

The Ontario Recreation Facilities Association is frequently contacted by our membership for guidance on how Section 51 of the Occupational Health and Safety Act (OHSA) should be interpreted and applied in a recreation environment. The ORFA is not an authority on such matters and therefore refers members to the Ministry of Labour for inquiries of this nature. It must also be noted that not one interpretation can be applicable to every critical injury situation. The following information is shared as general guidance on the topic to assist internal discussions, and for the review and ultimate creation of policy and procedure for Critical Injury Reporting this obligation. As always, the ORFA encourages members to seek specific guidance, expertise and direction from the most appropriate internal and external authorities.

Background

This ongoing legal decision was recently clarified when the Court of Appeal released its decision in the *Blue Mountain v. Ontario Ministry of Labour* case <http://www.ontariocourts.ca/decisions/2013/2013ONC A0075.htm>. The Ontario Labour Relations Board (OLRB) and a lower court held previously that the 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.

Notice of death or injury (OHSA)

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, telegram 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.

The Occupational Health and Safety Act (OHSA) governed by the Ministry of Labour (MOL) are specific to the obligations of all workplace parties when it comes to reporting workplace incidents and accidents. Further complicating these situations are workplace accidents that involve non-workers.

Incidents - Incidents are best described as “an unplanned event that results in, or has potential to result in, property damage, injury, illness, death or other loss”. Reporting these types of events is a worker’s legal obligation under the OHSA. This written information allows employers to assess and improve worker training, update policy and procedures, improve personal protective equipment, make building repairs/ improvements, or warn others of the potential for injury.

Accidents - An accident is often described as an event that will require some level of medical attention. These events will have a series of internal and external reports that must be completed – often in a set specific timeframe. However, the term "Accident" has been under scrutiny over the past few years among safety professionals, particularly since the Workplace Safety & Insurance Board came out with their 'Road to Zero' strategy. The rationale is that if every incident investigation drills down far enough to determine the root cause, it is evident that "every" incident is avoidable. In other words, if we can find the reason an incident occurred, then it could have been prevented - therefore not "accidental".

Frank Cowan Co. Risk Analyst, Jessica Jaremchuk recently remarked that **“in court, it is not what has happened and how you state your action, but being able to prove that your operation had done everything reasonable within their power to avoid the event that occurred”**. This statement rings true in both workplace investigations and civil litigation. Incidents that are recorded and acted upon are a positive defense tool when operational competency is called into question. Liz Sisolak, from the Public Services Health & Safety Association (PSHA) reminds of **“the legal duty of workers under the OHSA to report both hazards and incidents so that they can be prevented”**. To assist with these goals it is important to regularly reviewing and update current policies and procedures that guide worker incident and accident reporting obligations for **workers and non-workers**. When establishing procedures, clearly define who is responsible for collecting information and how information will be collected and filed/logged. It is important to include these same details as part of all new worker orientations.

Promoting the benefits of the *Internal Responsibility System, or IRS* as described in the OHSA helps reconfirm the accountability on all workplace parties to know and comply with all legislation and to be active in making all workplaces safe.

Internal Responsibility Systems (IRS)

The internal responsibility system is a system in which every individual is responsible for health and safety. It can be thought of as your organizational chart, with a clear set of statements about responsibility and authority for health and safety listed for each person -- no exceptions. Simply put, the IRS means everyone in the workplace has a role to play and a duty to actively ensure workers are safe. Every worker who sees a health and safety problem such as a hazard in the workplace has a duty to report the situation to management. Once a hazard has been identified, the employer and supervisor have a duty to look at the problem and eliminate any hazard that could injure workers.

What is a critical injury? *O. Reg. 834/90 defines a critical injury as life threatening events that result in a loss of consciousness, substantial loss of blood, a fractured leg or arm, loss of leg, arm, hand or foot, burns to the majority of a human body and loss of vision.* The reader must appreciate that each of these injuries may be open for interpretation. Determining if a situation meets the reporting requirements will require an internal review by competent persons. The general guiding philosophy in each workplace should be embraced as **“when in doubt – report”**.

As described in Section 51 (1) of the OHSA, the employer is to provide notification **immediately** and within 48 hours in writing “where a person is killed or critically injured from any cause at a workplace”. The term immediately is not defined. However, it is strongly recommend that the scene be secured until the report is filed and guidance given by the MOL to when the area may be reopened.

Preservation of wreckage

(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.
R.S.O. 1990, c. O.1, s.51

Acceptable forms of reporting to the MOL include email, fax or telephone. The ORFA has been unable to secure any direction of what content or in what layout format the report should be submitted – there is no known actual reporting form to be used at the time of printing of these guidelines.

Other Governing Agencies That Require Consideration

Recreation has a variety of legislative obligations. Members are reminded that they must seek out applicable legislative compliance requirements specific to their operations. The ORFA offers the following examples for review.

TSSA - Operating Engineer Regulation - Reporting of accidents in a plant room

In an arena environment injuries or death in a refrigeration plant room is governed under the Operating Engineer Regulation which states:

47. The user shall notify the chief officer, by telephone or other direct means, as soon as is practicable of any accident, injury or death, but no more than eight hours after the accident, injury or death, as the case may be, and shall within 48 hours after the accident, injury or death, send the chief officer a written report of the occurrence where,
(a) a person is seriously injured or killed from any cause; or
(b) an accident occurs involving property damage. O. Reg. 219/01, s. 47.

TSSA - Amusement Devices Act

In the aquatic industry injuries or death involving a waterslide or in the park where such an injury occurs at a carousel or other such device the incidents will be governed under the Amusement Devices Act which states:

Notification of accident, etc.

17. (1) If an accident or an incident occurs in connection with an amusement device that results in the death of or serious injury to any person, the licensee responsible for the device shall immediately notify the Director of the accident or incident. R.S.O. 1990, c. A.20, s. 17 (1).

Idem

(2) Every licensee responsible for an amusement device that is involved in an accident or in any incident indicating that the device is potentially dangerous shall notify the Director, by telephone, within twenty-four hours after the accident or incident and shall submit to the Director, within seven days after the accident or

incident, a written report setting out the particulars of the accident or incident. R.S.O. 1990, c. A.20, s. 17 (2).

Disturbing evidence

(3) No person, except for the purpose of rescuing a person injured in the accident, shall interfere with an amusement device involved in the death or serious injury of a person or disturb, destroy, carry away or alter any wreckage, article or thing at the scene of or connected with the accident without permission of an inspector. R.S.O. 1990, c. A.20, s. 17 (3).

Ministry of Environment (MOE) – if an incident involves a noxious gas leak the MOE should be advised. MOE offices are open 24-hours, 365-days per year. Call 1-800-268-6060. If a concentrated ammonia leak or spill occurs, you should call 911 immediately to report it. You may also consider contacting the Poison Control Centre at: 1-800-268-9017.

Alcohol and Gaming Commission of Ontario – if an incident occurs at a licensed event or involves the illegal consumption of alcohol the AGCO may need to be given consideration for reporting.

As each governing agency functions independently it is important to note that it is the “owners” responsibility to report such events to the appropriate governing authorities.

General Reporting Guidelines

ORFA recently met with senior Ministry of Labour representatives to better understand Section 51 of the OHSA and how it applies to the recreation industry. Ministry staff recognized the complexity and possible variables associated with injuries involving the general public or users in a recreational environment, but in the end reminded ORFA that recreation facility operations fall under the Industrial Regulations of the Act and that the legislation has not changed. Specifically, Section 51 remains intact:

Notice of death or injury

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. R.S.O. 1990, c. O.1, s. 51 (1); 2011, c. 1, Sched. 7, s. 2 (7).

Preservation of wreckage

(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. R.S.O. 1990, c. O.1, s. 51 (2).

Since the release of the original ORFA guideline in February 2010 additional examples of expected reporting obligations from ORFA members have surfaced.

Example #1: a young person at a summer day camp who fell and broke their arm required staff to submit a report to the Ministry within 48-hours.

Example #2: a teacher who fell and broke their arm during a school skating event (unknown/unreported to the facility staff) resulted in a visit from a Ministry Inspector. Facility staff was held accountable for the non-reporting of this injury.

Ministry staff reconfirmed that “the purpose of the notification of non-worker critical injuries” is to enable the Ministry of Labour and other workplace parties to become aware of hazards in the workplace that could present a risk to the health and safety of workers, thereby allowing workplace parties to work proactively to prevent similar worker injuries” makes the reporting requirements complicated.

The obligation to report is solely an operational requirement that has no set allowances. The ORFA continues to **strongly recommend** that a specific policy and procedure be created that clearly defines the internal reporting process for all critical injuries.

Ministry staff further suggested that recreation professionals consider the benefits of internal legal guidance on how these situations are to be best addressed.

Procedures that direct the process should include information that guides frontline staff on the handling of critical injuries. Contained in the procedure should be a list of contacts. This may include facility management, human resource professionals, JHSC members, health and safety officer, CAO or other appropriate senior staff who will direct the reporting process. Contacting the Ministry of Labour should

never be left with junior staff unless stated in the operational policy.

The ORFA also advises that events involving injuries to non-workers may need to be reported to the operation's insurance carrier. Reporting to the MOL may have plaintiffs accessing these same reports as part of a civil action. While failing to report such events may not only be a concern to the governing agencies it may also be used as part of a court proceeding.

Members should be educated on report writing to ensure disclosure of potentially incriminating information is not released or that contradicting information on the same incident does not occur.

Conclusion

The Blue Mountain accident resulting in a death of a skier and the failure by the resort to report the accident to the Ministry has helped clarify the complexities and variables of the critical injury reporting obligations under Section 51 of the OHSA.

ORFA members recognize that recreation environments, unlike a factory floor are more diverse requiring management to be more diligent in their understanding of the reporting responsibilities to ensure compliance. An MOL investigation may be time consuming and involve the preservation of an incident scene for an indefinite period – but it is a legal obligation that must be met. Be clear, such areas are the equivalent of a crime scene in another public location seen on the news surrounded by yellow police tape – making the right decision is not only a moral responsibility to those involved, but possibly a decision that could impact your employer legally and you personally.

The question raised by many ORFA members is “do we need to report every sport related critical injury” and the answer might be “better safe than sorry”. The phone call and direction from a Ministry representative who is available 24/7 is free – failing to act appropriately can quickly become very expensive and time consuming for all workplace parties.

Other Resources

Reporting Obligations Expanded: Labour Board Rules and clarifies when the Employer Must Report Critical Injuries to Non-Workers.

<http://www.ontariocourts.ca/decisions/2013/2013ONC A0075.htm>.

Amusement Devices Act

http://www.e-laws.gov.on.ca/html/repealedstatutes/english/elaws_repealedstatutes_90a20_e.htm

Technical Standards Safety Authority: Operating Engineers

<http://www.tssa.org/regulated/operating/default.asp>

Operating Engineers Website

<http://www.operatingengineer.ca/main/default.asp>

Red Cross Operational Best Practices Document

http://www.orfa.com/pdf/resource/LG_CRC_Operational%20Best%20Practices_en.pdf

Other Training Opportunities

- ORFA Legal Awareness Course
- Red Cross Aquatic Management Course

For details on these opportunities visit

<http://www.orfa.com/pdevents>

Sample Protocol for MOL Reporting of Public Critical Injuries: Town of Halton-Hills

1. Member of the public becomes critically injured.
2. If we are made aware (because sometimes we aren't unless they intend file a claim) ensure 1st aid and/or EMS is initiated.
3. Have the appropriate staff member investigate the incident/scene immediately.
4. Call the MOL office number on the Emergency Contact List to report injuries that meet the definition of "critical".
5. Only Managers will be taking these "critical/fatality" reporting calls at the MOL office. You will be asked a series of questions - answer as accurately as you can.
6. If you know the injury is critical - say so. If you are not sure - say so. If the injured person refused to give you their name or advise where they were going for medical treatment - say so. Members of the public are not required to provide us (as Employers) with their personal information. We cannot force this information from them and are prohibited from detaining a member of the public, insisting on medical aid, etc.
7. The MOL Manager will then decide if you need to secure the scene, etc. and will advise you whether or not an inspector will be dispatched. They will all have different interpretations and answers/direction/etc.
8. The MOL Critical Injury Report letter will be sent to the MOL office within 48 hours as a follow-up to the initial phone call to their office.

Our inspector advised that generally unless "equipment or machinery" is directly involved in the critical injury, there will not likely be a need to secure the scene or shut down services, beyond the normal time it would take you to investigate the occurrence. You do inspect

public injuries as soon as you are made aware of them, right?

Example #1:

Member of Public trips over his own feet in your parking lot, falls and fractures/breaks his arm, there are no pot holes, etc. that may have caused the fall (because you have investigated this). You call the MOL office to report the critical injury – MOL will likely not investigate.

Example #2:

Member of Public walks behind a fleet vehicle that is backing up, is hit and sustains a broken leg. You call the MOL office to report the critical injury – MOL will investigate.

Other Sample Policies:

City of Hamilton -

http://www.orfa.com/pdf/resource/documents/CriticalIncidentInvestigationReporting_CityofHamilton.pdf

City of Vaughan -

http://www.orfa.com/pdf/resource/documents/CriticalInjuryInvestigationReporting_CityofVaughan.pdf

City of Oshawa -

<http://www.orfa.com/pdf/resource/documents/AccidentReportingChart-CityofOshawa.pdf>

Blue Mountain Resort -

<http://www.orfa.com/pdf/resource/documents/ReportingCriticalInjuries-BlueMountainResorts.pdf>

City of Kitchener -

<http://www.orfa.com/pdf/resource/documents/ReportingCriticalInjuries-Kitchener.pdf>

TSSA –

Incident Reporting Guideline (for Passenger Ropeway Devices)

<http://www.tssa.org/CorpLibrary/ArticleFile.asp?Instance=136&ID=300A5E7E3A5D4B7583A0BABE07CAD4AF>

Incident Reporting Guideline (for Elevating Devices)

<http://www.tssa.org/CorpLibrary/ArticleFile.asp?Instance=136&ID=AD5EDD8123434CBB9B7C02732C4B285A>

Incident Reporting Guideline (for Amusement Devices)

<http://www.tssa.org/CorpLibrary/ArticleFile.asp?Instance=136&ID=B162474F8DF24DA69E2AF555676F094C>

Updated: January 2013:

<http://www.tssa.org/corplibrary/ArticleFileMain.asp?Instance=136&ID=210618C555BF11E2B4B11D39C73CD67E>

Other Sources used for this document include

Boglaw Bulletin – May 2009

Frank Cowan Company Bulletin – August 2011

http://www.amo.on.ca/AM/Template.cfm?Section=Risk_Management1&Template=/CM/ContentDisplay.cfm&ContentID=163067

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