

Ontario Labour Board Interpretation

Critical injury or fatality of a non-worker: to report or not to report?

By Meghan Ferguson



A guest drowns in the hotel pool. Does the hotel need to report the fatality to the Ministry of Labour under subsection 51(1) of the Occupational Health and Safety Act (OHSA)? According to a recent decision by the Ontario Labour Relations Board, the answer is “yes.” The Labour Board found that employers and contractors are required to report a critical injury or fatality suffered by a non-worker to the Ministry of Labour if it occurs at a place where workers work. The Labour Board found that this obligation to report applies regardless of whether a worker is present at the time of the injury.

In the case before the Labour Board, a guest of Blue Mountain Resorts drowned in a swimming pool on December 24,

2007. On March 27, 2008, a Ministry of Labour Health and Safety Inspector ordered Blue Mountain to report the fatality and to provide related reports. Blue Mountain appealed the order to the Labour Board.

EMPLOYER’S ARGUMENT

Before the Labour Board, Blue Mountain argued that the requirement to report a critical injury or fatality under subsection 51(1) of OHSA did not apply because the incident did not involve a worker and did not occur at a workplace. It argued that a workplace means a place where workers are present.

Blue Mountain also argued that the broader implications of interpreting

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Don't hesitate to call or e-mail us if you have a question. We are here to help you manage your risks and protect your university – and we are always looking for ways to serve you, our valued members, better.

subsection 51(1) of OHS Act to require the reporting of all incidents involving non-workers are problematic. To require Blue Mountain to report critical injuries of non-workers would mean that it would have to report incidents involving ski guests who suffer a broken leg or arm on the ski hill. Further, Blue Mountain argued it would then be required under subsection 51(2) of OHS Act not to disturb the accident scene. For example, it would have to barricade a ski run where a guest breaks a bone until such time as the Ministry of Labour was notified and a Health and Safety Inspector authorized the release of the scene.

MINISTRY OF LABOUR'S ARGUMENT

The Ministry of Labour argued that OHS Act must be given a broad and liberal interpretation. Subsection 51(1) of the Act uses the word "person," not "worker"; therefore, the section requires the reporting of all critical or fatal incidents at the workplace.

Further, the Ministry of Labour argued that workers are vulnerable to the same hazards and risks as non-workers who attend at a workplace. The reporting of a non-worker injury serves to enable the Ministry of Labour to conduct an investigation and make orders for the protection of workers who may attend at the workplace.

LABOUR BOARD'S DECISION

The Labour Board accepted the Ministry of Labour's argument and found:

Where workers are vulnerable to the same hazards and risks as non-workers who attend a workplace injury at a workplace... If the goal is to enhance worker safety by alerting the Ministry to hazards in the workplace that could

affect workers, a provision that requires the reporting of critical injuries suffered by non-workers in places where workers work, regardless of whether a worker was present at the time and place of the critical injury, is not absurd.

The fact that a worker could have been affected by a potential hazard was a significant factor in the Board's analysis. The Board upheld the Inspector's Order requiring Blue Mountain to report the drowning death of a hotel guest.

WHAT EMPLOYERS NEED TO KNOW

In the *Blue Mountain* decision, the Labour Board interpreted OHS Act broadly, particularly in its interpretation of what is a "workplace." The decision risks turning every place into a workplace, all of the time, regardless of the circumstances. If a snowplough operator is in the vicinity of an accident where a pedestrian is critically injured by a motorist, is this a reportable accident under OHS Act? Or if a patient slips and falls, breaking his or her leg, in a hospital, is this a reportable accident under OHS Act? The answer is "maybe." It will depend on all the circumstances, including whether a worker could be affected by a potential hazard.

In light of this decision, employers must carefully consider reporting critical injuries and fatalities involving workers or non-workers (e.g., patients, customers, guests and members of the public) alike to the Ministry of Labour or risk liability under OHS Act.

In addition to reporting the accident, employers must be aware of subsection 51(2) of OHS Act that requires an accident scene *not* to be disturbed until authorized by the Ministry of Labour Inspector.

Subsection 51(2) provides:

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) maintain[ing] 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.

In the *Blue Mountain* decision, the Labour Board declined to comment directly on an employer's obligations under subsection 51(2) if a non-worker is injured. Usually, employers tape off or barricade an area until the Ministry of Labour completes its investigation. This requirement may be problematic if it applies to workplaces that are frequently accessed by non-workers such as health and long-term care facilities, resorts, hotels, sports arenas, restaurants and municipal streets.

For more information on how to handle Ministry investigations, refer to the Resource Centre section of our website and the March 11, 2009 news item "Accident Investigations."

Hicks Morley permission was given in writing to reprint this article. For more information about your Health and Safety obligations, please contact Meghan Ferguson at Hicks Morley 416-864-7350.

STATEMENT OF INCOME AND EXPENSES

For the third quarter ended September 30, 2009

	2009	2008
Written Premium	\$ 22,639,081	\$ 20,536,114
Earned Premium	16,979,311	15,365,951
Less Reinsurance Costs	978,081	895,782
Net Earned Premium	16,001,230	14,470,169
Net Incurred Claims	16,160,462	17,508,393
<i>Net Loss Ratio</i>	<i>101.00%</i>	<i>121.00%</i>
Underwriting Profit (Loss) Before Operating Expenses	(159,232)	(3,038,224)
Operating Expenses	2,098,238	2,248,208
<i>Net Operating Expense Ratio</i>	<i>13.11%</i>	<i>15.54%</i>
<i>Combined Ratio</i>	<i>114.11%</i>	<i>136.53%</i>
Underwriting Profit (Loss)	(2,257,471)	(5,286,433)
Income from Investment	1,268,286	1,943,455
Other Income	225,890	511,518
*Other Comprehensive Income (Loss)	2,061,234	(2,022,402)
NET PROFIT (LOSS)	1,297,939	(4,853,862)
Subscribers Equity (surplus)	19,046,176	11,970,998

*Other Comprehensive income (Loss) represents unrealized gains (losses) on available-for-sale securities.

Exercising Your Business Continuity Program

By Joe Ozorio, CBCP

In the past several newsletters we have provided you with some guidance to get you started on developing an effective Business Continuity Program. This includes the development of Business Continuity, Pandemic, Disaster Recovery and Crisis Management Plans. One last component that we need to consider is exercising and testing the plans.

If we do not test and exercise our plans, we *do not have a plan*. Challenging words for those of you who have put much effort into developing your Business Continuity Program! But let's think about that...

The Importance of a BCP Exercise Program

You have taken great pains to develop your BCP. You've followed every best industry practice in the book. However no plan, no matter how well constructed, can take into account every possible permutation of what happens in real life. Every disaster, every incident, every crisis is different from whatever it's predicted to be, or even from the last time it occurred. The bottom line is we can't script a real disaster; there are way too many variables. But what we *can* do is rehearse our response plans so that we're familiar enough with our procedures and our roles to have a fighting chance of responding in a coordinated and efficient manner. The corollary to this is that if you've never practiced or gone through your plans to respond to any kind of hypothetical situation, how in the world do you know if it's going to work in a real situation? The bottom line is that if you don't exercise your plan, then you might as well have not taken the effort to develop it in the first place.

Clearly, BCP testing and exercising is as fundamentally important as the development of the plan in the first place. Industry best practices tell us that we should think of business continuity in terms of a program (a continuous cycle), and not just a one-time plan. This is just as true with exercising your plan: it should be an ongoing program, not a one-time event. As your Business Continuity Program and Plans continue to evolve and change with your changing business, you must be constantly and regularly exercising your plans to gauge how effective they are against potential real-life disasters. In other words, your BCP exercises must be part of a program within a program.

Starting Out

We need to first start thinking of BCP exercise programs in terms of the objectives we need to meet. Although objectives can vary from organization to organization, there are a few key objectives any exercise program should have:

- To gain experience and exposure to the appropriate procedures in a non-threatening environment;
- To identify gaps in the plans, procedures and technology;
- To create plan awareness (Business Continuity, Pandemic, Disaster Recovery and Crisis Management);
- To meet standards or audit requirements.

It's critically important that your exercises be conducted in a non-threatening and non-pressure environment when you're first starting out. This creates an atmosphere that will help ensure ongoing cooperation and enthusiasm from your participants. A key goal of an exercise program should always be to identify gaps (because there will *always* be gaps!), to ensure a continuous improvement cycle.

In developing your BCP exercise program, in order to gain support from management and participants alike, you need to understand and promote the benefits of exercising:

- It helps uncover any plan weaknesses *before* an emergency happens ("No plan survives first contact with the enemy": better the enemy is a plan rehearsal and not the real thing!);
- It helps to identify resource weakness (Do we have enough resources? Do we have the right type of resources?);
- It improves employee confidence in an emergency (or, how do you get to Carnegie Hall? Practice!);
- It clarifies roles and responsibilities (identifies overlaps or gaps and helps everyone know who is involved and how they are involved);
- It builds confidence in key stakeholders (i.e., students) that you are prepared;
- It reinforces who is in charge (you don't need too many chiefs);
- It enhances coordination between teams (not to mention cooperation!);
- It permits better understanding of how achievable the Recovery Time Objective is.

Just like rehearsing a stage play, the more you rehearse a plan, the more employees have the confidence and knowledge to conduct the recovery effort. A good exercise program also provides senior management with a higher degree of confidence in the BCP program (and hence greater support for the plan on their part!). Exercises can help determine what remains to be done or changed in the plan – which is crucial to its continuous improvement. Finally, exercises go a long way toward demonstrating the plan’s viability to students and stakeholders.

Making the BCP Exercise Program Successful

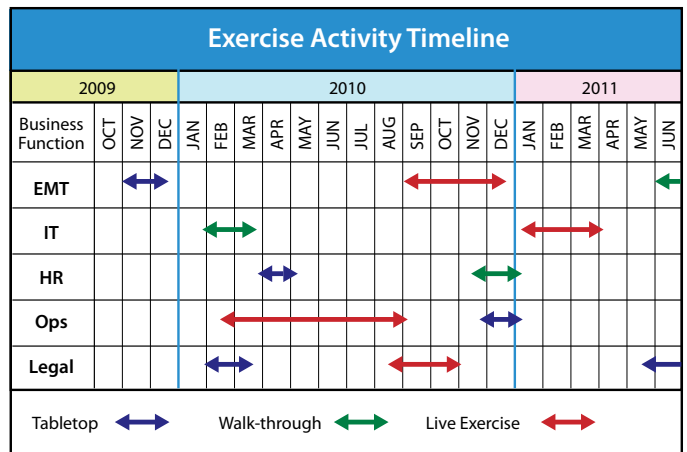
There are some important activities you need to undertake to ensure the success of your BCP program. It really should start by including a requirement for regular exercising in the BCP policy. This provides the very base-level support and justification for exercising in the first place. Next, you should create a formal exercise program outline and budget, and obtain senior management approval and sponsorship for both. You should also re-validate the budget approval before engaging in any exercise. Finally, you should promote the heck out of your exercise program through awareness campaigns. Make your participants and supporters aware of the program, the objectives, the benefits, the timing and the resource demands.

When you’re first building your exercise program, start out by identifying your initial priorities. Look at what business priorities are being met in the current BCP program or plan; incorporating these into your exercises might be a good jumping-off point. What are the current management concerns? This is another key element to include. Also, address any funding issues immediately, as these can create serious impediments to your exercise program’s success. Is there something in the Risk Analysis or Business Impact Analysis that stands out as a critical exposure, or key to the organization’s success or failure? This can be effectively addressed when creating the scenario. As your program evolves and matures, you’ll want to look at results of previous exercises and determine what gaps need to be addressed in your next set of exercises. Finally, if you’ve ever gone through some real emergencies, take a look at the lessons learned from these situations, and include them as key priorities in your exercise program.

When developing your exercise program, start by reviewing the type of exercises you want to do (these are covered in more detail below). Plan to start with several small basic exercises. Decide on how many exercises will be done and what the exercise period cycle will be. Estimate the planning

time required for each exercise, the schedule for each exercise and the associated activities leading up to and following each exercise. Determine what will be *exercised*, as opposed to what is being tested. This is an important distinction, because people should never be made to feel that they are being tested. It makes them uncomfortable and unwilling participants and can lead to mistakes and resentments, contrary to the goals of the exercise program! I always subscribe to the adage that we “test the *plan*, train and exercise the *people*,” that is ultimately the goal of any plan exercise. To round off your exercise planning, you need to determine your participants, secure their participation, finalize the budget and obtain approval.

A good visual planning tool would be something like this timeline chart:



To help you determine the types of exercises you want to hold, here are some definitions:

DRILL: This is usually a simple exercise to simulate an emergency response. The key goal is to practice and perfect the process. Some examples of drills are building evacuations, bomb threats, fire, emergency drop and replacement of technologies.

PLAN REVIEW: This is typically the easiest of all exercises. There is usually no scenario. You simply gather your plan participants and read the plan out loud. The goal is to seek agreement on the plan’s procedures and the defined roles. This may not work for all parts of the plans, but is a good approach when you’re first developing your plans.

WALKTHROUGH: This is a physical activity that is often aligned with technology and facilities. Its purpose is to familiarize participants with a particular environment (e.g., an Emergency Operations Centre). This is not a simulation; no equipment is being tested. This can work with or without a scenario. Walkthroughs have good value but are limited in realism.

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FUNCTIONAL: This type of exercise usually involves recovery of a specific system, application or piece of data and is normally focused on recovering a line of business. It often exercises some command and control functions and can simulate some stress. While this type of exercise provides a high level of assurance, it can also incur higher costs and more planning time (you do not want to impact your regular production!).

ORGANIZATIONAL: An organizational exercise is a highly realistic scenario-based simulation. It is intended to exercise the response and recovery activities of the plan, and is meant to specifically invoke the plan's command and control aspects. This often involves numerous people across the organization and can include outside agencies (e.g., emergency responders, civil authorities). This type of exercise involves high cost and a great deal of time and complex planning. It will, however, have the highest value in terms of realism and lessons learned.

TABLETOP: This is by far the most popular type of exercise. One definition of a tabletop exercise is that it's a tool to validate BC plans by presenting a scenario and walking through recovery plans while sitting around a table. However, there are many variations of a tabletop! The most common elements of tabletop exercises are as follows:

- Exercise planning is required;
- Scope and Objectives need to be developed;
- Usually scenario-based (needs a fairly realistic scenario that participants can relate to);
- Use of a script and problem sets (or injects);
- Possible timing of activities (a scenario covers and progresses along a point in time);
- Stays in the room;
- Has a relatively short duration (two to four hours).

The key benefits to tabletop exercises are to familiarize participants with their roles and responsibilities; improve overall understanding of the plan; identify gaps in plans and procedures; practice group problem solving for emergencies; demonstrate diligence to senior management; and promote group interaction and cooperation. (One caution: tabletops are usually not effective for technology recovery; this normally requires some form of hands-on work, such as a functional exercise).

Tabletop exercises can start out being very simple (e.g., exercising one section of a Business Continuity Plan with just a handful of people), to very complex (involving many departments, numerous participants and multiple plans). As mentioned earlier, if you're just starting out, make them simple. Then, as your exercise program matures, you can gradually incorporate more complex and challenging exercises.

You'll likely be using tabletop exercises as the preferred type within your exercise program, so here are a few simple tips to make them more effective and successful:

1. Start and end on time. You need to keep it crisp – people's time is valuable and they'll appreciate it!
2. Make sure everyone returns from breaks on time.
3. No responding to cellphones, pagers, or Blackberrys unless it's an emergency or part of the exercise script.
4. No sidebar conversations during exercise discussions. Everyone needs to pay attention to what's being said; there's great learning in that!
5. Absolutely no criticism of participants.
6. Play with enthusiasm. Encourage everyone to "get into" their roles.
7. There is no failure of people – the plan may fail, but not the people; we're all trying to do our best.
8. HAVE FUN WITH IT! Create a relaxed environment that promotes fun, while accomplishing a serious goal. You'll find you'll have better cooperation throughout, and more in future exercises.

Remember, exercising the plan is a vital and compulsory part of a Business Continuity Management program. The program or plan has little or no value without a complementary exercise program. Start small and grow your exercises, and use the early results to promote the entire program. Finally, always remember: good planning = great exercises!

Good luck with yours.

Joe Ozorio is an Assistant Vice-President in the Business Continuity Practice for Marsh Risk Consulting. If you have questions about this article or would like a quote from Marsh to provide assistance with your program, Joe can be reached at 416-868-2930 or joe.ozorio@marsh.com.

DOORS... Yeah man, doors!

By Philip Chandler

But not the rock powerhouse group of the sixties, the band that helped define an era for many of us. Sorry. You won't find the full seven-minute version of "Light My Fire" here, at least not in this issue. Rather, you'll have to settle for a pedantic treatise on fire doors.

Let's get right down to brass tacks: Doors are the unsung heroes of firefighting. They save lives and property. Don't get me wrong: fire alarm and detection systems are invaluable; there is nothing like an early warning of danger. Ditto automatic sprinkler systems; nobody gets water on the fire faster than they do. But when fire breaks out in a structure, a closed door is often the best thing we've got going for us! They alone, in their marvelous simplicity, stop the spread of smoke and fire dead in their tracks.

We're not talking rocket science here. The compartmentalization of buildings as a defence against fire has been going on for well over a century. In fact, the NFPA had a standard in place for their correct installation and maintenance as early as 1912, with their *Rules for Fire Protection Coverings for Openings in Walls and Partitions on the Interior of Buildings*. Today we have NFPA 80, *Standard for Fire Doors and Fire Windows*, a referenced standard for those communities adhering to the ICC family of codes.

Needless to say, but worth repeating anyway, opening protectives (a fancy term for fire doors) are only effective when properly selected and installed. Don't be fooled by their unpretentiousness; fire doors, together with their hardware and frames, are all part of a carefully engineered system. And just like any

ancient stereo system that rattled my windows with "People are Strange," fire doors are only as good as their weakest link. The wrong hardware slapped on a door, or a door carelessly mismatched with its frame, is not likely to provide the level of protection needed. Likewise, all the hardware in the world could be just a pile of junk if not installed in a workmanlike manner.

For many, summertime provides relief from the hectic pace of the academic calendar. Not so for the campus facilities shops. The summer is the time for all those remodelling projects – refurbishing worn-out spaces, creating new spaces, or reconfiguring what's already there. It should come as no surprise that the time allocated for completion of such projects keeps getting smaller, as does the budget needed to complete them properly. As a result, there is always the pressing need to save time and money. It's tempting, and dangerously common, to skip the professional design stage and bypass the permitting process. It's likewise very attractive to use materials, like doors and hardware, which are already on hand, often left over from who knows when. Do it fast and do it inexpensively!

The summertime is, no wonder, also the busiest time for fire inspectors. It is our job to make sure that fire safety is not compromised in the name of expediency. This is especially so in the case of doors. We must verify that when rated doors and assemblies are required, the correct ones are installed, and installed properly. That means that all the hardware that comes in the box gets used, like astragals, and all tolerances meet the design specifications.

The truth be known, proper installation is only half the battle. Doors, like every other fire safety system, must be diligently maintained. For tradespeople servicing rated opening protectives, there is one cardinal rule:



**"Swinging fire doors shall close from the full-open position and latch automatically. The door closer shall exert enough force to close and latch the door from any partially open position."
(IFC 703.2.3)**

From time to time, it is necessary for some of us to revisit the underlying principle of fire door operation. The air in a room, when heated by fire, expands, exerting positive outward pressure on all surfaces. A door that is not securely latched may thus be forced open, allowing the spread of smoke and fire to other parts of the building, often into

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exit enclosures specifically designed to offer refuge and escape.

For all the other building occupants, there is also a golden rule: **“Fire doors and smoke barrier doors shall not be blocked or obstructed or otherwise made inoperable.”** (IFC 70302) Oddly enough, the most frequent offenders are often facilities staff members themselves. Look, if I had to haul bags of trash all day or lug my tools from floor to floor and room to room, I too might look to make my job a bit easier by eliminating one inconvenient task, putting everything down and opening the door. Except I have seen how much destruction a closed fire door contains, and therefore, I try to be a convincing witness. I take every opportunity to inform others, at the very least, how much smoke and contaminants a wastebasket fire will

produce and how one closed door will prevent a whole lot of cleanup.

Unfortunately, we can talk about the importance of fire doors until we’re blue in the face. Nonetheless, fire doors will continue to be propped open, whether for convenience, sociability or simply to avoid hearing the door slam all day and all night long. Of course, there is the simple solution of installing magnetic hold-open devices that will allow doors to conveniently remain open, closing automatically upon the fire alarm activation. Clearly, this measure should be encouraged whenever possible. Yet, this fix is not always feasible, especially in the current economy. What we therefore need is a final fallback strategy.

We need to educate all building occupants, students, faculty and staff

alike, on what to do when a fire actually occurs and hope they come through in the end. As I have stated previously, I’m a firm believer in teaching the RACE protocol (Relocate, Alarm, Contain, Extinguish). If all else fails, I will take some comfort in knowing that when the worst happens, folks in my buildings will remember the mantra:

**STAY LOW AND GO,
BANG ON ALL CLOSED DOORS,
CLOSE THE REST.**

Philip Chandler is a long-time firefighter and a fulltime government fire marshal working extensively in the college environment – from large public university centres to small private colleges. Reprinted with permission from The Center For Campus Fire Safety. www.campusfiresafety.org





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Events to mark in your calendar

Campus Fire Safety, Security & Risk Management Conference & Expo

Hyatt Regency Hotel, Columbus, Ohio
March 7-9, 2010

Over 30 workshops and presentations.

Risk and Insurance Management Society, Inc. (RIMS) 2010 Annual Conference & Exhibition

Boston, Mass.
April 25-29, 2010

CAUBO – 67th Annual Conference

Memorial University of Newfoundland, St. John's, NF
June 12-15, 2010



It's a boy!

Carrie and Allan Green are happy to announce the arrival of Ryan Logan Green on Thursday, September 24th at 8:44 a.m., weighing in at 8 lbs., 12 oz., a little brother for two-year-old Gillian Evelyn. Mom and baby are both doing great!