SMHI LEGAL NOTES
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An Employer's Duty to Report Fatal and Critical Injuries

The Divisional Court of Ontario has issued a "heads up" to employers with respect to their duty to report to the Ministry of Labour when there has been a death or critical injury at the workplace. In essence, the Court has concluded that all fatal and critical injuries to a person, whether a worker or not, at a workplace must be reported to the Ministry of Labour.

The Facts
On Christmas Eve 2007, a guest, staying at the Blue Mountain Resort, drowned in the resort's swimming pool. Believing it had no obligation to do so, since the victim was not a worker, the resort did not report the death to the Ministry of Labour. Several months later during a field visit, the Ministry's inspector made an order against the resort for failing to notify an inspector of the fatal injury and ordered it to do so forthwith.

The inspector's order was upheld by both the Ontario Labour Board and the Divisional Court. The impact of this decision could have significant consequences for employers.

The OHSA
The relevant sections of the *Occupational Health and Safety Act* are as follows:

s. 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.*

The Act does not provide a definition of "person."

Section 1 states that a *workplace means any land, premises, location or thing at, upon, in or near which a worker works.*

The Divisional Court Decision
The Divisional Court agreed with the Labour Board that the word person in s. 51(1) of the Act is to be construed in its ordinary meaning and not as synonymous with the word worker. The effect is to give person a very broad meaning.

With respect to the word workplace, the Labour Board concluded that all 750 acres of the resort was a workplace for the purposes of section 51(1) of the Act. The Board stated 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.

While the Divisional Court did not agree that the entire 750 acre resort could be considered the workplace (the Court did state that each case must be determined on its own facts), it did agree that in these circumstances, the swimming pool was a workplace since it was a place where one or more workers work. Further, the absence of a worker at the swimming pool premises at the time of the death did not diminish the fact that it was a workplace.

The Impact
The ripple effect of this decision could be quite significant, particularly for the service industry and government bodies that operate parks and roads. Although the court did state that each case must be determined on its own facts, it would seem that organizations such as hospitals and nursing homes may have to report every fatality or critical injury occurring within their facilities.

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The potentially more onerous obligation for employers is outlined in section 51(2) of the Act, which requires the preservation of the scene of the occurrence.

s. 51(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.

According to Ministry of Labour spokesman Matt Blajer, *"An employer is required to notify the ministry if a non-worker is critically injured or killed at a workplace if the hazard that caused the incident also presents a risk to the health and safety of workers at that workplace. This is a reasonable expectation and should not be burdensome for employers."*

Our Recommendation

Unless and until the government makes changes to the wording of the *Occupational Health and Safety Act*, employers would be wise to review and if necessary develop a reporting policy. At the least, such a policy should include the circumstances in which notice and a written report must be given to the Ministry and the circumstances where the scene should be preserved. In addition, employers should consider erring on the side of caution and report all injuries, whether the injured party is a worker or non-worker.

Our firm works in the area of Employment Law and we would be pleased to assist you in developing such a policy.

When is Lump Sum Spousal Support Appropriate

When a marriage or common law relationship breaks down one of the issues that must be addressed is spousal support. In addition to deciding whether spousal support should be paid, and in what amount, a decision must be made as to whether the support should be paid in one lump sum or in the form of periodic payments. Traditionally, periodic payments are the most common form of spousal support, whereas lump sum payments tend to be reserved for more unique circumstances.

The Ontario Court of Appeal recently provided direction concerning when a lump sum award for spousal support is appropriate.

The Facts

The case of *Davis v. Crawford* involved a couple that had lived as common law spouses for 23 years.

At the time they began their cohabitation, Ms. Davis was 41 and worked full-time in the field of human resources. In 1999, Ms. Davis began to experience some serious health problems and in 2000 she retired from the workforce.

In 1982, 42 year old Mr. Crawford started a collection business with a business partner. Over the years, the business became quite successful.

During their cohabitation, the parties enjoyed a comfortable lifestyle and had always lived in "upscale housing." One of their hobbies was to search for and buy properties with older "tear down cottages."

Following their separation, Ms. Davis had her interest in a property the couple had purchased together (the White Lake property) and her $1,200 a month workplace pension. Mr. Crawford had his share of the net proceeds of sale of the White Lake property, his half-share in his collection business and his share of the tear down cottage properties that he continued to acquire with his new live-in.

The Trial

At trial, Ms. Davis sought lump sum spousal support. Mr. Crawford argued that Ms. Davis was not entitled to any spousal support.

The trial judge ordered Mr. Crawford to pay Ms. Davis a lump sum of $135,000. In reaching this conclusion, the trial judge took into consideration the following factors:

- that Ms. Davis' existing assets and means were considerably less than Mr. Crawford's.
- the significance of the parties' cohabitation, specifically that they relied on each other for financial and non-financial support over a lengthy period.
- that Ms. Davis would never be able to maintain the reasonable lifestyle she had enjoyed with Mr. Crawford.

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She ordered that the support be paid as a lump sum. The trial judge found that Mr. Crawford had been less than credible about his financial situation and she was concerned that he would not pay periodic support. She was also concerned that without a clean break Mr. Crawford would continuously bring Ms. Davis to court to vary the spousal support.

The Appeal

Mr. Crawford appealed the decision arguing that contrary to what the trial judge found, the parties' assets and means were approximately equal. He claimed that his only assets were his RRSP and his share of the proceeds of the White Lake property and that any other monies attributed to him were unsubstantiated speculation on the part of the trial judge.

The Court of Appeal upheld the trial judge's decision to award lump sum spousal support.

While the Court agreed that a lump sum award should not be made in the guise of support for the purpose of redistributing assets, it found that "*the purpose of an award must always be distinguished from its effect*" and that "*Any lump sum award that is made will have the effect of transferring assets from one spouse to the other.*"

The Court went on to list the factors that should be taken into account in deciding whether lump sum spousal support is appropriate.

1. The payor's ability to make a lump sum payment without undermining his/her future self-sufficiency.
2. The perceived advantages of making a lump sum award, which can include but are not limited to:

- terminating ongoing contact or ties between the spouses for any number of reasons (for example: short-term marriage; domestic violence; second marriage with no children, etc.);
- providing capital to meet an immediate need on the part of a dependant spouse;
- ensuring adequate support will be paid in circumstances where there is a real risk of non-payment of periodic support, a lack of proper financial disclosure or where the payor has the ability to pay lump sum but not periodic support; and satisfying immediately an award of retroactive spousal support.

The disadvantages of a lump sum award, which can include but are not limited to:

- the real possibility that the means and needs of the parties will change over time, leading to the need for a variation;
- the fact that the parties will be effectively deprived of the right to apply for a variation of the lump sum award;
- the difficulties inherent in calculating an appropriate award of lump sum spousal support where lump sum support is awarded in place of ongoing indefinite periodic support.

It should also be remembered that, while periodic spousal support is tax deductible, lump sum support is not.

If you require advice with family law matters please contact us, we would be pleased to assist you.

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call rights. As a result, beginning in the fall of 2008 and continuing for some time, there were regular discussions about restarting operations. These discussions produced an oral agreement between the union and the employer that the recall rights would be extended until the signing of a new collective agreement.

The union's hope came to an end in 2010 and it filed a grievance on behalf of its members in order to collect severance and termination pay for them. On July 6, 2010, Northern Sawmills and the union entered into a Memorandum of Settlement wherein the employees and their recall rights were terminated.

Northern Sawmills was eventually forced into receivership and on January 4, 2011, and a receiver was appointed.

It was the position of the union that all 232 members were entitled to WEPP benefits. The receiver, however, took the position that only the 54 employees laid off after July 4, 2008 were entitled to WEPP benefits.

The court ruled that all the employees were entitled to WEPP benefits. The basis of that opinion was the finding that the Memorandum of Settlement confirmed the parties' agreement that the employees had recall rights that were being extended so that Northern Sawmills' obligation to pay severance and termination payments would be deferred. The court further concluded that the employees had recall rights up to July 6, 2010, the date that the layoffs became a termination.

July 6, 2010, was within the six month period which ended on the date (January 4, 2011) that the receiver was appointed, which meant that all the employees met the eligibility criteria for the benefits provided by WEPP.

The Wage Earner Protection Program

Several years ago, the federal government made a number of changes affecting Canada's bankruptcy laws. One of those changes was to implement the *Wage Earner Protection Program* (WEPP), which came into force in 2008.

The Program

The purpose of WEPP is to pay up to a maximum of $3,400 to eligible workers, whose bankrupt employer has failed to pay them wages, vacation pay, severance pay and/or termination pay. (The program does not cover non-wage benefits such as dental insurance.)

The legislation defines wages quite broadly to include a number of different things including salaries, commissions, vacation pay, disbursements of a travelling salesperson, production bonuses and shift premiums.

For a worker to be eligible for the WEPP benefit, the following criteria must be met.

- The workers' employment has ended.
- The employer has filed for bankruptcy or is subject to a receivership.
- Wages or vacation pay have not been paid and were earned during the six months immediately before the date of the bankruptcy/receivership.
- Termination or severance pay has not been paid and the employment was terminated in the six-month period ending on the date of bankruptcy or receivership.

Officers, directors, employees who have a controlling interest in the business, managers whose responsibilities included making binding financial decisions and those who were not dealing at arm's length with any of these persons are generally not eligible to receive payments under this program. However, workers who are related to the employer may qualify for benefits if it is determined that they were treated in the same manner as other employees.

Workers of a bankrupt employer who find themselves in the position of having wages, vacation pay, termination or severance pay owning to them can apply to Service Canada for benefits. Before they apply they must file a proof of claim with the trustee or receiver. The trustee or receiver will provide workers with the necessary proof of claim. It is important that workers act quickly as WEPP applications must be submitted to Service Canada within 56 days of the later of:

- the date of the bankruptcy/receivership;
- the date that your employment ended due to termination, resignation, retirement or expiry of term; or
- the date on which the receiver terminated your employment.

While the above may seem relatively cut and dry, a recent Ontario Superior Court of Justice was asked to clarify which employees were eligible to receive WEPP benefits.

The Facts

The employer, Northern Sawmills, ran into financial difficulty and in the summer of 2007 and it began to wind down its operations. Layoffs began.

Pursuant to the parties' collective bargaining agreement, employees had 24 months of recall rights after which their employment would be deemed to have been terminated if they had not been recalled.

In the fall of 2008, Northern Sawmills permanently ceased operations. Neither the employer nor its employees wished the cessation of operations to be the end of the company or for the lapsing of re-

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