CANADIAN
Employment Law Today
PUBLISHED BY CANADIAN HR REPORTER www.employmentlawtoday.com
CURRENT NEWS AND PRACTICAL ADVICE FOR EMPLOYERS APRIL 3, 2013

'Sometimes a swimming pool is just a swimming pool'

Ontario resort wins appeal over requirement to report guest's death as a workplace accident

| BY CURTIS ARMSTRONG |

ONTARIO'S occupational health and safety regime exists to protect workers in the places they work. This includes a duty on employers to promptly report to the Ministry of Labour any workplace critical injury or death.

But what is a "workplace" and when is the duty to report triggered? In the case of Blue Mountain Resort, both the Ontario Labour Relations Board (OLRB) and the Ontario Divisional Court held that a workplace included all areas in or near where workers perform work. As a result, the resort had a duty to report when a guest – who wasn't an employee – drowned while swimming in the resort pool at a time when no worker was present in the area.

HEALTH AND SAFETY

The OLRB and court decisions shocked employers of every size and in every industry. If the OLRB and court were correct, virtually every place -- not just every workplace -- could be considered a "workplace" and every death or critical injury to anyone, anywhere, whatever the cause, would have to be reported to the Ministry of Labour.

Recently, the Ontario Court of Appeal brought clarity to the issue, much to the relief of Ontario employers.

What happened in *Blue Mountain*?

On Dec. 24, 2007, a guest at the Blue Mountain Resort near Collingwood, Ont., suffered a heart attack and drowned in the resort's indoor swimming pool. The pool was not supervised at the time and no resort employees were present.

The resort did not report the death under section 51(1) of Ontario's Occupational Health and Safety Act, which requires an employer to notify the Ministry of Labour whenever a "person" is killed or critically injured by any cause at a "workplace." It also failed to comply with section 51(2) of the act, which requires "where a person is killed or is critically injured at a workplace, no person shall ... interfere with, disturb, destroy, alter or carry away any wreckage, article or thing at the scene of or connected with the occurrence until permission to do so has been given by an inspector."

The resort argued it did not comply with the act because the reporting obligations did not arise since a non-worker was injured and the place of injury was not a workplace. The purpose of the act, the resort noted, is to protect workers, not the public at large.

Unfortunately for the resort, the Ministry of Labour disagreed, issuing an order against it essentially on the basis that because employees occasionally performed maintenance work around the pool it was to be considered a workplace.

The OLRB upheld the order, finding

Danger of making every place a workplace: Court

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"person" meant both workers and non-workers, and "workplace" meant all areas in or near where workers perform work, regardless whether workers are present at the time of an injury. This decision was upheld by the Ontario Divisional Court.

Court of Appeal brings practical approach to health and safety

On Feb. 7, 2013, the Ontario Court of Appeal overturned the decisions of the Board and Divisional Court, finding their interpretations would make almost every place — whether commercial, industrial, private or domestic — a workplace because a worker may, at some time, be there.

"This leads to the absurd conclusion that every death or critical injury to anyone, anywhere, whatever the cause, must be reported," said the Court of Appeal. "Such an interpretation goes well beyond the proper reach of the act and the reviewing role of the Ministry reasonably necessary to advance the admittedly important objective of protecting the health and safety of workers in the workplace."

The Court of Appeal noted several examples which punctuated the absurdity of the preceding decisions, such as a hockey game where a player or spectator was injured. Under the earlier interpretations, the injury would have to be reported to the ministry and the game shut down until an inspector released the arena. It also used an example of an accident on a highway where police or other workers may arrive after the accident or passed by another time.

"This leads to the absurd conclusion that every death or critical injury to anyone, anywhere, whatever the cause, must be reported."
— Ontario Court of Appeal

The Court concluded "the notification and reporting requirements of s.51(1) of the Act are engaged where: (a) a worker or non-worker ("any person") is killed or critically injured; (b) the death or critical injury occurs at a place where (i) a worker is carrying out his or her employment duties at the time the incident occurs, or, (ii) a place where a worker might reasonably be expected to be carrying out such duties in the ordinary course of his or her work (workplace); and (c) there is some reasonable nexus between the hazard giving rise to the death or critical injury and a realistic risk to worker safety at that workplace."

The bottom line for employers

The Court of Appeal's ruling brings much needed clarity to once very murky waters.

In the event of a critical injury or death of a worker or a non-worker, an employer should, at the very least, ask itself the following three questions when determining whether to report the incident to the Ministry of Labour as a workplace accident:

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

In Blue Mountain the cause of the accident was a guest's apparent heart attack while swimming, an event , while tragic, could not reasonably be said to create risk to employees carrying out their work duties. That is, the death was not related to worker safety at that workplace. Hence, the obligation to report to the Ministry of Labour was not triggered.

In the words of the Court of Appeal, not every death or injury can reasonably be linked to a hazard to a worker, and "sometimes a swimming pool is just a swimming pool."

For more information see:

- *Blue Mountain Resorts Ltd. v. Bok*, 2013 CarswellOnt 1337 (Ont. C.A.).

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