

Court of Appeal Overturns Blue Mountain Accident Reporting Decision



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Employers across Ontario are likely breathing a sigh of relief. The Court of Appeal just released its decision in *Blue Mountain v. Ontario Ministry of Labour*. The Ontario Labour Relations Board ('OLRB') and a lower Court held previously that the *Occupational Health and Safety Act* ('OHSA') required employers to report any 'critical injury' or fatality to any 'person' at a workplace; including whenever a non-worker died or was critically injured at or near a place where a worker is working, has passed through, or may at some other time work, regardless of the cause of the incident. The Court of Appeal held that this literal interpretation was unreasonable.

The Facts in the Blue Mountain Case

Blue Mountain operates a full service ski resort in Collingwood, Ontario. On December 23, 2007 a guest of Blue Mountain drowned in an unsupervised swimming pool. The drowning of the guest came to the attention of an Ontario Ministry of Labour Inspector in March of 2008. On March 27, 2008 the Inspector issued a compliance order directing Blue Mountain to report the drowning to the Ministry of Labour pursuant to section 51(1) of the Ontario *Occupational Health and Safety Act*, R.S.O. 1990, c. 0-1 ('OHSA').

Section 51 of the OHSA 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 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.

Section 51(1) of the OHSA obliges an employer to immediately report a fatality or 'critical injury' which occurs to a person at a workplace to the Ministry of Labour, the Joint Health and Safety Committee (or representative) and any trade union. A written report to the Ministry of Labour must be filed within 48 hours. The term 'critical injury' is defined by Regulation as an injury of a serious nature that,

(a) places life in jeopardy,

(b) produces unconsciousness,

(c) results in substantial loss of blood,

(d) involves the fracture of a leg or arm but not a finger or toe,

(e) involves the amputation of a leg, arm, hand or foot but not a finger or toe,

(f) consists of burns to a major portion of the body, or

(g) causes the loss of sight in an eye.

Section 51(2) of the OHSA imposes sweeping obligations upon employers to preserve the scene of a fatality or 'critical injury'. Section 51(2) states,

51. (2) 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

The Ministry of Labour took the position that the pool was a 'workplace' within the meaning of the OHSA and that the plain wording of the section required Blue Mountain to report each time a 'person' was fatally or critically injured. The Ministry noted that the term 'worker' was separately defined in the OHSA and that the legislature could have used the term 'worker' in section 51(1) if it wished to confine the scope of the reporting obligation to employees.

Blue Mountain's Appeal to the Labour Relations Board

Blue Mountain appealed the Inspector's order to the Ontario Labour Relations Board pursuant to section 61 of the OHSA. On an appeal under section 61, the Labour Relations Board has fairly broad jurisdiction. The Labour Relations may substitute its findings for those of the Inspector and may exercise all the sweeping powers of an Inspector under the OHSA.

At the hearing of the Appeal before OLRB Vice-Chair Diane Gee, Blue Mountain called evidence that there could be as many as 24 'critical injuries' on a typical Saturday during ski season at the resort. Blue Mountain argued that the preserving the scene requirements in section 51(2) were critically important to the proper interpretation of section 51(1).

It pointed out that on the busiest weekend of the season up to 39 runs would have to be closed or narrowed to preserve the scene. Blue Mountain called evidence that being forced to close or narrow ski runs would create more hazards as a result of barricades. It was argued by Blue Mountain that the Ministry of Labour's interpretation would result in the Toronto Maple Leafs being forced to stop a NHL hockey game when a player was critically injured until the scene was released by an Inspector.

The Ministry of Labour argued that the purpose of the broad reporting requirement was to ensure that the Ministry was made aware of situations that created risks to workers. The OLRB completely accepted this submission. The Vice-Chair referred to a hypothetical situation where a non-worker fell down an open shaft on a construction site and held that if Blue Mountain's approach were followed this dangerous situation would not come to the attention of the Ministry.

The OLRB held that the pool area was a 'workplace'. Even though no evidence was called about the work performed in the pool area, the Vice-Chair 'inferred' based on 'general and common knowledge' that at least one employee of Blue Mountain enters the pool area at least once each day.

The OLRB ruled on jurisdictional grounds that the issue of disturbing the scene was not properly before it as no orders were issued with respect to this issue. The Vice-Chair held that the issue of section 51(2) would be best addressed in a case where the provision was directly in issue. The Court of Appeal ended up taking a very different approach and placed

great emphasis on the broader implications of the OLRB's interpretation of the reporting obligation.

Judicial Review Application to the Divisional Court

Blue Mountain brought an Application for Judicial Review to the Divisional Court which dismissed the Application for Judicial Review. It upheld the Vice-Chair's finding that the plain wording of the section required that a critical injury or fatality to any 'person' had to be reported and accepted that it was not appropriate to consider the disturbing the scene accident. The Divisional Court also agreed with the OLRB's findings that the pool area was a 'workplace' even if there were no workers present or involved in the accident.

Decision of the Court of Appeal

Blue Mountain pursued a further appeal to the Ontario Court of Appeal. In a decision which surprised many legal experts, the Court of Appeal took a very different approach to this case than the other decision-makers. Significantly, the Court of Appeal refused to confine the analysis to the narrow facts before it and considered submissions and from the tourism industry and a group representing conservation authorities about the impact of this case on their operations.

The Court of the Appeal held while a technical reading of the OHSA offers some support for the OLRB's interpretation, the practical result of the approach taken by the OLRB was that the reach of the legislation was extended far beyond what was necessary to protect worker safety.

The Court of Appeal placed great emphasis on the legal principle which states that where there are competing interpretations of a law, the Court should interpret the legislation in a manner which avoids absurd results. It was held by the Court of Appeal that the OLRB's approach could result in a number of absurd results including parents being

obliged to report an injury to a child if they employed a nanny or a hotel being required to report the death of a guest from a heart attack.

The Court of Appeal rejected the 'limitless scope' of the OLRB interpretation but also did not completely accept Blue Mountain's interpretation which would have limited the application of the notice and reporting requirements only to situations where a worker is actually present at the scene of the accident. The Court of Appeal set out the following interpretation of an employer's reporting obligation under the OHSA,

I would interpret s. 51(1) to provide that the Ministry must be notified of a death or critical injury at a site, and the requisite report provided, where there is some reasonable nexus between the hazard giving rise to the death or critical injury and a realistic risk to worker safety at a workplace. A workplace is where (i) a worker is carrying out his or her employment duties at the time the incident occurs, or, (ii) where a worker might reasonably be expected to be carrying out such duties in the ordinary course of his or her work (Blue Mountain Resorts Limited v. Ontario (Labour) , 2013 ONCA 75, page 19, paragraph 66).

Practical Implications and Hypothetical Examples

The Court of Appeal has made it clear that there is now a two part test for reporting critical injuries and fatalities involving non-workers to the Ministry of Labour. For an accident to be reportable, the accident must actually take place at the 'workplace' which is broadly defined to include any area where a worker might reasonably be expected to be working in the ordinary course of their employment. Assuming the accident occurred at the 'workplace', there has to be a realistic chance that the hazard involved could put the safety of workers at risk.

This decision is obviously a welcome one for many employers, as it makes it clear that not all critical injuries or fatalities to non-workers are reportable. However, employers must still review the circumstances of each accident to non-workers are carefully, as it may still be difficult to determine whether an accident is reportable in some cases. We have set out below a number of hypothetical cases and have analyzed whether they would be reportable based upon the criteria set out by the Court of Appeal.

Example 1

Facts: A patient at a hospital dies of a heart attack.

Analysis: This event in our view is not likely reportable to the Ministry of Labour as it is clear that the hazard which caused the patient's death (a medical condition) is realistically not going to create a risk for workers.

Example 2

Facts: A patient at a hospital is critically injured when she trips over an object in the hallway which had been inadvertently left on the floor by janitorial staff.

Analysis: This event in our view is likely reportable to the Ministry of Labour in light of the fact that it occurred at a workplace and a worker could realistically be harmed by the tripping hazard.

Example 3

Facts: An intoxicated customer at a liquor store is critically injured when he passes out as a result of excessive drinking

Analysis: While the event took place at a workplace, we are of the view it is not likely reportable as a result of the fact that the cause of the customer's condition was intoxication. There does not appear to be any hazard which would

realistically impact worker safety.

Example 4

Facts: A volunteer at a municipal day camp is critically injured when he is hit by a car during his lunch break on a public road which is off the premises of the camp. All of the camp activities take place at a local school and campers are never taken off the premises. The volunteer was on his way to meet a friend for lunch at a fast food restaurant.

Analysis: This accident is not likely reportable as it did not appear to occur at a workplace. The accident occurred on a public road which is not a place where a worker could realistically be expected to be carrying out his duties with the camp.

Example 5

Facts: A fight occurs at a bar between two patrons which results in critical injuries to one of them. The patron who was injured has a history of fighting with other patrons at the bar. Bar staff have asked the owner of the bar to ban this patron from entering the bar on the basis that they were concerned about their own safety.

Analysis: This case is close to the line. Clearly, the accident took place at the workplace but a question arises as to whether there is a reasonable nexus between the 'hazard' which caused the accident and a risk to worker safety. In this instance, the hazard is arguably the bar patron who has a history of fighting with other customers of the bar. It should also be remembered that the OHS Act contains obligations related to the prevention of violence and harassment. The fact that workers have asked that this patron be excluded for workplace safety related reasons is an important factor. It is our view that it is more likely than not that a Court would conclude that the employer is obliged to report this accident under the

OHSA. A patron with a history of violent behavior likely poses a risk to the health of safety of the workers employed at the bar.

Employer Accident Reporting Policies

Employers should update their accident reporting policies to reflect the limitations set out by the Court of Appeal with respect to the reporting of accidents by non-workers. Employers with national operations should be aware that the scope and nature of accident reporting varies for each province. Obviously, the Blue Mountain case only applies to provincial regulated employers within Ontario.