54, Sub. 1(l)

It is essential that the worker representatives carefully assess an employer's notice of compliance.

- Determine compliance with orders.
Sec. 59, Sub. 4
- Order tests by qualified persons at the employer's expense.
Sec. 54, Sub. 1(f) and (k)
- Order that equipment not be used until it is tested.
Sec. 54, Sub. 1(l)
- Alter the frequency of inspections by worker members or health and safety representatives.
Sec. 55
- Examine and copy training materials and attend training programs provided by the employer.
Sec. 54, Sub. 1(p)
- Seize documents or objects as evidence of a contravention.
Sec. 56
- Require a compliance plan.
Sec. 57, Sub. 4 and 5
- Order that work not resume under a stop work order until the operation is re-inspected and the stop work order is withdrawn.
Sec. 57, Sub. 8

What can an inspector do if unsafe or unhealthy conditions are found?

- The inspector can issue orders to comply, issue stop work orders and/or initiate a prosecution.

Who has the power to determine compliance with an order?

- Compliance with an order can only be determined by an inspector.

Sec. 59, Sub. 4

- Work placed under a stop work order cannot resume until an inspector re-inspects, unless the worker member or a health and safety representative advises the inspector that he or she agrees with the employer's notice of compliance.

Sec. 57, Sub. 7

- The employer's notice of compliance with an order must be accompanied by a statement of agreement or disagreement signed by the committee member or the health and safety representative.

Sec. 59

Government can make regulations that restrict a union's right to represent its members in health and safety.

How should workers deal with work orders, stop work orders and compliance notices?

- According to Ministry of Labour policy, the inspector can accept that compliance has been met without re-inspection, if the worker representative agrees with the employer's notice of compliance. If the worker disagrees, then an inspector will re-inspect. If the worker declines to sign the employer's notice, then the inspector might re-inspect.

Worker representatives are well-advised to take the following measures:

- Insist that inspectors issue an order for a compliance plan. This gives you an opportunity to review how the employer will correct the hazard, and a means of monitoring the progress.
- It is absolutely essential that worker representatives carefully assess an employer's notice of compliance. In most cases, it would be wise to insist on a re-inspection by the inspector before endorsing the notice of compliance.

It is important that unions and central labour bodies demand effective participation in the regulatory process.

What can be done if an inspector's order or decision does not address the hazard or violation of the Act?

- The worker can file an appeal with the OLRB within 30 days of the inspector's decision.

Sec. 61

What can happen if someone violates the Act and its regulations, or fails to comply with an order?

- Anyone can be charged and prosecuted for these violations. If found guilty, they are subject to a fine of up to \$25,000 or one year in prison or both.

Sec. 66, Sub. 1

- If found guilty, a corporation can be fined up to \$500,000.

Sec. 66, Sub. 2

- The Attorney General can require that a case be tried by a provincial judge instead of a justice of the peace.

Sec. 68, Sub. 2

What can be done if the government refuses to prosecute an employer for violating the Act?

- In addition to putting public pressure on the government, an individual or a union can bring a private prosecution by filing information with a justice of the peace indicating that there is evidence that an employer violated the law.

Unless the crown prosecutor decides to assume the prosecution, the individual or the union is responsible for conducting the prosecution and paying the legal bills.

PART K:

Government Regulatory Power

What are the regulations?

- Section 70 of the Act empowers the cabinet to make regulations pursuant to the Act. These are the detailed rules applying to specific circumstances. These cannot, however, go beyond the powers of the Act or contradict the provisions of the Act.
- Any time you see the word “prescribed,” it means that a regulation could set specific safety requirements.

Can the government make regulations which affect workers’ or unions’ rights?

Yes. The Act gives the government the power to make regulations that:

- Require more than 4 persons on a joint committee at certain workplaces.
Sec. 70, Sub. 10
- Exempt any workplace from the requirement to have a committee. The right to a committee can be taken away without review by the legislature.
Sec. 70, Sub. 11
- Set the requirements for the terms, qualifications and eligibility for membership on joint committees. The union’s right to select its representatives on its own terms can be restricted.
Sec. 70, Sub. 13
- Exempt any workplace from the requirement to have certified members. This restricts our right to

training and takes away what little protective powers workers do have.

Sec. 70, Sub. 14

- Exempt workplaces from the bilateral or unilateral right to shut down unsafe work.

Sec. 70, Sub. 49

What can be done to protect our rights in this case?

- Given the power that government has to take away powers and rights of workers and unions, it is important that unions and central labour bodies be extremely vigilant and demand effective participation in the regulatory process.

Are there regulations that apply to toxic substances?

- Yes. Section 70 (23) gives the government power to designate substances for detailed control. For example, there are now several substances that are designated in regulation such as asbestos, lead, mercury, etc. These “designated substance” regulations require exposure assessments, control programs, exposure limits and medical monitoring. There is also Regulation 833 that sets out exposure limits for more than 400 substances in the workplace atmosphere. It does not provide for routine assessment and control programs unless so ordered by an inspector.

PART L:

Health and Safety Case Law

Staffing levels

Case #1

Decision: The adjudicator overruled an inspector and ordered additional staffing and regular relief for a worker assigned to monitor a violent resident on a one-to-one basis. This was the first time an adjudicator addressed staffing issues in a decision.

Place: Adult Occupational Centre at Edgar

Findings: The adjudicator found that the employer failed to take reasonable precautions for the protection of the worker who was assigned to work alone with a violent person. The adjudicator also found that an inspector had the power to require disclosure of the psychiatric assessment of the resident in order for the inspector to assess the extent of hazard.

(Decision No. 92-09)

Case #2

Decision: The adjudicator supported the inspector's decision to order safe staffing levels.

Place: St. Thomas Psychiatric Hospital

Findings: The adjudicator found that an inspector could consider staffing as a reasonable precaution and that an employer would be required to take steps to protect the health and safety of workers under Section 25(2)(h) of the Act.

(Decision No. 01/93-A)

Case #3

Decision: The adjudicator overruled the inspector and ruled that correctional officers had the right to refuse when staffing levels fell below a minimum.

The adjudicator overruled the inspector's determination that these conditions did not endanger workers.

Place: Sault Ste. Marie Jail

Findings: The adjudicator found that the employer's decision to run regular activities at below minimum staffing levels violated Section 25(2)(h). He also ruled under Section 43 that this condition was likely to endanger the workers. The adjudicator held that the correctional officers were entitled to refuse since reduced staffing levels were not a normal condition of employment or inherent in their work.

(Decision No. OHS 95-25A)

Case #4

Decision: The adjudicator ruled that the employer was required to have two correctional officers in the control module. The adjudicator held that a correctional officer in a maximum-security detention centre was entitled to an independent "back up" officer to monitor his or her safety.

Place: Sault Ste. Marie Jail

Findings: When the employer first cut staff in the control module, an inspector had written orders. The inspector subsequently ruled that the employer had complied with the orders when the employer modified the control module to accommodate a one-person operation.

The adjudicator found that the employer had not complied with the order since there were too many distractions that diverted a single officer's attention from observing the monitors.

(Decision No. OHS 97-02)

Case #5

Decision: The adjudicator ruled that a correctional officer must have an independent observer to

monitor his or her safety when escorting inmates on the down ramp at the Hamilton-Wentworth Detention Centre.

(Decision No. OHS 98-03)

The rights of disabled or susceptible workers

Does the employer have an obligation to protect susceptible workers?

Do susceptible workers have the right to refuse?

Case #6

Decision: The adjudicator found that a disabled correctional officer did have the right to refuse work he believed was unsafe, because performing work that medical advice says is unsafe is neither inherent nor a normal condition of employment. The Adjudicator also ruled that the employer could not require the worker to perform work a doctor said was unsafe.

Place: Metro West Detention Centre

Findings: The adjudicator overruled an inspector's determination that a disabled correctional officer did not have the right to refuse an assignment that a doctor said would be unsafe. The adjudicator found that while an inspector might not have the jurisdiction to order an employer to accommodate a disabled worker, the inspector does have clear jurisdiction under Section 25(2)(h) to forbid an employer from requiring a worker to perform work a doctor says is unsafe.

(Decision No. OHS 14-97)

Case #7

Decision: The adjudicator supported an inspector's order that an employer provide an ergonomically designed chair for a disabled worker who had suffered a back injury.

Place: Elgin-Middlesex Detention Centre

Findings: The adjudicator dismissed the employer's argument that the employer was only obliged under Section 25(2)(h) to provide protection for the average healthy worker. The adjudicator ruled that the employer had a duty to ensure that the health and safety of a disabled or susceptible worker was protected. The adjudicator also dismissed the employer's argument that the right to refuse under Section 43(3) was only available to the average healthy worker, and could not be invoked by a susceptible worker who had reason to believe that the conditions of work were likely to endanger him.

(Decision No. OHS 95-30)

The right to refuse

How must the restriction on the right to refuse be determined?

Case #8

Decision: The adjudicator ruled that the hospital employer must provide evidence that hazards are "inherent in the work or a normal condition of employment" when alleging that the right to refuse does not apply.

Place: Mohawk Hospital

Findings: The adjudicator overruled the inspector's decision that hospital workers did not have the right to refuse just because they worked at a hospital. The employer must bear the burden of

proof when seeking to take away the worker's right to refuse, and the inspector is obliged to consider the evidence prior to rendering a decision.

(Decision No. OHS 17-93)

Case #9

Decision: The adjudicator ruled that in deciding whether or not a correctional officer had the right to refuse under Section 43(3), the inspector had a duty under Section 7 of the Charter of Rights and Freedoms to make a determination in a manner consistent with the principles of fundamental justice. The adjudicator ruled that the inspector was required under Section 43(7) to come to the workplace in order to determine whether the refusing worker was entitled to refuse.

Place: Toronto Jail

Findings: The adjudicator overruled an inspector's "over-the-telephone" determination that a correctional officer did not have the right to refuse over the employer's failure to conduct a search for weapons at the Toronto Jail. The adjudicator held that a decision to restrict the rights of a correctional officer based on a telephone interview was not in accord with the principles of fundamental justice under Section 7 of the Charter of Rights and Freedoms.

The adjudicator also held that once a work refusal is initiated, it remains a work refusal until an inspector conducts an investigation at the workplace and determines that the worker does not have the right to refuse under Section 43. The adjudicator also ruled that the worker did have the right to refuse because incomplete searches for weapons were not an inherent or a normal condition of employment, and were also likely to endanger the worker.

(Decision No. OHS 97-15)

What is a “normal condition of employment”?

Case #10

Decision: The adjudicator ruled that workers who do not have the right to refuse under Section 43 are entitled to have their health and safety concerns dealt with promptly by an inspector because of the limitations on the right to refuse.

Place: Maplehurst Correctional Centre

Findings: In this decision, the adjudicator set out a “test” for “normal conditions of employment” to mean an established and prevailing practice at the institution. The adjudicator held that the inspector has a responsibility to assess whether the established and prevailing practice provides adequate protection for the worker when the worker expresses his or her concerns about their adequacy. At the same time, assignments that deviate from established and prevailing safe practice cannot be considered normal or inherent in the work and would, therefore, allow the worker to invoke the right to refuse.

(Decision No. OHS 94-21)

Can an employer assign a refusing worker alternative work during the employer’s investigation?

Case #11

Decision: An Appeal Director ruled that alternative work may not be assigned during the first stage of a work refusal. The employer cannot assign the refusing worker alternative work until the employer’s investigation is completed in the presence of the worker and his or her

representative, and an inspector has been notified of a continuance of the work refusal.

Place: Accuride /Hutt (May 12, 1989)

Can a group of workers continue to refuse after an inspectors ruling of not likely to endanger?

Case #12

Decision: Workers can refuse if they have a reasonable belief that they are endangered. To be protected by the Act, workers do not have to prove their belief. They do not have to be correct or have a mountain of evidence. A group of workers is entitled to exercise the right to refuse where they face the same hazard and have a collective belief that the work is likely to endanger them. Workers can continue to refuse after an inspector's decision that work is not likely to endanger where the inspector's decision is not independently and knowledgeably based, and where it rests solely on the view of the employer.

*(OLRB Reprisal Decision File No. 1297-79-U;
Pharand v. Inco Metals
(The Employees' Health and Safety Act,
1976, S.O. 1976, c. 79)*

Case #13

Decision: Workers have the right to continue to refuse and be paid where the employer fails to investigate as is required by Sec. 43 (4). And workers have the right to continue to refuse and be paid where an inspector issues a decision without first investigating at the workplace as required by Sec. 43 (7)(8)(9).

Findings: The Grievance Settlement Board found that the refusal remains at the first stage where the employer or inspector fails to conduct the investigation required by the Act. The GSB also found that it does have jurisdiction to hear and decide reprisal complaints arising out of Sec. 50 of the OHSA.

*(GSB Reprisal Decision File No. 926/96, 927/96:
OPSEU v. Crown in Right of Ontario.*

Protection from Environmental Tobacco Smoke (ETS)

Case #14

Decision: The adjudicator overruled an inspector and ruled that the employer must protect workers from exposure to environmental tobacco smoke (ETS). The adjudicator ordered the employer to reduce exposure to ETS to the level set by the World Health Organization within one year as an interim measure and to take measures to reduce the level of ETS to those found in a non-smoking building within 2 years of issuing the decision.

Place: Sault Ste. Marie Jail

Findings: The adjudicator held that the workers were entitled to be protected from the harmful effects of ETS regardless of whether the facility was considered an inmate's residence. The adjudicator also ruled that based on the medical evidence on the harmful effects of ETS, the workers were likely endangered by the levels of ETS. He ruled that exposure to the harmful effects of ETS was not inherent in their work.

(Decision No. 96-19)

Criteria for unilateral right to stop work

Case #15

Decision: The adjudicator found that in determining whether the unilateral right to stop work should be granted to a certified member, the adjudicator must primarily consider whether the employer has demonstrated a failure to protect the health and safety of workers. In addition, he must consider past success or failure of the bilateral stop work procedure to protect workers from “serious risk” to their health and safety. Such evidence would include consideration of the employer’s health and safety record, and health and safety climate at the workplace as set out in Regulation 243/95.

(Decision No. OHS 95-39)

Confidentiality of medical information

Case #16

Decision: The adjudicator ruled that it was a violation of Section 63(2) of the OHS Act for an employer to contact a worker’s doctor about the worker’s physical limitations without the worker’s written consent.

Place: Niagara Detention Centre

Findings: The adjudicator also held that the Workers’ Compensation Act did not require the employer to obtain this information in order to comply with its obligation to return the refusing worker to suitable modified work, and therefore could not be used as a defense for violating Section 63(2).

(Decision No. OHS 95-24A)

Maintain a safe distance from inmates

Case #17

Decision: The adjudicator ruled that a correctional officer did have the right to refuse to light an inmate's cigarette using matches. The adjudicator ordered the employer to develop a procedure that would allow officers to maintain a safe distance from inmates.

Place: Niagara Detention Centre

Findings: The adjudicator held that the worker was entitled to refuse because using matches to light an inmate's cigarette is not an inherent part of the work nor a normal condition of employment. The adjudicator also found that the situation was likely to endanger the worker, and that the employer was in violation of Section 25(2)(h) by requiring the officer to bring his hands too close to the hatch door when using matches to light a cigarette.

(Decision No. OHS 97-13)

Self-defence training for Non-correctional Officers

Case #18

Decision: The adjudicator overruled a Ministry of Labour decision to suspend an inspector's order requiring the provision of self-defense training to its non-correctional officer staff who were required to supervise inmates. The adjudicator reinstated the order for training.

Place: Guelph Correctional Centre

(Decision No. OHS 94-44A)

Protection from violence in the workplace

Case #19

Decision: The adjudicator ruled that an inspector should have investigated a work refusal that involved the hazard of violence from another worker and decided whether the worker's behaviour was likely to endanger the refusing worker.

Place: Guelph Correctional Centre

Findings: The adjudicator held that contrary to what the inspector decided, the Act does apply to a situation where the danger being complained about was the violent behaviour of another worker. While the adjudicator found that the alleged behaviour did not endanger the worker, the adjudicator did find that Section 25 (2) (h) and Section 43(3) do apply to a hazard that stems from the violent behaviour of another worker.

(Decision OHS 96-50A)

NOTE: There have been a series of appeal and reprisal decisions that uphold a worker's right to refuse where the worker is likely to be endangered by a person's violent behaviour.

See appeal decisions OHS 92/09, 93/01A, 92/23, 94/21, 92/19 and OLRB reprisal decision OH 3284-94

Correction Officers escorting inmates

Case #20

Decision: The adjudicator found that the Ministry of Correctional Services failed to provide sufficient protection to correctional officers assigned to escort inmates in the community. The decision overturns

a number of inspectors' decisions on work refusals and complaints by correctional officers at several institutions over inadequate protection during community escorts.

The adjudicator issued orders that require:

- 1) No less than two officers during escorts;
- 2) Upgraded kevlar vests to prevent knife penetration;
- 3) ASP expandable batons;
- 4) Pepper spray;
- 5) Training in the use of new equipment, and the avoidance of surprise attacks;
- 6) Inmates must be placed in full restraints;
- 7) Provision of special "black box" handcuff devices;
- 8) Direct contact with police;
- 9) Revisions to "hostile situation" policy;
- 10) Restrict visits to family and legal counsel only;
- 11) Vehicles must meet Ministry standardized security specifications;
- 12) Distinct uniforms for correctional officers;
- 13) Fluorescent orange coveralls for inmates on escort;
- 14) Access to CPIC information on inmate being escorted.

(Decision No. OHS 98-05)

Competency of Supervisors

Case #21

Decision: The adjudicator found that the employer had failed to ensure that its supervisors were competent as defined by Section 25 (2) of the OHSA.

Place: Whitby Jail

Findings: This decision established that the standard for assessing competency of supervisors must be judged by objective criteria. The adjudicator listed the areas that a manager at a correctional facility must be trained in to establish competency. This list included knowledge of the Act and its Regulations as well as established safe operating measures and procedures, all contingency plans, standing orders, the functioning of a joint health and safety committee, and the employer's and supervisor's duties under the OHSA.

(Decision No. 163)

Other relevant decisions to note

Inspector must address a workplace illness

Case #22

Decision: The adjudicator ruled that the employer was in violation of Section 25 (2) (h) by continuing to expose workers to “sticky foam,” an unintended by-product in the production of foam insulation.

Place: Johnson Controls

Findings: The adjudicator concluded that the conditions of the workplace experienced by the refusing workers were likely to endanger them. The adjudicator held that in determining the likelihood of endangerment, it is not essential to require a precise determination of what agent produced by the work process is causing illness among the workers. In the Adjudicator's view the notion of danger in Section 43 is broad enough to address

adverse health effects experienced by workers even where the immediate cause is not yet known.
(Decision No. OHS 94-32)

Does the right to refuse apply to “hypothetical” hazards?

Case #23

Decision: The adjudicator overruled the inspector and ruled that a work refusal could be based on conditions that might endanger the worker in the future. In these cases, one would have to show a probability that the danger could arise.

Place: Kut-Kwick Mower

Findings: The worker could exercise the right to refuse because he had reason to believe that he was likely to be endangered by a hazard which was likely to develop rather than being immediately present.

(Decision No. OHS 85-22)

What factors must be addressed when applying for a suspension of an inspector’s order?

Case #24

Decision: The adjudicator laid out the factors to be considered by an adjudicator when deciding a request to suspend an inspector’s order or decision pending the disposition of an appeal. These include: 1) adverse impact on workers’ health and safety; 2) prejudice to the employer’s operation and undue hardship; and 3) strong prima facie case for winning the appeal.

Place: Zehrs Markets Ltd./Ellis

(Decision No. OHS 4-91)

PART M

OPSEU Health and Safety Policies

OPSEU Policy on Health and Safety Committees

1. Each local union must form a standing union health and safety committee (committees) that is responsible and accountable to the local executive (LEC).
2. Each committee shall be composed of an appropriate number of members who are appointed by the LEC as health and safety committee persons.
3. All health and safety committee persons shall serve on the committee for a term of office determined by the LEC, and shall serve at the pleasure of the LEC.
4. All health and safety committee persons must have completed at least one (1) weekend health and safety school, and by the end of their first term in office must have completed a 30-hour health and safety program.
5. Health and safety committee persons shall focus on health and safety matters including participation as union representatives on joint (union-management) health and safety committees.
6. The union health and safety committee shall be responsible for the following:
 - a) investigating members' complaints and assisting in obtaining a remedy.
 - b) inspecting the workplace as per the provision of the legislation or collective agreement.
 - c) conducting or arranging health and safety

- training for local members.
- d) regularly informing members about health and safety hazards and their rights under the legislation and their collective agreement.
 - e) representing members during Ministry of Labour inspection tours, work refusals and health and safety hearings.
 - f) calling in the Ministry of Labour inspectorate when concerns are raised by individual members.
7. Union representation of joint (union-management) health and safety committees shall consist of at least one (1) member of the LEC, and an appropriate number of health and safety committee persons appointed by the LEC from the union health and safety committee.
 8. Union representatives on joint committees shall be solely accountable to the LEC.
 9. The union health and safety committee shall meet as required and report to the LEC and the membership at all regularly scheduled meetings.
 10. Each health and safety committee person shall be provided with a wallet-size certificate and lapel pin with a health and safety designation recognizing their status within the local union.

OPSEU Policy on Selection of Certified Members and Trainers

In order to ensure that certified members on joint committees remain accountable and responsible to the local union and the members they represent the following policy has been developed by the OPSEU's Board of Directors. It is based on the

principle that the local union is the basic building block of our union, and that it is the elected officials of the local union that have been empowered to represent the interest of its members vis a vis the employer:

1. Certified members on the joint health and safety committee must be appointed by the local union executive and are directly responsible and accountable to the local executive and serve at the discretion of the local executive.
2. All certified members are required to undergo political orientation by completing OPSEU's course on health and safety.
3. Certified members will be appointed for a set term of office determined by the local executive. However, the local executive may remove any certified member who has not satisfactorily represented the health and safety interest of the members.
4. Worker certification instructors must be selected by the union and undergo union orientation in health and safety by completing OPSEU's BPL course on health and safety.

These measures have become more and more necessary due to the shift to bipartite training development and the increase in lax legal enforcement in health and safety. While employers promote the popular myth that health and safety is non-adversarial and based on partnership, in reality workers and unions have no more say in health and safety decision making than they did at the turn of the century. The employer objective is to disarm our representatives by viewing them as safety technicians who are not first and foremost local union officials who are representative and accountable to their members.

PART N

Other OPSEU Health & Safety publications

Violence at Work: Zero Tolerance (revised 1999)

An Injured Worker's Right to Return to Work Safely (1999)

Safe Work, Healthy Work: A Guide for Home Care Workers (1999)

Stress: What Can We Do

Office Ergonomics Workbook: published by Occupational Health Clinics for Ontario Workers; available from OPSEU

For further information on health and safety matters, contact your staff representative or OPSEU health and safety officers.

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