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### **How an Employee Injury Impacts a Company & Affects Its Workers' Compensation & OSHA Compliance**

By Robert Ray

The purpose of this article is to demonstrate how every alleged workplace injury affects an organization and the business implications regarding workers' compensation and OSHA compliance. The reader will better understand the importance of determining fraudulent workers' compensation versus a true accident (with resultant injury), how each accident affects a company, experience modification (X-Mod) and the interdependencies among employee rehabilitation, workers' compensation and OSHA citation prevention.

### **A Reported Workplace Accident with Resultant Claimed Injury**

As everyone in the safety, health and environmental (SH&E) community knows, the trigger event is the first reporting of an accident (whether it includes injury or illness or not). This trigger event should put into action your plan for addressing and investigating the alleged first report of an accident.

Typically, the SH&E function does not stand alone as its own directorate. SH&E services usually fall within the human resources (HR) directorate, or in some instances, manufacturing. Most HR managers with whom I have worked are kind and concerned individuals who have an inherent affinity and concern for the employee, and they usually take information as being truthful. Unfortunately, in the last 22 years of my practice, I find that a good majority of reported accidents have substantial portions of their truthfulness somewhere between gray and black.

Between that gray and black lies the truth, and it is my job, to the best of my abilities, to cut through all of the noise, chatter and anxiety surrounding an event, the claimant and alleged witnesses to get to the truth of the matter. In most organizations, the adjudicator of any disciplinary action, once the accident is fully investigated and determinations of

fault derived, is not the SH&E professional. But if you are lucky, this may not be the case.

The more experience you gain in these matters makes for a good convincing argument that you should be the “decider” and adjudicator as long as you remain impartial and fairly disciplined, regardless of relationships and the perceived “value” of a particular employee. As any labor attorney will tell you, the greatest risk to an organization is the establishment of an unfair precedence to the employee population and treating any employee differently than those you treated in the past. After all, labor attorneys make their money in defending a suit that alleges a violation of public policy or an individual discrimination tort.

If your organization shows biased adjudication and dissemination of employee discipline, then I highly recommend you work your hardest at changing that culture and purchase a high limit-low deductible Employee Practices Liability Insurance (EPLI) policy because you will need it.

For me, with every telephone call, e-mail or personal notification of an alleged accident I receive, I immediately assess what portion of our program has a hole or inadequacy that led to the reported loss. Comparing and contrasting your existing SH&E program and assessing your company’s internal compliance with those provisions and the accident investigation results, gives you the basis to begin your assessment and final determination of where the truth lies.

### **Defending an OSHA Citation Before Conducting the Accident Investigation**

At this point, you must determine if the alleged accident is a reportable OSHA accident or incident. You may want to call your consultation division for clarification on the requirements. I remember an incident in California where the reporting requirements indicated that if you hit bone in an amputation, you had to report it. If you did not hit bone, you did not have to report it.

So I suppose back then you could have your nose, ear or fingertip amputated, and as long as no bone was hit, you did not have to report that accident or incident. If I saw an employee with an amputated nose or ear, I would have considered it a terrible injury and reported it anyway.

The laws have changed over the years, and now those types of accidents and incidents are covered by the disfigurement portions of the law. My personal mantra has always been that when in doubt, seek advice and consultation from OSHA and report. Be sure to note the name of the person who gave you advice as well as the date, time and subject of the conversation. Many times, reporting an accident or incident to OSHA will not result in an inspection. You must judge the severity and circumstance of the accident or incident when reporting and be prepared should an inspection occur.

However, you may find yourself in an OSHA inspection when you did not even report an accident. This is because many states have laws that require the ambulance service to

report their activity directly to OSHA. The employee involved in the accident may also report it for the company. Again, my mantra for nearly every accident or incident that is not treated by first-aid is to prepare for an OSHA inspection.

### **Preparing for a Fraudulent WC Injury Case Before Conducting the Accident Investigation**

I believe you should prepare for the worst and hope for the best so that you are not taken by surprise when the worst occurs. This too should be the consideration prior to reporting a workers' compensation claim.

Every workers' compensation policy has a provision that losses are to be communicated or conveyed to the carrier as soon as possible, so every company has a duty to comply with their policy provisions. Every carrier then has the ability to either accept or deny the claim once it is made. There is usually a time limit associated with making this determination, and that can vary from state to state, or when not regulated, from carrier to carrier. Typically, 30 days is the minimum, and 90 days is the maximum, which again vary from state to state and from carrier to carrier. Check with your particular carrier to determine your specific requirements.

Unfortunately, once a claim has received accepted status, it is hard to un-ring that bell if information arises in the future to indicate or substantiate fraud. If fraud is suspected during the incipient stages of the accident investigation, communicate that with your carrier. In those instances, the carrier will suspend determination while you progress with your accident investigation. Overall, if fraud is absolute or highly suspected, it is best to press the carrier to reach a determination of claim denial. It then becomes the applicant's duty to prove otherwise. Many states' workers' compensations claims review boards can be liberal in reinstating or forcing a carrier to accept the claim, but there is a process, and hopefully you and your carrier can show exculpatory evidence to exonerate both the carrier and your company and consequently sustain the determination of claim denial.

### **Conducting the Accident Investigation with Both of These in Mind**

When conducting your accident investigation, be diligent and thorough. Many occasions exist in which, on the surface, the accident and causation seem to be clear, cut and dry. But after digging a bit more, you may find that the clarity begins to fade, and you are back in the middle of gray and black. Employees have asked me for a confidential meeting in which they tell me circumstances they either observed or have knowledge of that did not surface in the course of the accident investigation.

You will only achieve this level of trust and confidence when you get to know each employee personally and when those employees know you are truly concerned about their health and wellbeing.

### **Collusion & Cooperation by the Injured Worker & Co-Workers**

There are many internal, external and interdependent factors at work in every workplace; similarly, there are employee allegiances and loyalties. Poor morale,

minimum compensation, layoffs and other factors may influence the collusion of employees in framing the circumstances surrounding an alleged accident or injury. Do not be surprised to find that employees have greater allegiances and loyalties to each other, especially when they perceive the company is wronging them or out to get them. This is especially true in advance of a layoff. However, some states have legal provisions to provide protection for claims made in the midst or prior to a layoff. Check with your carrier and legal council for details.

### **Developing Facts & Conclusions Before Reporting to the WC Carrier**

Once you feel that you have completed a thorough accident investigation, present the results of your findings to the assigned claims representative at the carrier. Collectively make a determination of acceptance or denial of the claim. If you feel fraud is involved, make your case to the carrier and remain adamant in your determination and opinion that the claim should be denied. I must add that the final determination is at the prerogative of the carrier. Most claims representatives can cite you their legal necessity for accepting the claim in those instances.

### **Properly Reporting the Alleged Injury to the WC Carrier**

Per your workers' compensation insurance policy, it is your duty to report the claim as soon and as practicable as possible. So do not hesitate to report or to communicate information about the progress of your internal investigation.

You may also, depending on the state in which you work, have the ability to treat a claim as a first-aid claim. In those instances, you should still report the claim; however, the carrier does not reserve an amount of money to pay the claim. You pay the cost of the first aid directly.

Check with your carrier regarding the limitations and guidelines on what is or is not a first aid claim. Treating legitimate first-aid claims as first-aid claims is a great way to control your experience modification. Expediting the closure of claims and removal of reserves is also an excellent way to handle your own experience modification factor. You should calendar a detailed claims review about a month before your annual X-Mod is calculated and try to have as many claims closed, reserves removed or reserves reset on the remaining open claims-hopefully a downward resetting of the reserves on open claims.

### **Teaching WC Claims Adjusters Their Job**

Claims adjusters have hundreds of claims assigned to them. You have the luxury of knowing your claim, personnel, circumstances and the way you conduct your business. It is your job to help educate your assigned claims examiner (and treating physicians) in these matters. Your own knowledge of your state's workers' compensation laws will help you relate to your claims examiner and will possibly offer some ways in which the examiner may wish to handle the claim.

Two great stall techniques of the applicant (claimant) and their council is to ask for further medical evaluations and to miss scheduled doctor's appointments. If this

happens, you must notify your claims examiner immediately. In those instances, either you or the carrier can arrange for transportation to ensure that the employee keeps his/her scheduled doctors visits. You also need to manage your own claim to ensure that your employee is treated by a workers' compensation doctor you and your carrier have chosen. The doctor should be impartial in the medical diagnosis, limitations and restrictions and should not favor the applicant's interests.

### **Guiding & Pushing the WC Carrier for a Prompt Determination**

Calendar the date for which a determination should be made and make sure you communicate directly with the assigned claims examiner before that date.

If that date comes and goes, your state laws will take precedence, and the claim will be accepted by default.

### **Litigation**

Most workers' compensation claims I have seen result in litigation. You can try to abate or prevent this from happening by communicating with your employees, possibly visiting them at their home and by speaking with them often to determine their status, wants and needs.

### **Your Insurance Policy**

Sometimes it is possible to obtain a workers' compensation policy that allows you to choose your own legal council. This is for the larger companies that have such council.

It is best that your attorney know your company more intimately than the panel council assigned by the carrier. Panel council firms have hundreds of claims like the claims adjusters/examiners. In those instances, you have to take a number like the rest of the claims defended. Having your own attorney may be key in those large high-profile workers' compensation cases. Check with your carrier before renewal to see if you can have this provision endorsed onto your policy. Not having it prior to renewal will more likely prevent you from getting it during the policy term, so you will have to wait a year.

### **Parallel Internal Legal Investigation**

If you suspect a claim will become a litigated claim, it is important to have your own attorney involved as soon as possible and to act as your advocate with the carrier's and applicant's council.

A few dollars spent on council may save thousands when it comes to renewal time and you see that your policy premium has increased by 30% due to an X-Mod increase. X-Mods are pure premium multipliers.

### **Here Comes OSHA! Who Told Them? Now What Do I Do?**

When OSHA shows up at your door, determine who notified them. If you notified them, their arrival is obvious, but it is good to know if they were summoned by the ambulance report or by the employee. This may also give you some insight as to the employee's

intentions in their claim. You can be sure that if OSHA got called, so did an applicant's attorney.

### **Keeping the OSHA & WC Balls in the Air**

If you started your accident investigation with your eyes on the carrier and claim as well as OSHA, you are ahead of the game. If you did not, then prepare for the worst. Many times, I was able to accommodate OSHA upon their arrival. OSHA looks favorably upon employers who have their act together, i.e. written programs, policies, procedures, documented training, etc. If you have not assembled this information in the course of your accident investigation, you did not conduct a thorough accident investigation, and you did not prepare for OSHA. Consequently, you may find yourself on the wrong end of OSHA.

I have defended employers and clients in 30 OSHA-related cases. From my experience, in order to convince an OSHA official that you are innocent of any wrongdoing, you must impress them at the initial visit. If you are prepared for them, it goes a long way toward the credibility of your assertion of innocence.

### **Temporary Disability, Temporary Total Disability (TTD), Permanent & Stationary (P&S), Compromise & Release**

Pay particular attention to the carrier's and doctor's determination of disability, whether it is in the form of temporary disability or permanent disability.

The rules have changed in certain states and so have the tables that determine disability and rehabilitation. The calculation of your X-Mod considers all costs of the claim, so it is best to contain these costs. Returning an employee to work early will eliminate the cost of temporary disability and ultimately the entire cost of the claim. In intricate litigated claims, it may be best to seek an employment separation in the final compromise and release settlement. In settled fraudulent claims, it is difficult to put the genie back in the bottle when other employees learn that Employee X got a paid year off from work and a few hundred thousand dollars on top of that.

### **Subrosa**

I like to get what I pay for from my insurance policies, so I always ask for Subrosa of a suspicious claim. These are costs of surveillance the carrier pays to observe the daily activities of the employee who is too injured to work. I remember one case when I worked on the carrier side in which an employee was videotaped lifting large stones while performing his own landscaping when he was restricted from doing so as a course of his employment. Or others videotaped surfing when they were supposed to be bedridden or taking on a job with another employer. Imagine how fast an applicant's attorney withdraws a claim when they are allowed to view this evidence.

### **Independent Employee Action Defense**

If you have done your due diligence in your company's SH&E program, a good OSHA strategy is the Independent Employee Action Defense. In this defense, if the employer

can prove they met their burden regarding the test(s) of this defense, they can be exonerated and have any citations withdrawn.

I have used this defense at various levels of the appeal process in approximately 20% of the cases I have defended.

### **The Informal Conference**

With any OSHA citations, I always recommend appealing the citations. Sometimes OSHA will look for a citation or penalty to stick because of the gravity of the accident and resultant injury, much like how prosecuting district attorneys develop a record based on conviction rates. Usually, OSHA is accommodating, especially if you have your collective SH&E efforts together, and they are genuine.

### **Putting Up a Vigorous OSHA Defense**

In any case, I always offer and recommend that a vigorous OSHA defense be presented, and I always appeal every inspection and citation. OSHA settlements become part of the public record and can be accessed through their national database by anyone.

### **Consider Your Offer & Options**

Most times, at the OSHA informal conference, an offer of settlement will be extended. Weigh those settlement options and considerations carefully and compare and contrast them with your future business needs. Since many organizations must pre-qualify with customers, having an extensive OSHA record may not bode well with future business opportunities.

### **Preparing for the Hearing & Trial**

If your evidence supports your case of innocence, prepare for the next levels of OSHA appeals. Present your case and evidence and hope for the best. At this point, you should seek legal counsel.

### **Cost of Claim**

The cost of the claim has a future effect on your insurance premium in the form of the X-Mod. That is why it is important for you to manage every claim and to assist the carrier as much as possible. I have seen claims go on for years because it fell off everyone's radar screens. Do not let this happen to you. In some instances, outrageous X-Mods will limit the pool of insurance carriers who will even want to quote your business.

### **Claim & OSHA Inspection are Closed**

Hopefully, with a solid, established and enforced SH&E program, you will not have accidents. If you are forced to go through the process discussed in this article, it is important that you conduct a thorough "After-Action Review" and learn the lessons you were taught, either by the carrier, the applicant and their attorney, OSHA or all of the above. Learn from your errors.

### **Word of Mouth Travels Fast**

In my experience, word of mouth travels faster than any memo, policy or procedure. Setting a precedent at your company that you will aggressively manage all claims will set a positive tone.

Most employees do not like to see other employees take advantage of the company or others. They know that if they wish to continue to receive a paycheck and future increases, the company must survive. Teaching employees that the survival of the company is important helps everyone focus on controlling costs and claims. Employees who know that the company will not stand for fraudulent claims will serve as a self-policing force within the company.

Having employees who trust that you and the company are concerned for their wellbeing will help you get those employees who come to you with information contrary to the objectives of the company and report those suspicious claims or provide information to help you combat fraudulent claims. Fraudulent claims hurt everyone and jeopardize the existence of the entire company either through high insurance costs, citations or penalties.

Robert Ray is a degreed industrial safety and industrial hygiene professional and a privately practicing risk management and SH&E consultant who provides services nationally. He has 22 years of professional corporate experience for a variety of Fortune 500 companies, both public and private. He also has 7 years of professional experience in the insurance industry as a Senior Loss Control Consultant.

Prior to his current positions, Ray was a U.S. Army Combat Engineer Officer. After his military service, he worked as the Lead Safety Engineer for the U.S. Space Shuttle Program at Kennedy Space Center. He provided SH&E supervision on the first return-to-flight missions after the Challenger disaster.

Ray later assumed corporate risk management and SH&E roles for such organizations as Hughes Aircraft, MCA Universal Studios and Farmers Insurance before entering the private sector as a Senior Director of Risk Management and practical consultant.

He is a member of AIHA, ACGIH and NSC, and he has served on the California OSHA Standards Board T8:5155 Steering Committee. He is also a Past-President of ASSE's Los Angeles Chapter and was honored as its Safety Professional of the Year.

Ray holds a bachelor degree from Indiana University of Pennsylvania and a master degree from Embry-Riddle Aeronautical University.