

EMPLOYERS MAY BE REQUIRED TO REPORT NON-WORKER INJURIES

Blue Mountain Resorts Ltd. v. Bok
[2011] O.J. No. 2256

The Ontario Divisional Court recently confirmed that employers and constructors may be required to report critical injuries suffered by non-workers in the workplace, whether or not a worker is affected or present at the time of the injury.

Background

On December 24, 2007, a guest drowned in a swimming pool at Blue Mountain Resort, a 750 acre property near Collingwood, Ontario. The swimming pool was not supervised by Blue Mountain employees at the time of the incident, and Blue Mountain did not notify the Ministry of Labour of the incident.

During a March 27, 2008 field visit, a Ministry of Labour Health and Safety Inspector heard about the incident and ordered Blue Mountain to report it pursuant to section 51(1) of the *Occupational Health and Safety Act* (the “*OHS*”), which requires the employer to notify an inspector when “a person is killed or critically injured from any cause at a workplace”.

Blue Mountain appealed to the Ontario Labour Relations Board. Affirming the inspector’s order, the Labour Board held that a “person” could include a non-worker, and also held that the entire resort area was the “workplace” for the purpose of the reporting requirements under the *OSHA*. The Labour Board noted that “the fact that an employee is not physically present within a section of that ‘workplace’ does not mean that that particular section is not part of the ‘workplace’ during the period when no employees are present”. The Labour Board noted that the requirement to report non-worker fatalities or critical injuries is consistent with the purposes of the *OHS*, because any hazards to non-workers also place workers at risk.

The Divisional Court Decision

In its application for judicial review of the Labour Board’s decision, Blue Mountain raised concerns about the practical effect of the Labour Board’s interpretation of “workplace” as including all 750 acres of the resort area. Blue Mountain argued that the Board ought to have given recognition to the fact that its facilities are recreational premises and that a guest may experience a critical injury or be killed while engaged in a recreational activity on the premises in circumstances which do not pose a risk to a worker. It was Blue Mountain’s view that the proper interpretation of the term “workplace” is one which requires the physical presence of a worker at a place where a worker works at a time at which an occurrence with a guest or another person takes place.

Blue Mountain further took the position that the Labour Board's interpretation of "workplace" had the potential to significantly disrupt its operations, since it would be required to rope off and preserve the scenes of any serious injuries or fatalities suffered by guests on its ski hills and keep those areas closed pending an investigation.

The Court held that there were significant flaws in Blue Mountain's interpretation of "workplace," because it was entirely temporal, and did not take into account the causative nexus between prevailing conditions and the resulting harm. The purposes of the *OHS*A would be undermined if a physical hazard with the potential to harm workers and non-workers alike did not have to be reported just because no employee was present at the time of the incident. The Court further held that Blue Mountain's interpretation was not supported by the language of the *OHS*A, which defines "workplace" as "any land, premises, location or thing at, upon, in or near which a worker works," and not at which a worker is currently working.

Accordingly, the Court concluded that the Labour Board's finding that non-worker fatalities and injuries are reportable was reasonable. However, the Court also held that the Labour Board went further than necessary in concluding that the whole of the Blue Mountain Resort was the "workplace," since it was common ground that the swimming pool was a place where one or more workers work. The Court noted that what constitutes a "workplace" will turn on the facts and circumstances of each case.

The Court declined to comment on Blue Mountain's argument with respect to the potential disruption of its operations because it was not an issue before the Labour Board.

Commentary

The Court's ruling offers two lessons to employers with respect to the requirement to report fatalities or critical injuries to the Ministry of Labour.

It is clear that the definition of the "workplace" will turn on the facts of each case, and that reporting obligations may arise even if no worker is present when the fatality or critical injury occurs.

The Court's decision also indicates that the reporting obligations extend to non-workers. Conditions and hazards resulting in the death or critical injury of a non-worker may have the potential to cause similar harm to workers. Accordingly, the Court's approach is consistent with the underlying purpose of the reporting obligations under the *OHS*A, which is to give the Ministry of Labour the opportunity to rectify unsafe situations.

June 9, 2011