

Benefits of Involving Counsel When an Accident Occurs

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When an accident occurs on a jobsite, firefighters, emergency personnel and other first responders focus more on helping the injured than preserving valuable evidence. Meanwhile, field workers and supervisors are concerned with continuing to move the job forward.

Construction executives are responsible for ensuring someone on the scene focuses on what needs to be done to complete the investigation and protect the company against potential claims or inaccurate or misleading investigation results. Experienced legal counsel can help firms navigate the potential minefield of reporting to insurance carriers and workers' compensation officials, preserving the scene and other artifacts and preparing critical documentation to help prevent or defend against claims. Using experienced counsel also builds a layer of protection between the construction firm and potential claimants by creating attorney work product protections.

Insurance and Workers' Compensation

Most liability policies require reasonable notice of a claim or an event that may result in a claim. Failure to provide the carrier with reasonable notice can serve as a basis for the denial of coverage (*Hartford Fire Insurance Co. v. Redding*). The liability carrier also can be an asset to contractors by referring or providing expert consultants during the initial phases of the investigation. Even before an accident, experienced

counsel can review the policy and provide onsite training on the specific requirements of the policy at the beginning of a construction project or when new key personnel is brought on board.

Policies also may include notice requirements for accidents that lead to workers' compensation claims. Key personnel should be well-versed in these requirements, and have experienced counsel available to determine what agencies and carriers need to be put on notice of an accident and potential claim.

Evidence Preservation

Even without negligence by the construction firm, the way evidence is handled during an investigation can lead to a spoliation claim. A claim for spoliation of evidence is an independent cause of action for negligence where a party is unable to prove its case due to the loss or destruction of key evidence (*Bondu v. Gurvich*). If key material is not preserved and the plaintiff believes his or her ability to pursue a claim against a third party is damaged because of the lack of evidence, a separate claim may be made against one with a duty to preserve evidence.

In Florida, the courts recognize one of the most important rules and conditions stated in the workers' compensation statute is the duty to cooperate, which includes the duty to preserve evidence. Experienced counsel

can help contractors properly protect and document evidence to avoid a spoliation claim in the future, but legal representatives are required to be on the scene as soon as possible to recognize and preserve key evidence.

Protected Investigation

Involving legal counsel at the initial stage of an investigation also can provide a construction firm with crucial legal protections. The primary shield against disclosure of investigation results is the attorney work product protection.

The rules of civil procedure broadly allow parties to obtain discovery of any matter that is relevant to the subject matter of the pending action, whether the discovery would be admissible at trial or is reasonably calculated to lead to the discovery of admissible evidence. This broad scope of discovery in civil actions can permit opposing parties to obtain results of investigations, including internal incident reports (unless they are privileged). If information qualifies for protection as work product, a party seeking discovery may obtain disclosure of such information only by showing a need and undue hardship to obtain the materials through other means. originally, the work product privilege

applied to documents and other tangible things prepared in anticipation of litigation or for trial. However, the work product of an attorney also is reflected in many ways, including interviews, statements, memoranda, correspondence, briefs, mental impressions and personal beliefs.

In order to enjoy the benefits of this privilege, the information must be prepared in anticipation of litigation. Courts have determined incident reports may be prepared for a purpose other than in anticipation of litigation; when this is the case, the reports are not work product. While the law does not require attorney involvement in the investigation to establish the work product protections, involving counsel at the onset of the investigation can help demonstrate the documents and other investigatory materials were prepared in anticipation of litigation.

Working with experienced counsel can provide a level of control to the otherwise chaotic environment surrounding an injury-inducing accident. Counsel serves as a key asset in the investigation of the accident, the safety of workers and the company's protection from claims.

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