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Critical Injury or Fatality of a Non-Worker: To Report or Not To Report?

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A guest drowns in the hotel pool. Does the hotel need to report the fatality to the Ministry of Labour under subsection 51(1) of the *Occupational Health and Safety Act ("OHSA")*? According to a recent decision by the Ontario Labour Relations Board, the answer is "yes". The Labour Board found that employers and contractors are required to report a critical injury or fatality suffered by a non-worker to the Ministry of Labour if it occurs at a place where workers work. The Labour Board found that this obligation to report applies regardless of whether a worker is present at the time of the injury.

In the case before the Labour Board, a guest of Blue Mountain Resorts drowned in a swimming pool on December 24, 2007. On March 27, 2008, a Ministry of Labour Health and Safety Inspector ordered Blue Mountain to report the fatality and to provide related reports. Blue Mountain appealed the Order to the Labour Board.

At issue before the Labour Board was the interpretation of subsection 51(1) of *OHSA*, which provides as follows:

*Where a **person** is killed or critically injured from any cause at a workplace, the constructor, if any, and the employer shall notify an inspector, and the committee, health and safety representative and trade union, if any, immediately of the occurrence by telephone, telegram or other direct means and the employer shall, within forty-eight hours after the occurrence, send to a Director a written report of the circumstances of the occurrence containing such information and particulars as the regulations prescribe.* (emphasis added)

EMPLOYER'S ARGUMENT

Before the Labour Board, Blue Mountain argued that the requirement to report a critical injury or fatality under subsection 51(1) of *OHSA* did not apply because the incident did not involve a worker and did not occur at a workplace. It argued that a workplace has to mean a place where workers are present.

Blue Mountain also argued that the broader implications of interpreting subsection 51(1) of *OHSA* to require the reporting of all incidents involving non-workers are problematic. To require Blue Mountain to report critical injuries of non-workers would mean that it would have to report incidents involving ski guests who suffer a broken leg or arm on the ski hill. Further, Blue Mountain argued that it would then be required under subsection 51(2) of *OHSA* not to disturb the accident scene. For example, it would have to barricade a ski run where a ski guest breaks a bone until such time as the Ministry of Labour was notified and a Health and Safety Inspector authorized the release of the scene.

MINISTRY OF LABOUR'S ARGUMENT

The Ministry of Labour argued that *OHSA* must be given a broad and liberal interpretation. Subsection 51(1) of the *Act* uses the word "person", not "worker"; therefore, the section requires the reporting of all critical or fatal incidents at the workplace.

Further, the Ministry of Labour argued that workers are vulnerable to the same hazards and risks as non-workers who attend at a workplace. The reporting of a non-worker injury serves to enable the Ministry of Labour to conduct an investigation and make orders for the protection of workers who may attend at the workplace.

LABOUR BOARD'S DECISION

The Labour Board accepted the Ministry of Labour's argument and found:

…where workers are vulnerable to the same hazards and risks as non-workers who attend a workplace, it is not an absurd result for an employer to be required to report when a non-worker suffers a critical injury at a workplace …

If the goal is to enhance worker safety by alerting the Ministry to hazards in the workplace that could affect workers, a provision that requires the reporting of critical injuries suffered by non-workers in places where workers work, regardless of whether a worker was present at the time and place of the critical injury, is not absurd.

The fact that a worker could have been affected by a potential hazard was a significant factor in the Board's analysis. The Board upheld the Inspector's Order requiring Blue Mountain to report the drowning death of a hotel guest.

WHAT EMPLOYERS NEED TO KNOW

In the *Blue Mountain* decision, the Labour Board interpreted *OHSA* broadly, particularly in its interpretation of what is a "workplace". The decision risks turning every place into a workplace, all of the time, regardless of the circumstances. If a snow plough operator is in the vicinity of an accident where a pedestrian is critically injured by a motorist, is this a reportable accident under *OHSA?* Or a patient slips and falls breaking his or her leg in a hospital, is this a reportable accident under *OHSA?* The answer is "maybe". It will depend on all the circumstances, including whether a worker could be affected by a potential hazard.

In light of this decision, employers must carefully consider reporting critical injuries and fatalities involving workers or non-workers (e.g. patients, customers, guests and members of the public) alike to the Ministry of Labour or risk liability under *OHSA*.

In addition to reporting the accident, employers must be aware of subsection 51(2) of *OHSA* which requires an accident scene NOT to be disturbed until authorized by the Ministry of Labour Inspector. Subsection 51(2) provides:

Where a person is killed or is critically injured at a workplace, no person shall, except for the purpose of,

(a) saving life or relieving human suffering;

(b) maintaining an essential public utility service or a public transportation system; or

(c) preventing unnecessary damage to equipment or other property,

interfere with, disturb, destroy, alter or carry away any wreckage, article or thing at the scene of or connected with the occurrence until permission so to do has been given by an inspector.

In the Blue Mountain decision, the Labour Board declined to comment directly on an employer's obligations under subsection 51(2) if a non-worker is injured. Usually, employers tape-off or barricade an area until the Ministry of Labour completes its investigation. This requirement may be problematic if it applies to workplaces that are frequently accessed by non-workers such as health and long-term care facilities, resorts, hotels, sports arenas, restaurants and municipal streets.

For more information on how to handle Ministry investigations, refer to the Publications section of our website and the March 11, 2009 news item "Accident Investigations."

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