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OHS & Workers' Compensation

M A N A G E M E N T U P D A T E

Every "Person" Counts When Reporting OHS Accidents In Ontario

A skier suffers a broken arm while skiing. A student is briefly knocked unconscious during a physical education class. A patient dies while in hospital. Aside from being sad and unfortunate events, incidents such as these are generally not seen as attracting an obligation to report the matter to health and safety authorities. That is no longer the case as a result of a recent OHS decision. On May 18, 2011, the Ontario Divisional Court upheld an Ontario Labour Relations Board (OLRB) decision that determined that all fatal and critical injuries, occurring to a person at a workplace should be reported to the Ministry of Labour.

The decision has the potential to significantly impact numerous Ontario employers and constructors, who are obligated to both report and preserve the scene of the injury as set out in the *Occupational Health and Safety Act* (OHSA). The circumstances leading to the decision, its potential ramifications, and practical steps organizations may take to manage their obligations in such cases, are discussed below.

THE INCIDENT AT BLUE MOUNTAIN AND THE ORDER

Blue Mountain operates a resort that includes ski runs and other recreational facilities and an inn. The resort includes a property of approximately 750 acres and the business employs 1,750 people in peak season. In December 2007, a patron drowned in an unsupervised indoor swimming pool at the Blue Mountain resort. At the time, no Blue Mountain workers were in the pool area. Blue Mountain did not report the drowning to the Ministry of Labour because it did not involve a worker.

In March 2008, a Ministry of Labour inspector conducting a field visit at Blue Mountain learned of the drowning and Blue Mountain was issued an order under subsection 51(1) of the OHSA which requires that:

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 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.

The order indicated that Blue Mountain had failed to notify an inspector of the "fatal injury to a person" and directed Blue Mountain to comply forthwith, based on the literal wording of this Ontario OHSA requirement.

THE APPEAL – WAS A "WORKER" OR "WORKPLACE" INVOLVED?

Blue Mountain appealed the order to the OLRB, alleging it was incorrect because the drowning incident did not involve a "worker" and/or did not occur in a "workplace." Blue Mountain argued that an interpretation of subsection 51(1) that would require the reporting of injuries to non-workers that occur at a location where no worker is present at the time of the injury is absurd. Blue Mountain asserted that the purpose of the OHSA is to ensure the safety of workers, rather than persons or non-workers, and that the absence of workers from the location of the accident means the location is not a workplace as defined by the OHSA. In taking this position, Blue Mountain argued that the word "person" in subsection 51(1) of the OHSA should be interpreted to mean "worker."

The OLRB upheld the order. While the OLRB agreed that the purpose of the OHSA is to protect workers, it did not agree that "person" means "worker" in subsection 51(1). In reaching this decision the OLRB considered that the term "person" is not defined in the OHSA, whereas "worker" has a specific defined meaning: "a person who performs work or supplies services for monetary compensation [...]"¹ The OLRB held that a "worker" was a category of "person" and the terms were, therefore, not synonymous. Further the term "person" is broader than the definition of "worker" as it "is generally understood to refer to the broadest range of people."² The numerous provisions in the OHSA where the term "person" is used establishes that "person" cannot be equated with "worker." In the OLRB's view, had the Legislature intended that employers report only accidents involving workers it would not have used the word "person" in subsection 51(1) of the OHSA.

The OLRB also rejected the argument that, because no Blue Mountain workers were at the pool at the time of the accident, the indoor pool was not a "workplace".³ The OLRB found that Blue Mountain was a fixed workplace; it is a fixed location to which employees regularly report. It had a defined area which consisted of the ski hill, buildings, parking lots and other areas and that workers employed by Blue Mountain would perform work

functions in all or parts of the defined area on a daily basis. The entire 750 acres of the Blue Mountain resort was found to be a "workplace" for the purposes of subsection 51(1). The absence of a worker from a particular location within the defined area did not mean the particular location ceased to be a "workplace." Essentially, the OLRB held that, in a fixed work location like Blue Mountain, areas do not transition in and out of being a "workplace" based on the comings and goings of workers.

The OLRB also declined to interpret subsection 51(1) of the OHSA as only applying to injuries involving workers on policy grounds. It accepted the MOL's position that notification of all critical and fatal injuries to all persons is intended because workplace hazards that injure non-workers may also endanger workers.⁴

THE JUDICIAL REVIEW – REPORTING OBLIGATION UPHELD

Blue Mountain sought judicial review of the OLRB's decision.⁵ The issues before the Divisional Court were largely the same as were before the OLRB: whether the word "person" in subsection 51(1) of the OHSA should be interpreted to mean "worker" and whether the "workplace" is defined by the physical presence of a worker.

In arriving at its decision, the Court concluded that the OLRB's logic was:

transparent, intelligible and justified in light of the total context of the legislation's purposes and the language used to implement those purposes. [...] Conditions and hazards that result in the death or critical injury of a non-worker have the potential to cause similar harm to workers. The reporting obligation serves to enhance the protection of workers by bringing hazards to the attention of the Ministry whereas an absence of a reporting obligation would lead to a diminished oversight and potentially less worker safety.⁶

The Court agreed with the OLRB that the physical presence of a worker was not necessary to make a location a "workplace" for the purpose of subsection 51(1) of the OHSA. The Court noted that the obligation to report an accident under subsection 51(1) is not entirely based on the timing of the accident but on the "causative nexus between prevailing conditions and the resulting harm."⁷ The Court agreed that the Ministry should be notified of accidents because the cause of the accident may also place workers at risk.

That said, the Court did take issue with the OLRB's finding that Blue Mountain's entire 750 acre property was a "workplace." In the Court's view, that finding went farther than was necessary to resolve Blue Mountain's appeal. In the Court's view, each case should be determined on its own merits. However, this divergence of opinion did not have any practical effect on the outcome of the judicial review. The Court found that, notwithstanding the absence of a worker from the swimming pool area at the time of the accident, the area was a "workplace." As a result, the decision reached by the OLRB was not unreasonable and the Court dismissed the application for judicial review.

MANAGING THE IMPLICATIONS FOR REPORTING AND PRESERVING THE SCENE

a) Accident Reporting

A wide variety of workplaces will be affected by this decision. All businesses that provide services to the public at large or other non-workers (such as volunteers) may face the requirement to report fatal and critical consequences involving these persons. We note that subsection 51(1) of the OHSA does not even refer to a fatal or critical injury arising from an accident; rather, if any person is injured from any cause the reporting obligation arises. Subsection 51(1) of the OHSA refers prompt notification of a MOL inspector, as well as the joint health and safety committee representative and trade union, and then as, a second requirement, a written report within 48 hours after the occurrence. The written report must follow appropriate minimum reporting requirements detailed in the applicable regulations. The potential impact that will be felt on those operating in the retail, hospitality, public transit, education, and other service industries cannot be overstated. Municipal and provincial government bodies operating and maintaining facilities, parks, roads and infrastructure all stand to be significantly impacted. Hospitals, nursing and retirement homes, and provincial jails will now, apparently, have to report every fatality or critical injury occurring within their premises that involves a person such as a patient or inmate. One could reasonably expect that this decision will require almost constant reporting from some employers.

b) Preserving the Scene of an Accident

Aside from the reporting obligation, another serious implication arises from the obligation to hold the scene of a fatality or critical injury. Subsection 51(2) of the OHSA requires that the scene of an injury not be disturbed, without the permission of an MOL inspector, except to save life or relieve human suffering, maintain an essential public utility service or a public transportation system, or prevent unnecessary damage to equipment or other property. Blue Mountain had raised this concern before both the OLRB and Divisional Court, noting that it would be required to hold the scene of all accidents until released by the MOL. Blue Mountain argued that the requirement to cordon off an accident scene could have a serious impact on their operations. However, the OLRB and the Court did not address this issue as it was not raised on the circumstances of the appeal – which was against an order to report the incident. Without any guidance on this obligation for incidents involving non-workers, employers and constructors must assume that the obligation applies in full, meaning that the scene of an injury will need to be held until released by an MOL inspector.

c) Suggested Strategy

In light of the potentially onerous obligations placed on employers and constructors, and the potential consequences of failing to comply with them,⁸ short of an amendment to the OHSA and its regulations⁹ or a clear policy directive on this matter from the MOL, prompt consideration must be given to managing this issue. All employers and constructors should have in place incident reporting policies, strategies and procedures. In light of the Blue Mountain decision, policies and procedures should be reviewed, and every employer and constructor should be prepared as follows:

- (i) Incident reporting requirements should clearly state circumstances in which notice and a written report must be given to the MOL, and be amended to reflect reporting where a "person" is killed or critically injured from any cause at a workplace. They should also state circumstances where the scene should be preserved;
- (ii) Front-line supervisory personnel in workplaces must know who to notify in the event of a fatal or critical injury, and human resources and health and safety personnel must have contact information for the MOL available in case notice and a report must be provided. Public and private sector

organizations who stand to be significantly affected by the amendments, should speak with a regular MOL contact to provide advance notice that increased notifications will be occurring as a result of the Blue Mountain decision;

- (iii) Employers in a sector that will be significantly affected by ongoing incidents potentially giving rise to reporting should keep in mind that the Blue Mountain decision left the door open to a possible argument that a particular event or incident of fatal or critical injury has not occurred at a "workplace." Accident and incident reporting requirements should instruct human resources or OHS personnel to make immediate contact with a local MOL inspector to inquire as to whether the MOL will require notice, a written report, and the preservation of the scene in circumstances where there may not clearly be a notice and reporting obligation. Inquiries of this nature could potentially be made in circumstances involving an incident that:

- does not involve an employee or contractor of the organization;
- does not arise out of the organization's work or work-related activity;
- did not involve the organizations equipment or vehicles;
- did not occur in a vehicle, building or area where an employee or contractor of the organization works; and
- could not readily have happened to an employee or contractor of the organization.

In some instances in the past, the MOL has ruled, upon receiving a verbal notice, that they do not wish a formal notification or report, or the scene to be preserved, where they determine, from the verbal notice, that the matter does not involve a workplace or work-related issue. Such matters should, in the writers' view, be left to the discretion of the MOL. If the MOL does not wish notice, a report or the scene to be preserved, the name of the MOL official and detailed notes should be recorded and retained.

- (iv) Standard letters and reporting forms should be kept available, to ensure that minimum statutory notification and written reporting requirements to the MOL, health and safety committee and trade union, are met.

While these suggested strategies do not entirely eliminate the possibility that certain organizations will be inundating the MOL with telephone notifications and inquiries, they may assist in permitting an organized, managed approach to the burdensome consequences occasioned by this interpretation of subsection 51(1) of the OHSA. ■

¹ *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, ss. 1(1).

² *Blue Mountain Resorts Limited v. Ontario (Labour)*, 2009 CanLII 13609 at para. 69 (O.L.R.B.).

³ Defined in subsection 1(1) of the OHSA to mean "any land, premises, location or thing at, upon, in or near which a worker works".

⁴ "I accept the Ministry's submission that, where workers are vulnerable to the same hazards and risks as non-workers who attend at 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 workers go in or near places where an incident has occurred resulting in a non-worker suffering a critical injury, the workers are equally at risk. The reporting of the non-worker injury serves to enable the Ministry to conduct an investigation and make orders or recommendations designed to enhance the protection of workers". *Blue Mountain Resorts Limited v. Ontario (Labour)*, supra at note 2, at para. 61.

⁵ There is no ability to appeal a decision of the OLRB. However, an application may be filed with the Divisional Court to have the decision reviewed by the court. A judicial review is different than an appeal as the court will generally focus on whether the OLRB had the authority to make the decision it did and whether it properly exercised that authority. The court will not consider whether it would have made the same decision but will look at whether the decision is reasonable in all of the circumstances.

⁶ *Blue Mountain Resorts Limited v. Ontario (The Ministry of Labour and The Ontario Labour Relations Board)*, 2011 ONSC 3057 at para. 17 (Ont. S.C.J. (Div. Ct.)).

⁷ *Ibid.* at para. 26.

⁸ The MOL considers the failure to notify and the failure to hold the scene to be serious offences and will almost always prosecute the failure to comply with these obligations.

⁹ The authors note that the Ontario MOL is currently engaging in a review of accident reporting requirements under the OHSA, which are currently found in seven separate regulations governing industrial establishments, mines, window cleaning operations, health care and residential facilities, construction projects and other workplaces. A planned consolidated regulation is scheduled to be released in July, 2011. Any discussions respecting such amendments, which may occur between industry associations and the MOL, particularly in light of the Blue Mountain decision, should be initiated immediately.

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