PSRs: Don't expand your legal liabilities

by Mary Beth Currie, LLB

Recently, the author spoke at a conference for engineers on Section 7 of the Regulation for Industrial Establishments made under the *Occupational Health and Safety Act* (OSHA). Her talk was to explain professional engineers' obligations under the regulation as interpreted by the labour ministry's *Guidelines for Pre-Start Health and Safety Reviews* (PSRs) and how they relate to the PEO guideline on PSRs. What she found was confusion.

What was interesting about this day long session was the diversity of views about the role of the professional engineer in the PSR process. A number of participants wanted to expand their role, and thus their liability, beyond that specified in the Regulation. Some proposed amalgamating a variety of retainers into a single contract under the guise of performing a PSR. Others wanted to continue to interpret the Regulation enacted October 7, 2000 in the same manner that they had interpreted the cumbersome, unenforceable regulation in effect from December 1997 until the new one became law. Still others wanted to gratuitously provide advice to the client beyond the scope of their retainer, if they happened upon a potential hazard in the workplace.

Because such conduct is not expressly mandated by the Regulation, such actions could lead to liability for the P.Eng. in excess of that which would be assumed if Section 7 is applied in the narrow, restrictive manner intended by its wording.

What's your job?

A PSR requires that a professional undertake a timely review to identify specific hazards and suggest remedial measures to implement before the item being reviewed is used by workers. Generally, a professional engineer will undertake the review in the design stage, although a PSR may be performed at any time prior to the item being used. Once the remedial measures are identified, it is the responsibility of the employer, after discussion with the Joint Health and Safety Committee (JHSC), to address the hazard.

It is not the role of the professional engineer to remove or eliminate the hazard in the course of performing the PSR. Yet this seems to be what some want to do. Here's what the PEO guideline says in Section 5, professional responsibility, scope of work and liability:

"While professional engineers who undertake PSRs are responsible for identifying and addressing issues of compliance with the applicable section of Regulation 851, professional engineers do not bear responsibility for implementing the report recommendations. The employer remains responsible for ensuring that all requirements of the OSHA and Regulations are complied with in the workplace. Even where a Pre-Start Health and Safety Review is not required or an exemption from the requirements of Section 7 applies, the employer must ensure that workers are protected before operating any apparatus, structure, protective element or process in the workplace."

How did it come to be that so many professional engineers hold such divergent views on their obligations under the "new" regulation? I think the genesis is found in its predecessor. Engineers were trained on the earlier legislation, gained their experience trying to implement it, and may not, in all cases, have carefully contrasted the language in the first version to the much more precise one now in force. The first required that owners (not employers) undertake a Pre-Development Review (PDR) before any equipment, machine or device was constructed, developed, altered, reconstructed or installed in a factory.

In my view, this first regulation was poorly drafted, overly broad and ambiguous. The government itself admits that it was "unclear and inflexible." It required professional engineers to review (not prepare) drawings of the proposed changes to the equipment (including guarding), or processes involving "a substance that is hazardous," and then to stamp those drawings to certify that if the equipment or process

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were altered as proposed by the drawings, it would comply with "the Act and regulations."

What did that mean? Was the professional engineer certifying that the drawings, if implemented, would comply with the OHSA and the Industrial Regulations or was the professional engineer certifying compliance with the OHSA and all regulations passed under the OHSA? There are at least 32 regulations passed under the OHSA, which means the certification applied widely. Many in the profession refused to provide PDRs because of the ambiguity and/or breadth of the language in that first regulation. Of those who did perform PDRs, many interpreted the language in that first regulation to mean that the measures proposed by the professional engineer actually had to be implemented and confirmed by them, before any PDR certification would be issued. This may not have been how the first regulation in fact was written, but it seemed to be how many interpreted their obligations when retained to provide a PDR.

As well, because the first regulation was not enforced, there was generally little corrective guidance from MOL. I feel the thinking behind PDRs was commendable: that a knowledgeable person review for safety compliance, the installation of new equipment or alteration of existing equipment or process at a workplace to ensure worker safety. But because it was unenforceable, there were no prosecutions and no guidelines or directives issued from the labour ministry, or any court cases to guide practitioners. So,

when those in the profession determined that they would not issue a PDR certification until the modifications were in place on the machine, device or equipment in question, and such modifications had been approved by the certifying professional engineer, this became a known–and accepted–practice.

It's time for clarity

The new regulation is not ambiguous. It is very specific as to the requirements imposed upon the workplace parties and professional engineers. It also expressly does not require implementation of recommendations made by the engineer before a PSR is issued. Nor does it require a workplace visit by the engineer to confirm that the recommendations have been adopted. Finally, the new regulation does not require the engineer to certify that the measures implemented complied with the "Act and regulations."

If you are performing PSRs, read and re-read the new law, the ministry's guideline and the PEO one. The latter two documents provide clear and extensive instructions on how to comply with the regulation: This is what is legally binding and what you must comply with.

Nowhere in the documentation is there any intimation that attendance at the workplace is a prerequisite for the issuance of a PSR. This is a key point. Workplace visits may be prudent to prepare a PSR, but the regulation only requires the engineer to identify hazards and provide recommendations for remedial action. Full stop. There is no requirement to confirm that the recipient of the PSR has implemented those recommendations. Indeed, if the PSR is not issued until after the recommendations have been implemented, such a timetable may circumvent the involvement of the JHSC in the process.

As further justification that confirmation of the implementation of the PSR recommendations is unnecessary, the regulation contemplates that in some cases, the employer may determine that the recommendations contained in the PSR will not be acted upon. In such cases, it must provide an explanation in writing to its JHSC as to what measures it will introduce to reduce or eliminate the identified hazards. Presumably the JHSC, if not satisfied, can seek the assistance of the ministry. But there is no requirement imposed on the professional engineer issuing the PSR to certify that the recommended measures have been carried out by the employer before the item is used or that they, once implemented, comply with "the Act and regulations."

If you follow the former procedure for issuing PDRs and certify that the recommendations will, if implemented, comply with the Act and regulations, or wait until the remedial measures have been implemented to certify that these measures comply with them, you voluntarily assume liability for certification with the OHSA and the 32 regulations. Such assumption of liability is not required, so why voluntarily assume such a burden?

The obligation imposed upon employers to obtain a PSR in the circumstances defined in the regulation matters. Skilled professionals will review and identify potential hazards in only those circumstances expressly enumerated in the table attached to Section 7 of the regulation.

However, you should be mindful that if you are retained to perform a PSR, you must comply with the regulation and deliver to the client a PSR that is in accord with the regulation. This is not to say that the engineer may not accept work arising from the retainer to produce a PSR. Indeed, additional retainers are likely, and the engineer may be retained to oversee the design and implementation of the measures recommended in the PSR. But the professional engineer should enter into separate retainers to perform such work.

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