

# School Workshop Safety in Action

## After NSW WorkCover investigates...

From time to time, organisations, including schools, are investigated by NSW WorkCover. Here's what happens in NSW after the investigation...

### The investigation

A WorkCover inspector generally attends an accident site within a relatively short period to conduct an investigation. It may even be a matter of hours after the accident. Employers usually have enough time only to conduct a preliminary investigation and carry out remedial work to remove the immediate risk. Consequently, many of the substantive actions taken in response to a workplace accident often occur after an inspector's initial visit.

Towards the end of a WorkCover investigation, some indication is likely to be given as to how the matter will progress. Essentially, an inspector may:

- issue an improvement or prohibition notice and/or a penalty notice
- commence proceedings or take no further action.

### Commencing proceedings

Given the wide obligations of employers under the *Occupational Health and Safety Act 2000* (NSW), employers should assume a prosecution follows all but minor workplace accidents. Although an inspector's investigation generally occurs shortly after the accident, a formal prosecution may be commenced at any time up to two years later. This can create obvious problems for an employer.

Under the Act, the WorkCover Authority, the Minister or the secretary of an industrial organisation whose member is involved in the matter may commence a prosecution. WorkCover, however, usually commences prosecutions. The following steps are involved:

#### Step 1 - Prosecutor elects prosecution venue

At the time of commencement, the prosecutor elects whether to commence the prosecution in the Chief Industrial Magistrate's Court or the NSW Industrial Relations Commission in Court Session. Factors such as the severity of the alleged offence generally determine the choice of court. The principal practical difference lies in the maximum fine that may be imposed. While the Act provides for a maximum penalty of \$550,000 for first offences and \$825,000 for second and subsequent offences, the Chief Industrial Magistrate may impose a maximum fine of \$55,000 and/or two years' imprisonment.

#### Step 2 - Employer receives "information and summons"

A prosecutor commences an OHS prosecution by serving the employer with an "information and summons". The "information" specifies the basis for the charge, including a full description of the alleged offence. The "summons" provides notice of the time, date and location of the employer's required attendance at court to answer the charge.

#### Step 3 - Employer obtains prosecution brief

After receiving the information and summons, the employer should obtain a copy of the prosecution brief. When commencing the prosecution, the prosecutor initially relies upon the information in the prosecution brief. This is likely to include a factual inspection report, copies of statements from employees and witnesses, photographs and any other documentation the employer provides or that is relevant to the prosecution.

#### **Step 4 - Employer decides whether to plead guilty or not guilty**

After obtaining the prosecution brief, the employer's solicitor identifies the basis for prosecution (the pleadings) and discusses whether a plea of guilty or not guilty should be entered. The prosecution brief may not yet have been received or the employer may not have had sufficient time to consider an appropriate plea before the date listed in the summons. Therefore, the matter is usually "stood over" for a short period (in the vicinity of four weeks) to enable advice to be obtained.

#### **Step 5 - Employer enters plea before registrar**

Once a decision to enter a plea is made, the plea is generally entered before a registrar on the next date listed for the matter. A registrar is a judicial officer who exercises both judicial and administrative functions and is responsible for the coordination of each matter before the hearing. After entering a plea, the registrar sets the matter down for either a brief plea in mitigation or a defended hearing.

#### **Step 6 - Affidavits on evidence prepared**

In the case of a plea in mitigation, evidence is usually given in written form by affidavit. This is a sworn document detailing the evidence of a person and attaching any documentary evidence relevant to that person's evidence. Affidavits are prepared in advance and should contain evidence of all the matters relevant to the plea in mitigation. This generally includes:

- the factual circumstances surrounding the accident
- evidence of past training and supervision of the injured person and others
- past safety audits relevant to the accident
- details of any systems of work designed to prevent the accident from occurring
- the existence and content of an OHS policy
- the presence of an OHS committee and the extent of its proactive role in safety and management support
- the size and nature of the employer's operation, including the number of employees.

In defended matters, evidence is usually given orally.

#### **Proceeding with a plea**

##### **Pleading guilty**

Where an employer enters a plea of guilty, the matter is set down for a short "plea in mitigation". The purpose of this hearing is for the employer to put before the court all matters relevant to the assessment of penalty. These matters will generally include:

- the employer's past OHS record and the nature and gravity of the offence (including the foreseeability of the risk)
- the degree of culpability of the employer
- remedial actions the employer has taken
- the employer's general attitude towards OHS (both before and since the accident)
- the severity of the accident and injuries on the employer's contrition
- steps the employer has taken to assist injured employee(s)
- the employer's cooperation with WorkCover
- the employer's decision to enter a plea of guilty at an early stage.

Hearing a plea in mitigation generally takes between 15 and 30 minutes, with evidence primarily given by affidavit. Oral evidence may also be given. While the deponents (the persons who have provided

affidavits) must be present in court during the hearing to answer any questions, they are not usually called for cross-examination.

## **Pleading not guilty**

Where an employer pleads not guilty, the matter is listed for a formal hearing to determine guilt. Prosecutions commenced in the Chief Industrial Magistrate's Court are heard by a magistrate (generally the Chief Industrial Magistrate), whereas prosecutions commenced in the NSW Industrial Relations Commission in Court Session are heard before a judge.

Preparation for the hearing generally involves formal procedures for acquisition and exchange of evidence and preparing witnesses. When obtaining expert evidence or reports relevant to the defence, it is essential that the employer's solicitor requests all the reports from the experts. This will ensure they are subject to legal professional privilege and protected from discovery. (The term "discovery" relates to an order of the court for one party to provide the other party with copies of, or access to, all documents relevant to the prosecution.)

Legal professional privilege works to protect a confidential communication or document from discovery where the dominant purpose for its communication or preparation is to obtain legal advice, particularly where that advice relates to legal proceedings. Where the employer (and not the employer's solicitor) obtains an expert's report, privilege does not attach and the report must generally be supplied to the prosecution if properly requested.

## **Being prepared**

An employer's actions following an accident can have a critical impact on its ability to defend a prosecution or its plea in mitigation. Employers should therefore ensure that they:

- **investigate accurately** While a post-accident investigation is generally critical to begin understanding the causes of an accident (and therefore preventing a recurrence), employers should accept that all accidents have multiple causes and no one factor will be definitive. Accepting this, employers should investigate accidents accurately and avoid the natural temptation to make assumptions, make guesses and identify a single "cause".
- **gather evidence immediately** Usually there is a delay between an accident and the commencement of a prosecution. Obtaining detailed evidence two years after the accident increases the risk that the witnesses' recollection will be only partial or that intervening actions or assumptions have influenced them. Therefore, it is essential to obtain detailed statements from witnesses as soon as possible after the accident has occurred. While the investigating inspector also obtains statements from witnesses, the practical realities of limited resources and time for an inspector may ultimately result in only a superficial picture being obtained.
- **consider legal professional privilege** Where an accident is likely to result in a prosecution, an employer has a distinct advantage in involving its solicitor at the investigatory stage. In addition to the benefits of having a solicitor present during WorkCover interviews, an employer may gain significant advantages through using legal professional privilege.

The employer's solicitor should commission any required external investigations or reports to ensure legal professional privilege attaches. Similarly, internal reports and witness statements should be prepared in conjunction with the solicitor, with the report being addressed solely to the solicitor. Again, this will ensure that privilege attaches to the document.

## **Prevention better than cure**

An employer's conduct after an accident can have significant ongoing consequences for the conduct of a prosecution. This, however, should not distract the employer from the primary objective of preventing accidents in the first place. Without exception, employers who implement safe systems of work and are vigilant towards workplace risks are always better placed to deal with the consequences of accidents.