2013 Occupational Health and Safety Debrief

by Curtis Armstrong and Carissa Tanzola

In 2013, there were many important workplace health and safety developments.

As in previous years, 2013 brought an increase in Ontario Ministry of Labour (the "Ministry") field visits, orders, charges and fines. In fact, September 2013 saw the largest fine ever ordered under the *Occupational Health and Safety Act*. Following a guilty plea with joint submissions on sentencing, Vale Canada Limited was ordered to pay $1,050,000 (plus the 25 per cent victim fine surcharge) relating to the death of two workers crushed in an uncontrolled release of broken rock and ore in a Sudbury mine.

With increased inspector scrutiny and rising fines, employers in the road building industry should be aware of the latest developments in occupational health and safety law.

The Good: Court of Appeal clarifies reporting requirements in event of critical injury or fatality.

When a critical injury or death occurs at a workplace in Ontario, an employer is obliged to notify the Ministry. However, must an employer report a critical injury or fatality to the Ministry if the accident does not involve a worker?

In the case of Blue Mountain Resort (the "Resort"), a guest drowned in a swimming pool. The Resort did not report the death to the Ministry because the death was not considered by the Resort to be a workplace accident. The Ministry disagreed, issuing an order requiring the Resort to report the death.

Initially, the Ontario Labour Relations Board (the "OLRB") and lower courts agreed with the Ministry, finding that a workplace includes all areas in or near where workers perform work, regardless of whether any worker is present at the time of an incident.

The logical but somewhat absurd result of this analysis is that virtually every place could be a "workplace" because a worker might at some point be at that place. In that case, every critical injury or death, regardless of the individuals involved, would have to be reported to the Ministry.

Thankfully, in February 2013, the Ontario Court of Appeal overturned the OLRB and lower court decisions, holding that an employer is only required to report a critical injury or fatality if there is a reasonable nexus between the hazard which caused the critical injury or fatality and a "realistic risk" to worker safety at that workplace.

Accordingly, when an employer becomes aware of a critical injury or fatality, it should ask itself three questions before reporting to the Ministry:

1. Did the death or injury occur at a place and time where a worker was carrying out employment duties?
2. If not, did the incident occur in a place where an employee might reasonably be expected to perform work duties?
3. Is there a reasonable connection between the cause of the incident and worker safety at the workplace?

The Concerning: The Supreme Court of Canada upholds restrictions on random drug and alcohol testing even in safety sensitive positions.

There is no argument that an employer has a duty to take all reasonable precautions to ensure the safety of workers in the workplace. But what if the hazard is caused by the effects of suspected drugs and/or alcohol use on the part of employees?

In June 2013 the Supreme Court of Canada ruled that a program of mandatory, random alcohol testing of employees in safety sensitive positions is not reasonable. In *CEP, Local 30 v. Irving Pulp & Paper* the employer operated a unionized paper mill and unilaterally adopted a testing policy under which 10 per cent of employees in "safety sensitive" positions were randomly selected for unannounced breathalyzer testing for alcohol use. A positive test would lead to disciplinary action.

The testing policy was challenged by the employees' union, which argued it was an unreasonable invasion of privacy. The Supreme Court of Canada agreed, holding that random alcohol or drug testing in a safety sensitive workplace might only be reasonable if one of the following additional requirements were met:

- Reasonable grounds to believe an employee is impaired while on duty;
- A workplace accident or near miss justifying post-incident testing;
- An employee returning to work after treatment for substance abuse so that the testing protocol is part of a "return-to-work" program; or
- The employer can show evidence of a general workplace problem of alcohol or drug abuse.

The Encouraging: Standardized health and safety training requirements.

In December 2012, the Ministry launched public consultations with the goal of introducing new mandatory health and safety training regulations by July 1, 2013. As we head into 2014, the regulations have not yet been proclaimed into force, but when they are, they're likely to focus on basic health and safety awareness in the workplace, particularly among new employees, including rights and responsibilities under the *Occupational Health and Safety Act*, joint health and safety committees, Ontario's workplace safety and insurance regime, recognition of hazards, and so on. While additional training obligations may be burdensome for some employers, increased worker awareness of basic health and safety can reduce injuries, lost workdays, occupational health and safety charges and claims. ■

To learn more and/or for assistance with any aspect of occupational health and safety law, workplace safety and insurance, employment or labour law, please contact a member of Sherrard Kuzz LLP.

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