

OCCUPATIONAL HEALTH & SAFETY UPDATE

Reporting Obligations Expanded: Labour Board Rules That Employers Must Report Critical Injuries To Non-Workers

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It is well established under the OHSA that the employers must report critical and fatal injuries suffered by workers at their workplace. However, many employers would likely be surprised to find out that the reporting obligation also encompasses critical injuries or fatalities suffered by non-employees (i.e. contract workers and visitors). Although section 51 of the OHSA has always required employers to notify the Ministry each time a “person” is critically injured, it has been our experience that most employers have decided not to notify the Ministry about critical injuries or fatalities involving non-employees. In fact, some employers have had the experience of being advised by the Ministry itself that there is no obligation to notify the Ministry when the accident did not involve a worker.

However, a very recent decision of the Ontario Labour Relations Board has determined that employers are required to report critical or fatal injuries to any person at the workplace to the Ministry. *In Blue Mountain Resorts Ltd.*¹, a large ski resort operator appealed an Order directing it to report critical injuries and fatalities involving non-workers.

The OLRB Case

Blue Mountain took the position that the OHSA does not cover non-workers and thus there was no obligation to report accidents involving resort guests and other non-workers. The Board heard evidence that there were as many as 24 potential critical injuries per day during peak periods at the resort. Blue Mountain pointed out that it was often impossible to assess whether a guest is critically injured or not at the time of the accident. The ski operator was also concerned with the requirement not to release the scene of an accident until authorized to do so by an Inspector. Blue Mountain argued that the delay in waiting for authorization from an Inspector could result in large parts of the resort being shut down during peak periods and that guests would face additional hazards associated with barricades or closed runs.

The Ministry argued that it was clear on the face of section 51 that the reporting obligation was triggered by a critical or fatal injury to a “person” and that the term “person” clearly included non-workers. The Ministry also pointed out that being notified of critical injuries to non-workers allows Inspectors to identify and investigate potentially serious hazards to workers. The Inspector testified that most ski resort accident scenes are released over the telephone without a physical inspection and that only “known” (as opposed to suspected) critical injuries need to be reported to the Ministry.

¹ 2009 CanLII 13609 (ON L.R.B.)

The Board accepted the Ministry's arguments and determined that critical injuries and fatalities involving non-workers must be reported to the Ministry. The Board was persuaded that the use of the term "person" in section 51 was determinative of the issue. Interestingly, the Board avoided making any findings with respect to Blue Mountain's arguments about the disruption the reporting obligation would cause to the facility's operations (the issue of disturbing the scene was not technically part of the Orders under appeal). The Board pointed out that the Inspector testified that the obligation not to disturb the scene was not applicable to the worker's own clothing and equipment. The inspector indicated that only equipment that was not owned by the skier had to be preserved. It is difficult to understand the legal basis for this distinction as the OHSA does not reference to the issue of ownership of tools in the context of the obligation to preserve the scene.

Commentary

As a matter of law, the decision of the Board is not particularly surprising. Section 51 of the OHSA clearly states that critical and fatal injuries to any "person" must be reported. Clearly, the legislature could have used the word "worker" if it wished to confine the reporting obligation to employees. It is clear from the decision that employers are required to take appropriate measures to ensure that critical and fatal injuries to non-workers are reported to the MOL. Secondly, employers should be aware that the Ministry could proceed with charges relating to hazards uncovered by any investigation triggered by the reports involving non-workers.

There are a number of questions that remain unanswered with respect to the accident reporting obligations under the OHSA. The Inspector in Blue Mountain testified that the employer was advised that it was not required to report "suspected" critical injuries. Given that a critical injury is very specifically defined by Regulation, there are many situations where it is not clear at the time of the accident whether the injury is critical. Many employers are understandably reluctant to report accidents in light of the reality that an inspection creates a serious risk of potential charges.

The Inspector's comments in this case that Blue Mountain was "advised" not to report "suspected" injuries raises some interesting legal questions. Does this mean that employers are only required to report injuries when they become aware that an injury meets the strict legal criteria for triggering a reporting obligation? On the face of the legislation, this is a plausible interpretation as the reporting obligation is confined to fatalities and specifically defined "critical injuries".

However, there is considerable confusion about an employer's obligations to report an injury which is "close to the line" in terms of being considered a "critical injury". For example, a fractured leg is considered to be a "critical injury" under the OHSA. However, there are many occasions where an employer will not be sure whether the leg has been fractured or not at the time of the accident. It is clear that an employer would be obligated to report the accident once it is aware that the injury was critical. However, it remains unclear if the employer has a positive obligation to make inquiries about whether the leg is fractured or not. There is a plausible argument that the employer's only obligation is to report the accident once it becomes aware that the injury is critical.

There are divergent approaches to responding to the issue of when to report accidents. As a matter of policy, some employers report any accident which could potentially meet the “critical” injury definition. This approach has the advantage of eliminating any risk of a charge of failure to report, but does virtually guarantee an investigation by the Ministry which may result in charges related to the accident. Further, the Ministry may become aware of the accident without an employer’s report if it is advised by the police, ambulance or workers.

It is very common for employers to hear from inspectors that it is not the Ministry’s job to tell the employer how to comply with the OHSA. It is our view that this approach creates confusion in the employer community about what the Ministry’s expectations are and may create inconsistencies in the manner in which the OHSA is enforced. It would be very helpful for the Ministry to publish a clear guideline which sets out the Ministry’s interpretation of accident reporting obligations under the OHSA. Although such a guideline would not have the force of law, it would hopefully serve to make the Ministry’s clear with respect to accident reporting obligations and eliminate some of the confusion about this issue.

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