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Briefs

Proposed amendment to Occupational Health & Safety Regulation Part 8: Personal protective clothing and equipment, Section 8.11 Safety headgear

A PDF of the complete submission can be found here.

Introduction

The BC Federation of Labour (“Federation,” “BCFED”) appreciates the opportunity to provide our submission with respect to the proposed amendments to: Part 8: Personal Protective Clothing and Equipment, Safety Headgear, Section 8.11 General Requirement.

The Federation represents more than 500,000 members of our affiliated unions, from more than 1,100 locals, working in every aspect of the BC economy. The Federation is recognized by the Workers’ Compensation Board (WCB) and the government as a major stakeholder in advocating for the health and safety of all workers in BC and full compensation for injured workers and their surviving dependents.

This submission was prepared in consultation with our affiliates.

The proposed amendments to Part 8, Personal Protective Clothing and Equipment, Safety Headgear Section 8.11 General Requirement

According to the Explanatory Notes attached to the proposed amendments to Section 8.11 Safety Headgear, General Requirements, the purpose of this section is to require safety headgear be worn by a worker where there is a danger of head injury from falling, flying or thrown objects, or other harmful contacts.

The request for an amendment to this regulation came from the Ministry of Labour (MOL) on behalf of the Sikh community who have raised concerns some employers are effectively applying this section as a blanket requirement at workplaces, resulting in turban-wearing Sikhs workers not being able to fully participate in the workforce. The Explanatory Notes explain the MOL asked the WCB to consider amending Section 8.11 to continue to protect the health and safety of turban-wearing Sikhs, while providing accommodation where there is no risk of head injury.

It is unclear from the above comment whether the MOL expects the WCB to provide accommodation where there is no risk of head injury. The WCB is mandated to ensure the health and safety of workers but has no jurisdiction or responsibility for the duty to accommodate. There is no requirement in either the *Workers Compensation Act* (WCA) or the Occupational Health and Safety Regulation (OHSR). Currently in BC, the duty to accommodate falls under human rights legislation and is the employer's obligation to accommodate in consultation with workers and their union.

Background

The issue at hand is whether workers who are of the Sikh faith and wear a turban should be required to wear a hard hat at their workplace. The WCB has provided no background information on this issue in the very brief Explanatory Notes. The BCFED believes it is important to provide an overview of the some of the important decisions and cases for the benefit of those who will read our

submission. Given the very short time frame the WCB has given stakeholders to provide a submission this is not an exhaustive list.

The issue presents some complexity with the intersection of religious freedoms under the federal and provincial human rights legislation and the rights and obligations for employers and workers under occupational health and safety laws.

We can go back to the 1985 Supreme Court of Canada (SCC) in Canadian National Railway Co (CNR). v. Bhinder, in which Mr. Bhinder a Sikh turban wearing worker was fired for refusing to wear a hard hat.[1] In this case the SCC ruled in favour of CNR, saying the hard hat was a bona fide occupational requirement. (BFOR)

In 1999, the SCC in the Meiorin case established a test for determining if a workplace policy or rule is a bona fide occupational requirement.[2] The three-step test, using the hard hat as an example:

1. Was the rule about hard hats adopted for safety purposes that are rationally connected to the required job?
2. Was the hard hat rule adopted in an honest and good faith belief that the standard is necessary for the fulfillment of that legitimate purpose of safety?
3. Was the hard hat requirement reasonably necessary to accomplish that legitimate purpose? And can the employer accommodate individual workers without imposing undue hardship on the employer?

These requirements meant that employers could no longer have a blanket requirement that all workers must wear a hard hat. On the face of it, this rule may seem neutral, with no intent to discriminate against workers because of religious beliefs; however, there may be an adverse effect for turban-wearing Sikhs.

Before employers make a blanket rule that all workers on a worksite must wear protective headgear, they must show they have done their due diligence in meeting the three-steps of the Meiorin decision.

There have been several legal decisions in Canada regarding turbans and hard hats. Most recently in 2019, the highest court in the province of Quebec ruled workplace safety comes before religious beliefs. The ruling concerns Sikh truckdrivers who challenged a requirement to wear hard hats when leaving their trucks during loading and unloading in the Port of Montreal. The Port has a blanket rule requiring hard hats for all workers on its property. The rule was adopted by the private truck company. The court ruled Quebec's *Charter of Human Rights and Freedoms* did apply but the temporary infringement was justified by the helmet's safety benefits. In British Columbia, a similar case in 2006 failed and the Sikh longshore workers were assigned to areas where the hard hat was not required. In 2008, two BC mill workers who challenged the hard hat requirement were assigned to a less dangerous part of the mill.

Currently the issue for turban-wearing Sikhs is perhaps best described by the World Sikh Organization:

> *The right of Sikhs to wear religious headgear, the turban, is protected under human rights legislation, subject to the tests for bona fide occupational requirements and the undue hardship standard.*
>
> *Employers are to accommodate and assess health and safety risks against the undue hardship standard where an employee is requesting an exemption from a hard-hat requirement to wear a Turban.*
>
> *Employers must avoid attempts to restrict the wearing of religious headgear based on uniform requirements or concerns about image or customer preference.*
>
> *Hard hat requirements may be bona fide occupational requirements however every attempt must be made to ensure that accommodation is provided-whether that means an alternative work placement or an exemption where the risk is de minimus and borne exclusively by the Sikh requesting accommodation.[3]*

The BCFED is concerned about the perception that all turban-wearing Sikhs are men and we think it is important to understand that women of the Sikh faith also wear turbans. For example, Palwinder

Kaur Shergill, was the first turbaned Sikh judge appointed to the BC Supreme Court.[4]

Section 8.11 General Requirement Safety Headgear

The WCB proposes to amend Section 8.11 as follows:

(1) Before a worker starts a work assignment where there is a risk of head injury to the worker from falling, flying or thrown objects, or other harmful contacts, the employer must take measures to

(a) eliminate the risk, or

(b) if it is not practicable to eliminate the risk, minimize the risk to the lowest level practicable by applying the following control measures in order of priority:

(i) engineering controls;

(ii) administrative controls;

(iii) if the control measures set out in subparagraphs (i) and (ii) are not adequate to minimize the risk to the lowest level practicable, the use of safety headgear by the worker.

According to the Explanatory Notes, the purpose of the proposed amendment to sub-section 1 is to clarify the hierarchy of control measures employers must follow when there is a risk of head injury to workers from falling, flying or thrown objects, or other harmful contacts. The amendment also clarifies the employer must take measures to control the risk prior to the worker starting the work assignment.

The BCFED supports the proposed amendment but we believe it requires further amending to include the steps an employer must take prior to considering how to mitigate or control the hazard. Hazard identification, and risk assessment must be done first. This is where the hierarchy of control of occupational hazards and the process of improving safety and health really starts. Awareness of hazards will lead to preventative action. Risk assessment provides the opportunity to evaluate and

prioritize the hazards and risks.

And there are other regulations in the OHSR that prescribe these steps. For example, hazard and/or risk identification is specifically required in Sections 4.20.2 Working Alone; and 4.28, Violence in the Workplace and 4.48 Ergonomics.

Recommendation

The BCFED proposes sub-section 1 be further amended to include “the employer must identify the hazards and conduct a risk assessment prior to taking measures …..”

To provide clarity we recommend the WCB develop appropriate language using Section 4.20.2 Working Alone or in Isolation as an example:

4.20.2 Hazard identification, elimination and control

(*1) Before a worker is assigned to work alone or in isolation, the employer must identify any hazards to that worker.*

(2) Before a worker starts a work assignment with a hazard identified under subsection (1), the employer must take measures

(a) to eliminate the hazard, and

(b) if it is not practicable to eliminate the hazard, to minimize the risk from the hazard.

(3) For purposes of subsection (2) (b), the employer must minimize the risk from the hazard to the lowest level practicable using engineering controls, administrative controls or a combination of engineering and administrative controls.[5]

The BCFED supports the proposed amendments to sub-subsection (1) (a) and (b) requiring the employer to consider each step in the hierarchy of controls. A simple, workable hierarchy of controls definition is that it is a framework that identifies the relative effectiveness of various corrective actions

that can be taken to mitigate safety hazards. The hierarchy of controls is represented by the image of the reverse triangle beginning at the top with the ideal control measure of eliminating the hazard. If we can eliminate a hazard, we no longer need to be concerned with it and workers are provided with the best protection.

If elimination is not possible then we consider other methods to control a hazard by working down the hierarchy. Sub-section (b) (i-iii) requires the employer to consider engineering controls and administrative controls and if they are unable to minimize the risk to the lowest level practicable only then can they consider using protective headgear. Personal protective equipment is the least effective way of providing workers with protection, it simply places a barrier between the hazard and the worker.

By practicing the fundamental process of hazard identification, risk assessment and mitigation according to the hierarchy of controls, employers are less likely to implement blanket requirements for headgear. Adherence to the proposed amendments to Section 8.11 will help organizations to move from blanket rules to individual context; and this has the potential to benefit many workers in addition to turban-wearing Sikh workers.

Conclusion

These are laudable goals, and the BCFED supports the proposed amendment. That said, we are concerned that the process of consultation is being unduly rushed through the pre-consultation, public consultation and public hearing stages. We are certain the BCFED is not the only stakeholder that has not had sufficient time to consult with our affiliates on such a complex issue that encompasses the important aspects of safety, diversity and human rights.

Finally, we would like to emphasize the BCFED’s support for the WCB taking on this issue, and our hope that it can serve as the starting point for a larger conversation about how the WCB can better serve equity-seeking groups, including women, workers of colour, immigrant workers, workers who identify as LGBTQ2S, Indigenous and workers with disabilities. The Board’s current policy against

considering differences based on social and biological factors in injury prevention and claims adjudication disadvantages those groups, and we would welcome the opportunity to discuss broader changes with a goal of greater equity.

[1] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/102/index.do

[2] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1724/index.do (British Columbia (Public Service Employee Relations Commission) v. BCGSEU)

[3] https://www.worldsikh.org/can_i_wear_my_turban_in_the_workplace

4.https://www.cbc.ca/news/canada/british-columbia/palbinder-kaur-shergill-appointed-to-supreme-court-british-columbia-1.4176952

[5] https://www.worksafebc.com/en/law-policy/occupational-health-safety/searchable-ohs-regulation/ohs-regulation