CUT YOUR LOSSES:
IMPLEMENT A SAFETY PROGRAM
& AGGRESSIVE INVESTIGATE CLAIMS
Injuries, Illnesses and Fatalities

Bureau of Labor Statistics
2013 Data

- Total recordable cases: 3,007,300
- Cases with days away from work: 917,100
- Cases with strains/sprains: 327,060
- Cases with slips, trips: 229,190
- Cases with back injuries: 170,450

4,585 fatalities
People Tend to Forget that Almost every Life Safety Code or other Regulation was Written because of What Happened in Years Gone By
Continuing to This Day Are Real Life Stories Impacting Families

• March 2015 – OSHA Highlights
  – Georgia wood product manufacturer cited for exposing employees to fire, amputation and unprotected equipment hazards
  – Retaliation. Company pays $350,000 to employee who reported workplace injury issues to OSHA
  – Steel manufacturer faces penalty of $366K for employee exposure to machine, fall and confined space hazards
  – Bowling center employee dies after hooded sweatshirt catches in pinsetter
– Maine roofing contractor with serial violations faces $400k fine and owner jail time
– 58 year old worker dies because company ignored safety hazards
– Trench collapsed buries and kills local **day laborer**
– Blast in Chicago Heights injures two employees
– Worker killed in scrap metal baler
What Are The Reasons?

- It’s management’s fault for not implementing a health & safety program
- It’s the employee’s fault for not following safety policies and procedures
- Safety is common sense. Oh really?
- It’s the aging work force.
- Does a company really understand the cost of risk?
- What behavior is rewarded?
- It’s unrealistic to think every work risk can be eliminated but it can be minimized and managed
  - Think of a construction site where the risk of injury is high compared to a warehouse
- Not every incident reported means it is work-related
Safety Development Takes a Cultural Shift – Just Like Operations

Questions to ask
1. Where do you want to be?
2. How long are you willing to invest?

- Natural Instinct
  - Supervision
    - Management
    - Fear/discipline
    - Rules/procedures
    - Supervisor control
    - Training
  - Self
    - Personal
    - Knowledge
    - Standards
    - Personal value
    - Care for self
    - Individual recognition
  - Teams
    - Help others conform
    - Others keeper
    - Care for others
    - Organization pride
    - Injury understanding

Reactive
- Injury Rates
- Errors
- Personnel issues
Building Blocks of Safety Program

- **Management & Employee Involvement**
  - Management provides the motivating force & resources

- **Workplace Assessments**
  - Anticipate, identify & fix work hazards

- **Safety Performance Analysis**
  - Proper investigation; part of operational review; create scorecard

- **Safety & Health Training & Communication**
  - Training is based on complexity of risk with a set schedule

- **Hazard Recognition, Prevention & Control**
  - Design of the job process or what control is required?
Core Elements that has to be Cemented Within Your Business

• You have to train employees.
  – They do not come to your business knowing every risk or potential risk

• Your TEAM has to provide the leadership
  – What expectations have been established?
  – Supervisors need to be held accountable for coaching employees to work safely

• How do you identify and correct safety hazards?
  – Frequency of safety assessments
  – Are you willing to make changes?
  – How is your equipment checked to ensure it is safe

• What kind of communication is shared with employees?
  – Is it visible? Timely? Updated?
  – Is it a slogan or truly an ingrained part of who you are as a company?
  – Is there a mechanism for employees to voice safety concerns?

• Some jobs are preconditioned where injuries can result
  – Highly repetitive lifting jobs can cause a muscle strain at any time

• Not every business will have a Safety or Risk function
  – That is understood, but it doesn’t absolve a business to protect its employees
Team Commitment to Safety

When it comes to safety let us never leave a team member behind for it is the responsibility of each one of us that everyone goes home safe to their families and stays injury free.
There **MUST BE** a fundamental belief that injuries and incidents can be prevented!
Avenues of Investigation:
The 4 primary methods of investigation to detect abuse and fraud

- Claimant statement
- Witness statements
- Background Investigations
- Surveillance
The Claimant’s Statement

• The foundation of the fact finding process
• Make certain the incident report has an anatomical diagram
• Get the interview/statement early
• Face-to-Face statement
• Assess credibility
• Address AOE/COE, Apportionment and subrogation
• Document how the injury occurred, body parts, prior claims, concurrent employment, outside hobbies, etc.
• Identify any witnesses
• Get detailed information about the injury, including:
  » Specific Limitations and Restrictions (surveillance)
  » Prior Medical History (apportionment)
Witness Statements

- Witnesses are typically co-workers, supervisor, customers or anyone that possesses relevant information about the alleged injury
- Video/Security Cameras: Secure video evidence
- Key Areas of Interest:
  - Pre-existing or non-work related injuries
  - Concurrent employment
  - Job related problems (disciplinary issues, demotion, pass-over for promotion, work-force reduction)
  - Physical activity or hobbies
  - Identify inconsistencies between claimant and witness statements

- Regarding statements from witnesses:
  - What did they witness? What are the pertinent details?
  - What did the claimant say about the incident?
Background Investigations

- DMV records
- Civil Filings
- Criminal History
- Hospital & Pharmacy Search
- Fictitious Business Name Filings
- Professional Licenses
- Social and Professional Networking Sites
- Vehicle Sighting History
SURVEILLANCE

- One the MOST EFFECTIVE TOOLS to prove a fraudulent claim
- A PICTURE is worth a thousand words
- It’s EXPECTED by the court
Legal

Who can perform Surveillance?

- Must be a licensed Private Investigator
- Must be licensed in the state the investigation is performed
The courts have held that the defense has a duty to investigate and bring the facts before the court, as long the method used is not unreasonably intrusive.
Legal

Generally, surveillance may be conducted so long as:

✓ The subject has no reasonable expectation of privacy.
✓ The surveillance is not unreasonably intrusive.
✓ No attempt is made to induce the subject to engage in activity that he would otherwise not have undertaken.
Obtaining the Best Surveillance Results

• Provide as much information as possible to the investigator
  ❖ Physical Description or Photograph
  ❖ Date of last medical evaluation
  ❖ Most recent medical report
  ❖ Claimant’s specific injuries, limitations and restrictions
  ❖ Dates and details of any upcoming appointments
  ❖ Deposition transcript if applicable

• Pre-surveillance Investigation
  ❖ Social Media/Internet research
  ❖ Driving History and Vehicle Ownership
  ❖ Business Affiliations
  ❖ Satellite view of surveillance location
  ❖ Vehicle Sighting History
Negating the “Good Day” Defense

• If the claimant engages in activity that is contrary to their allegations, restrictions or limitations, conduct an additional 1-2 days of concurrent surveillance.

• This will help negate the claimant’s explanation for such activity in that they were having a good day, but the next day they weren’t active because they “over did it.”
Is This Fraud? Doctors Update

• The patient complains of pain mainly in the low back. She has a hard time getting around, even having a hard time walking. She really drags her left leg.

• ....she has an antalgic gait on the left side. She is barely able to mobilize due to the discomfort. She has exquisite tenderness in the lower lumbar spine....with evidence of muscle spasm and guarding.

• I do think she needs to be off work and with this amount of pain there is no way it is safe for her to be working. She can barely walk....
Q: It identifies that if you were to get up out of a chair, that you would need upper extremity assistance. Do you remember that?

A: Yes. I would lean to the right and kind of look like I’m a pregnant lady and just kind of lift up my back.

Q: So at this time in August did you need assistance actually getting out of a chair?

A: Yes, at times.

Q: And then it says here “All ADLs limited.” And ADLs means activities of daily living. Does that mean anything to you?
• Yes. It means to me I cannot be a normal human function - human being.
• Q: The doctor’s report say you mention that your stride length is very short due the increased pain. Do you remember telling her that?
• A: Stride length?
• Q: Meaning when you walk, the distance between your steps is shorter than it usually is.
• A: Yes, sir. It would be like just really slow, like I’m walking like a grandmother.
Doctor Yuan?

- The activity level that I witnessed on the surveillance video certainly was not consistent with the description given by the applicant on her last physical evaluation or any prior evaluation for that matter. When I evaluated the patient, she appeared to be in extreme pain, had difficulty even with walking and had a forward hunched posture. She had exquisite tenderness in her low back and significant guarding with very limited flexion and extension.

- **On review of the film, it has certainly changed my opinion about the nature and extent of her injury. I doubt that she really had an injury at all....**
The sometimes strange world of Worker’s Compensation…
When does trial preparation begin?
BEFORE THE ACCIDENT OCCURS!!!
Accidents WILL happen - are you prepared?

- What are your procedures?
- Who does what—when—how?
- What documents do you need?
- Do your procedures give you the best chance for success?
- What do your documents contain?
- Can you ensure your procedures are followed?
The Investigation

A step-by-step process (almost)
Freeze The Facts

• Only a properly investigated and documented file can result in a sound decision. FREEZE THE FACTS as soon and as thoroughly as possible after the accident.

• The better your investigation is, the better your decisions concerning the file will be and the better equipped your attorney will be should the case be heard at the Illinois Workers' Compensation Commission. A properly documented file allows you to either confirm the compensability of the claim or to effectively dispute it at the Workers' Compensation Commission.

• EMPLOYERS CAN WIN CASES AT THE COMMISSION. But facts must be effectively developed in order to do so. There is no formal discovery process at the Workers’ Compensation Commission, and, therefore, having all of the facts frozen in time right after their occurrence can prevent “altered memories” and fact re-shaping after the worker obtains an attorney. Second-hand information, innuendo, “I just know it didn’t happen here,” gut feelings, and verbal reports from doctors are not sufficient.
The Accident Report

1. Immediately have the injured worker, supervisor and witnesses complete an accident/witness report

2. The report must include the details needed for trial
Why is this important?

- Stories change during the course of medical treatment/attorney representation.
- Provides an excellent source for cross-examination.
- Arbitrators do pay attention to dramatic differences in accident reports versus live testimony.
Does your accident report stack up?

- Employee’s verbatim detailed accident description
- date, time, place of injury
- *Three Pertinent Dates* - date of accident, date reported, date accident report prepared
- supervisor, job & equipment involved
- Precise information to identify specifics—left, right, upper, lower—of any and ALL body parts at issue
- Witnesses – actual and potential
- Prior history of injury to those body parts injured?
- Prior treatment for same condition or body part?
- Current medical provider
- PRIMARY CARE PHYSICIAN
- Employee signature – “True & Correct Statement”
- OPEN ENDED—more is best
Post-Accident Drug/Alcohol Testing

- Do you have procedures?
- Are they known and in the EE handbook?
- Do you have a separate signed document?
- Consequences for non-compliance? Are they known and in the handbook?
- New statute may give the presumption that the accident did not arise out of the employment if employee fails the test
- There are rules in the statute—do your procedures comply?
Accident Scene

- Check all details to confirm or rebut employee’s story
- When do you investigate? IMMEDIATELY—delay causes nothing but problems
  - stories change (are “set straight”);
  - accident scene is changed or altered or there is the implication that it MAY have been changed or altered
- Photographs—
  - instantaneous type
  - date/sign
  - know who took the photos for trial
- Any available video (more on this later)
- Equipment—did you preserve the evidence?
  - may need the broken chair for trial—or may need for third-party defense or products liability claim.
  - Condition of stairs—Were they viewed directly following accident by anyone? Cleanup or repair after accident? Type of stairs? Were they open to the public? Anything on the stairs at time of the accident (water, paper, salt etc.)
  - Example: Stairs in good condition not open to the public but person who investigated found a piece of the manual on the stairs with a footprint clearly marked on the paper.
RECORDED STATEMENT OF THE PETITIONER

• Do you have a statement playbook?
• Know what type of claim you are looking at first.
• Date, time, parties recorded, statement that they are aware you are recording.
• DO NOT feed the petitioner closed questions—keep them open ended.
• Make them describe the accident in great detail!!
• Ask again for primary care or all doctors/medical treatment
• Be prepared to testify. What is heresay? Why isn’t the recording enough?
• Sign/date notes if possible or ensure they are in log notes.
• Do you have a script? If so, good, but be prepared for the type of claim AND the unexpected.
• If repetitive trauma ask to describe job duties—note whether they have changed recently as well
• Stair cases—in a hurry? Carrying job related material? Etc.
Does the worker have any non-occupational activities that may impact the claim?

- Second jobs
- Self-employment
- Sports
- Hobbies
- Vehicles

Remember if the worker says no at the beginning of the claim and later evidence contradicts it, this affects the worker’s credibility at trial.
Freeze The Facts--Witnesses
Arbitrators generally believe unbiased witnesses who contradict the injured worker’s version of events

- Have witness fill out a witness report.
- If speaking to the witness -- manner of inquiry: At the scene ask open ended questions; **do not lead witness to answer what you expect**
- Get Recorded or written statement or verbatim notes of oral statements – request witnesses to sign their statements (and have interviewer sign and date his own notes).
- Verify same facts as the Petitioner, i.e. who, what, where, how, when, why-- you’re asking the same questions you asked the injured worker. Determine relationship to the injured worker (are they best friends and golfing buddies—or hated enemies?)
- Ask who might have been a witness and interview them--do the same (verify they saw or know nothing); rebuttal of future collusion
- Investigate further to determine WHO ELSE might have been a witness
Time may be on your side…

- Time of day? – ensure that claimant and witnesses tell the same story
- Beginning or end of shift or week?
- Time cards – ensure claimant and witnesses worked at the same time
- Supervisor – present or not?
- Record retention – time cards, schedules, production sheets, computerized tracking for use at trial
Contact with the injured worker and “the Doctor”

- Early contact is the best as the worker will be unrepresented. Once the Petitioner has a lawyer, direct contact should cease (except for contact required by statute).
- Petrillo: cannot contact the treating physician directly even if it is your occupational doctor—consequence is that information received or doctor opinions which use information received by you may be barred.
- You may contact the doctor’s staff to ask for updated medical information and bills.
Video Evidence - not just singing cats on YouTube

Oh look, a cute squirrel eating a french fry. Let me get this on tape.

Best night of Karaoke ever. I better get this up on youtube.

That guy just got arrested. Good thing I have my super amazing G-4 nectarine phone so that I can record this arrest.
Video Evidence of Accident

- Do you have it? Do you need it? Where do you have it or need it: parking lot, on-site?
- Consistent with the witnesses?
- Verify with records
- Retain essential records and video—what is your policy? DO YOU HAVE ONE?
- Provide complete copies, not just portions
How Reliable are Your Procedures to Freeze the Facts?

Investigation

Immediately upon notification. Don’t wait!

Why? Again, Arbitrators credit facts closest to the actual accident. They also credit those employers who have a rigid post-accident investigation plan. (“This is the way we ALWAYS investigate EVERY claim.”)

Do you have procedures? Are they enforced? (Are there consequences for non-compliance – non-reporting, late reporting – for injured worker, witnesses, supervisor?) Do it every time – it helps to prove a negative. If it wasn’t reported it must not have happened.

Are your procedures documented in your employee handbook?

Do all employees sign a statement indicating they received and have reviewed the handbook?
TOOLS IN THE RESPONDENT TOOL BOX
Medical Treatment
In-Plant or at Outside Medical Facility

- Have employee sign a medical Authorization / 8(a) Letter

• I hereby authorize any licensed physician, chiropractor, medical practitioner, hospital, clinic or other medical or medically related facility, insurance company or other organization, institution or person, that has any records or knowledge of my mental or physical health, history, condition or well-being, to supply such information including any and all prior medical records to my employer or its insurance carrier, claims administrator or attorneys.

• I specifically authorize any treating physician or medical care provider to communicate orally or in writing with my employer or its insurance company, claims administrator, rehabilitation or medical management consultant or attorneys as to my care and treatment, and as to any other issues including diagnosis, prognosis, causal connection of care and treatment to my work injury or duties, and ability to work. I hereby waive my physician-patient privilege. In conjunction with this, I also authorize any treating physician or medical provider to review any additional materials provided to them.

- Did the employer send the Petitioner? Is that documented? Are there procedures or requirements for first treatment? Are they in your handbook?
- Consistent accident history—Is the accident account consistent with the version reported to hospital and/or ambulance (yes—If ambulance is involved, obtain that report).
- Treatment consistent with accident/condition
- Prior conditions
- PCP or prior treating doctors
- Contact the doctor’s office up front—before atty rep
- Does Petrillo apply?
- Make communication professional/in writing preferred over a phone call.
- Standard letter to doctor indicating you will accommodate light duty before representation?
- AMA ratings and causal connection statements—do you ask the treater?
The Personnel file

• Termination information (Why? Motive to fabricate accident?)
• Employment application – prior employment and military service information (potential prior claims, use for vocational rehabilitation, potential prior causes of repetitive trauma)
• If pre-employment physical available, check for medical history and prior similar condition
• Check absence reports for prior condition or accidents—or motives for off-work
• Prior medical work authorizations
• Group disability claim information to obtain medical records of potential providers
• Employer reprimands—potential for upcoming termination or axe to grind—motive to fabricate.
• FMLA information with treatment records
Other information from the employer that may lead to usable evidence

- Construction – job site wrapping up and layoffs imminent
- Downsizing or closing plant--layoffs on the way
- Upset employee – recent bad review or reprimand; problems with co-worker or supervisor
- Denial of raise, promotion, or recent off-work request;
- Issues with ability to perform specific portions of a job;
- Family issues which may impact desire to be off work
- FMLA, drug, alcohol or ADA issues

- REMEMBER: RUMOR AND INUENDE ARE NOT EVIDENCE
JOB DUTIES AND REPETITIVE TRAUMA

• JOB ANALYSIS (ERGONOMIC) AND JOB VIDEO ANALYSIS (ERGONOMIC)
• What are we looking for? Are the job duties causally connected—cause or aggravate the condition?
• Petitioner’s version of the job vs. how it is really performed.
• Supervisor’s version or written job description
• When did the Petitioner KNOW the job duties were causally connected to the job?
• What tools are really used?
FEET ON THE GROUND – NURSE CASE MANAGER

- Eyes and ears at doctor’s visits.
- Save on TTD with prompt appointments.
- Impression is left with the injured worker that the ER cares about him/her.
- Nurse can gain an impression of the claimant, the doctor and can resolve billing issues.
- Provide insight on the need for an IME.
Getting the most from your Vocational Rehabilitation Nurse

- Blind labor market survey or LMV after meeting?
- Just an initial report of possible jobs?
- Communication is key—What are the expectations: any job vs high paying job? Retrain or reeducate?
- Job interviews, job fairs: push them hard, not just meet for coffee in the library.
- Must be prepared to testify
- They are the experts on non-compliance
  - document non-compliance
  - most importantly, provide you with notice when non-compliance reached.
Role of the IME doctor

• Causation, treatment, RTW and ability to work a job
• Clarify delayed reporting
• Clarify delayed treatment
• Clarify inconsistencies in accident details
• Information on past medical treatment
• Information on Chain of physician
• You may ask but you may not receive
• Dr. No
• Gets Petitioner away from the billing machines
• May still lead to an “agreed” IME
How to choose an IME doctor

• What is the purpose?
• Dr. No
• Technical medical causation issue vs. cut-off treatment
• What specialty is needed?
• Reputation at the Commission
• Communication is key—it works both ways
LESSONS LEARNED

• Evaluate your procedures and continue to improve
• COMMUNICATE AND ENFORCE—procedures must always be followed in all cases, communicate this to all supervisors and employees.
• Create definite consequences for non-compliance with procedures and ENFORCE those consequences.
• Great facts make great lawyers—it’s a partnership pre and post accident to determine compensability and defend those claims which are not compensable.