Divisional Court ruling confirms employers' expanded reporting obligations under the OHSA

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Under the *Occupational Health and Safety Act* (OHSA), employers are required to report workplace injuries and fatalities to the Ministry of Labour. Traditionally, the employer's obligation in this regard was understood to apply to injuries or fatalities sustained by workers. For Ontario employers who deal with the public this is no longer the case. The Divisional Court has confirmed an Ontario Labour Relations Board ruling that the employer's duty to report all fatal and critical injuries at a workplace extends beyond workers to members of the public when the incident arises from potential hazards or risks to employees.

In *Blue Mountain Resorts Limited v. Ontario (the Ministry of Labour and the Ontario Labour Relations Board)* (May 2011) the Divisional Court ruled that for the purposes of the reporting obligation in the OHSA, the term “person” applies equally to workers and non-workers. The Court also ruled that a “workplace” includes anywhere that a worker may work, regardless of whether a worker is present at the time of an injury or fatality.

The case arose in December 2007 when a guest at the Blue Mountain Resort drowned in an unsupervised swimming pool on the resort premises. An OHSA inspector ordered Blue Mountain (the “employer”) to report the death to the Ministry of Labour (the “Ministry”) pursuant to s. 51(1) of the OHSA. This provision states:

> 51.(1) 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 48 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.

At the time of the incident, the employer did not report the incident because the person involved was not a worker. The Ministry inspector took a different view. The inspector concluded that the term “person”, as used in s. 51(1), included a guest at the resort, and that a “workplace” included the unsupervised swimming pool. The inspector's order was upheld by the Ontario Labour Relations Board (the “Board”). Fearing the far-reaching implications of the Board's interpretation,

the employer brought an application for judicial review of the Board's decision.

DIVISIONAL COURT

The issue before the Court was the proper interpretation of s. 51(1) of the OHSA and, in particular, the meaning of the terms “person” and “workplace” as they are used in that section. The Court noted that the OHSA, as a whole, displays the Legislature's intention to “cast a very wide net to ensure that all circumstances resulting in death or critical injury at a workplace are brought to the Ministry's attention…” In the Court's view, the OHSA required that “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 [the event occurs] in a workplace.”

The Court therefore accepted the Board's interpretation of the term “person”, and that an injury to a non-worker is included in the employer's reporting obligation under s. 51(1). This broad meaning was justified because hazards that result in death or injury to non-workers have the potential to cause similar harm to workers. In the Court's view, the broader reporting obligation would operate to enhance the protection of workers by requiring all such hazards to be brought to the attention of the Ministry of Labour.

The Court then considered the employer's submissions on the Board's interpretation of the term “workplace”. The employer argued that the Board's interpretation led to an absurd result. This was based on the fact that where there is an injury at a workplace, the OHSA requires the scene of the incident to be preserved until it is inspected and cleared by a Ministry inspector. Keeping in mind that the employer operated a resort where the predominant activity was skiing, if the term “person” included non-workers such as guests, and the term “workplace” included the entire resort, then each time a guest was injured in a ski accident the employer would have to secure the scene of the occurrence. The employer argued that the logistics of this would be severely disruptive, potentially dangerous to other guests, and costly.

Instead the employer suggested an interpretation that would recognize the dual nature of the employer's premises as both recreational and as a workplace. This dual nature meant that there could be circumstances in which a guest could experience a critical or fatal injury while engaged in a recreational activity and yet there would be no risk to a worker. The employer argued that the term “workplace” should be interpreted to require 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.” In applying this definition to the facts, the employer stated that the swimming pool would have been a workplace had a member of staff been working at the swimming pool when the incident occurred.

The Court rejected this interpretation. First, it did not take into account the “nexus between prevailing conditions and the resulting harm.” The Court stated:

> For example, had the swimmer been critically injured by a structural fault in the pool area, it could hardly be argued that the circumstances ought not to attract the attention of the Ministry and thus the reporting obligation. Workers and guests are vulnerable to the same hazards. The purposes and intents of the legislation would be undermined if a physical hazard with potential to harm workers and non-workers alike was not subject to reporting and oversight.

The Court also relied on the definition of "workplace" in the OHSA to reject the employer's interpretation. Section 1 of the OHSA defines "workplace" as "any land, premises, location or thing at, upon, in or near which a worker works."

The Court pointed out that had the Legislature intended the meaning proposed by the employer, it would not have used such language. Instead "workplace" would have been defined to be "any land…at, upon, in or near which a worker is working". [Emphasis in original]

The Court concluded its analysis by stating that there was no dispute that the swimming pool was a place where one or more workers work. In its view, the absence of a worker at the swimming pool at the time of the drowning did not diminish the fact that it was a workplace for the purposes of the OHSA reporting requirements. It held that the Board's ruling was not unreasonable and dismissed the employer's application for judicial review.

In Our View

The Court's decision has significant implications for all employers who deal with the public. Employers are required to report all critical and fatal injuries in the workplace when the incident arises from potential hazards or risks to employees, regardless of whether the injured person is a worker or a member of the public. The difficulty is that employers will have to enter into a detailed analysis of each situation to determine if a worker could have been injured by the risk or hazard in order to determine whether the duty to report arises in the circumstances. Where there is any question as to whether the risk or hazard could have resulted in worker injury, prudent employers should err on the side of caution and report the injury.

The decision in *Blue Mountain* has attracted considerable criticism. Some critics point out that the Court's interpretation has the effect of elevating the OHSA from a statute dealing exclusively with occupational health and safety to a general public safety statute – a result not intended by the Legislature. Others have noted that the ruling may trigger an overwhelming flood of reports to an already resourced-strapped Ministry of Labour.

It is possible that Blue Mountain will appeal the Divisional Court's decision. However there has

been no indication of an appeal at this time. Until such an appeal is heard, employers should review their reporting policies and ensure that relevant personnel are aware of the broader reporting requirement under the OHSA.

For further information, please contact Paul Lalonde at (613) 940- 2759.