FTR Now

Blue Mountain Required to Report Non-Worker Injury

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A recent decision of the Divisional Court confirms that employers and contractors are required to report a critical injury or fatality suffered by a non-worker in the “workplace” to the Ministry of Labour, regardless of whether workers were present at the time of the occurrence. In this *FTR Now* we consider this decision and what it means for employers.

BACKGROUND

On December 24, 2007, a guest of Blue Mountain Resorts drowned in a swimming pool at the resort. The Employer did not report the drowning of the hotel guest to the Ministry of Labour because the incident did not involve a worker.

THE MOL ORDER

On March 27, 2008, a Ministry of Labour Health and Safety Inspector ordered Blue Mountain to report the fatality pursuant to section 51(1) of the *Occupational Health and Safety Act* (“*OHSA*“). This section provides that if a *person* is killed or critically injured from any cause at a workplace, the employer must report the occurrence to the Ministry of Labour.

THE LABOUR BOARD DECISION

Blue Mountain appealed the Order to the Labour Board, which held that Blue Mountain had an obligation to report the occurrence. The Labour Board found that where workers are vulnerable to the same hazards and risks as non-workers who attend at a workplace, it is not absurd for an employer to be required to report when a non-worker suffers a critical injury. The Labour Board relied upon the purpose of the legislation to enhance worker safety by alerting the Ministry of Labour to hazards in the workplace that could affect workers.

Blue Mountain applied to the Divisional Court for a judicial review of the Labour Board’s decision.

THE DIVISIONAL COURT DECISION

THE EMPLOYER’S ARGUMENT

At the Divisional Court, the Employer raised concerns about the practical application of the reporting requirement flowing from the Labour Board’s interpretation of “workplace” to include all 750 acres of the resort, noting that Blue Mountain was both a place of work and a recreational facility. For example, under the applicable regulations, fractured arms are considered “critical injuries” and thus reportable under the *OHSA*. However, as a ski resort, such injuries were “an expected and not-infrequent by-product” of skiing. Therefore, the Employer argued that as a result of the Labour Board’s decision, the Ministry of Labour “will have expanded its reach to realms of activity that are completely unrelated to worker health and safety.”

The Employer further argued that this interpretation had the potential to seriously disrupt its operations as a result of the requirement under s. 51(2) of the *OHSA* to preserve the scene of the occurrence when a critical injury results. It argued for an interpretation of “workplace” which requires the “physical presence of a worker at a place where a worker works at the time at which an occurrence with a guest or other person takes place.”

DECISION OF THE DIVISIONAL COURT

The Court found that there were logical flaws in the Employer's interpretation of "workplace", holding that it did not take into account the causative nexus between prevailing conditions and resulting harm. The Court held that the Employer's interpretation was not supported by the language of the *OHSA* or the purposes of the legislation. The *OHSA* defines "workplace" as "any land, premises, location or thing at, upon, in or near which a worker works" and does not require the physical presence of a worker.

However, the Court also found that the Labour Board's interpretation of the reporting obligation was too broad and went beyond the purposes of the *OHSA*. The Court noted that on the plain reading of the legislation applied by the Labour Board, "any event resulting in death or critical injury, even if occurring in circumstances having no potential nexus with worker safety, is reportable so long as [it occurs] in a workplace." According to the Court, this had the potential to "reach beyond the ambit of the purposes of the statute."

The Court held that the Labour Board went farther than was necessary in concluding that all 750 acres of the Blue Mountain Resort was a workplace and this aspect of the decision was unreasonable. Since it was common ground that the swimming pool was a place where workers work, the absence of a worker at the time of the occurrence did not diminish the fact that the area was a workplace. The Court noted that what constitutes a workplace will be dependent upon the facts of each case. Since "workers and guests are vulnerable to the same hazards," in order to uphold the purposes and intents of the legislation, physical hazards with potential to harm workers and non-workers alike should be subject to reporting and oversight.

The Divisional Court found that it was unnecessary to comment on the issue raised by the Employer of the potential disruption as a result of the requirement to preserve the scene of the occurrence since this was not an issue before the Labour Board.

The Court upheld the Labour Board's decision that non-worker injuries are reportable as reasonable and dismissed the application.

IMPLICATIONS

This decision provides further guidance for employers about when a critical injury is reportable to the Ministry of Labour. It will depend on whether a worker could potentially be affected by the hazard. Employers must therefore undertake a consideration of the hazards which caused the critical injury, the context in which the injury occurred and whether there is a potential nexus with worker safety.

For example, the death of a patient in a nursing home due to old age is not the type of critical injury sought to be captured by the reporting requirement based on the Court's reasoning, despite the fact that this is a "workplace" for many workers. This critical injury was not due to a "physical hazard which has the potential to harm workers." However, the loss of consciousness of a patient due to a slip and fall on a wet floor in that same nursing home would meet the test advanced by the Court.

It is also clear that a single definition of what constitutes a "workplace" will not be the determining factor, since the Court held that this will depend upon the facts of each case. Instead, employers must focus on the vulnerability of a worker to the hazard or physical condition of the workplace causing the occurrence.

For more information about this decision or your Health and Safety obligations, please contact Nadine S. Zacks at 416.864.7484 or your regular Hicks Morley lawyer.

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