

ACCIDENT INVESTIGATIONS: PART ONE

I am sure that as a member of this Association you do everything you can to keep your employees safe and avoid accidents. As we all know, as hard as we try, accidents do occur. When they do occur, it is important to perform an accident investigation to determine the cause of the accident.



By: Gary Auman

The first step in a good accident investigation procedure is to require that all accidents, whether an employee injury, or property damage, be reported to the supervisor as soon as possible. 29 CFR 1904.35(b)(1)(i) – “you must establish a reasonable procedure for employees to report work related injuries and illnesses promptly and accurately. A procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness.” You cannot require “immediate” reporting.

I believe that a good accident investigation, and the records of those accident investigations, must be performed every time an accident occurs. This will also go far to establish that you are concerned about the safety of your employees and that you have a strong safety culture. I recommend that a written record be maintained of every accident investigation. Not only should the investigation documentation show that you investigated and identified the cause of the accident, but also what corrective action should be, and has been, taken. Remember, anytime that an employee is injured, you have an exposure to liability, at least through workers' compensation but sometimes beyond that administrative remedy. These might include things that are OSHA-related, and/or indemnification and hold-harmless agreements that you may have signed with the owner of other contractors.

So, now you are reading this and thinking – do I have to pull together an entire accident investigation team every time someone cuts his finger, gets a band aid, or bruises his/her elbow? The answer to that is NO! However, I do recommend that you establish a hierarchy for staffing and conducting accident investigations. Obtaining some basic information and employing a few basic procedures should be followed in all accident investigations.

First, you should always interview the injured employee. If there was no injury (just property damage), interview the employee who either was an eyewitness to the accident, or whose actions may have caused, or contributed, to the accident. The procedure that I describe above is the minimum

that should be done for every accident. This may take up some of the supervisor's valuable time; however, these interviews should always be done by the responsible supervisor, even in the case of a very minor accident. Also remember that by being a safety conscious employer, accidents are not normally an everyday, or frequent, occurrence. Therefore, we are not talking about taking a lot of the supervisor's time to do an initial investigation.

This also means that every supervisor should be trained in the basics of accident investigation, including witness interviews. How you choose to approach accident investigations should not devolve into taking shortcuts or into “pencil-whipping” the accident investigation forms. One thing you should never do in performing an accident investigation, no matter how minor the accident may seem, is to merely hand out an accident report form to the employee(s) involved, ask them to complete it, and return it back to you. Employees should never fill out the investigation forms.

No matter how “minor” an accident may seem, we still need to remember that there are really no “small” accidents or incidents. At the time the accident occurs, you will have no clear idea as to how it may evolve. For example, after spending decades doing workers' compensation defense work for large and small employers, I have seen many “minor” accidents and/or injuries become magnified MANY times over by an aggressive claimant's workers' compensation lawyer. Several years ago, I represented a large, self-insured company that employed truck drivers as part of its workforce. I received a call from my client that he wished me to defend a suspicious workers' compensation claim that had been filed by one of these drivers. My client, who was very experienced in accident investigation and safety-related claims, gathered the claim history through his investigation. The claimant alleged that as he stepped out of his truck cab onto a gravel parking area, he stepped onto a small stone that bruised the big toe on his left foot. My client had performed his usual (excellent) investigation, which revealed that the claimant had been wearing standard work shoes with a thick sole when he stepped on the stone.

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While the claim was pending on the claimant's bruised toe, he also filed additional motions to add additional conditions to the claim. These began with the allegation that the incident had also resulted in a sprained ankle, which had morphed into plantar fasciitis, which resulted in an altered gait, which then, allegedly, had aggravated a pre-existing low back condition, and that had turned into a herniated disc. So, the "minor" bruised toe had, after about two months, expanded to a herniated disc, with an extended period of disability. Thanks to my client's initial investigation, we successfully defended the "bruised toe", which resulted in a denial of all of the additional requested conditions.

In one other case, the employee of a different client had an employee hobble into her office one morning, right after starting time. This employee's job was to use a hand grinder to clean up large cast iron flanges. These flanges were so large and heavy that he had to use a hoist to move them around and to place them onto his worktable. He claimed that one of these flanges, after he disconnected the hook on the hoist, fell off the table had struck is knee. After he was taken to the emergency room (he was admitted to the hospital), my client took a look at his work area and found it to be in "pristine" condition. There was no flange laying on the floor, where one that was accident-related, should have been. Also, all of his tools were where they were supposed to be put at the end of each workday. After seeing this, she began to interview employees who had come into work at the same time as the claimant. She had two employees that signed statements indicating that when they saw him arrive at work, he could barely walk from his car into the shop. Further investigation revealed that he had been in a serious incident the night before and been injured. He had "lived with the pain in his knee" so that he could make it into work the next day to make an accident claim, in order to obtain workers' compensation benefits. This incident occurred before the current OSHA reportability requirements. If it had occurred today, it would have to have been reported to OSHA, being "work-related". Her investigation was completed in less than a day and, therefore, if this had occurred in 2022, she would not have had to

report it to OSHA.

I could describe at least dozens of situations in which the employers' accident investigation resulted in controlling what could have been very costly claims. It is not just in the area of workers' compensation where a good investigation can be very beneficial in controlling your exposure to other costs, it can also prevent possible OSHA inspections and citations.

For any incident/accident, which does not result in hospitalization, the supervisor should notify the company safety director, or his/her team leader, that an accident has occurred and the severity of the accident/incident. In the case of such an incident/accident, the supervisor should be directed to conduct an investigation using the company's standard accident investigation form. He/she should interview the injured employee, noting their identity, and then interview all eyewitnesses. I suggest that the supervisor commit the witnesses' statements to writing. He/she should add a line to the end of the statement similar to: "I have read this entire statement and it is a true recitation of what I saw and/or heard regarding _____'s accident on _____(date)." The supervisor should also take photographs of the accident scene, if appropriate, and document any other related environmental conditions. This may seem like quite a bit of effort, but what may seem like a small incident when it occurs, can grow into something much more serious with the passage of time. Also, even though the incident may not be OSHA reportable, it could still result in a compliance inspection if it results in an employee complaint.

In the next issue I will discuss the accident investigation procedure itself, including witness interviews and the five "Why's" of an accident investigation. I will also provide some guidelines on how to deal with different types of accidents, from minor incidents to serious hospitalizations, as well as fatalities.

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ATTORNEYS