

**“DEAR BRIAN”**

**-**

**ANSWERING KEY SAFETY  
QUESTIONS WITH FABRICATOR  
PANEL**

# **First Question – Christine Flanagan**

**How do you manage pre-existing injuries within the workplace?**

# 1. How do you manage pre-existing injuries within the workplace?

## Concept of Pre-existing injuries

- ▶ If there was no incident or nothing happened to make your injury worse, then this would be a continuation of the existing injury and would be subject to the original claim.
- ▶ The injury at work doesn't have to be a new problem. The definition of injury includes recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing injury or disease.

- ▶ It does not matter whether the pre-existing injury or disease was work related or not.
- ▶ If you have a pre-existing condition that did not happen at work an employee can still claim workers' compensation if the recurrence, aggravation, acceleration exacerbation or deterioration is work related.
- ▶ This will have to be determined by the doctor who will give a written opinion about whether they believe something did happen at work to cause the recurrence, aggravation etc. The doctor should enquire about the employee's injury history to give this opinion.
- ▶ It is the responsibility of an organisation to ensure they don't place employees in a position that will put them at risk either of a new injury or aggravation of a previous injury or condition.

- ▶ Establish a company doctor/clinic and make sure employees are aware of the requirement to attend their clinic in work or non-work related illness or injury situations.
- ▶ Procedural fairness does however require that the employee be allowed to obtain their own medical opinion if they do not agree with the opinion provided by the employer's doctor.
- ▶ The current advice from the Fair Work Ombudsman is that the employer does not have the right to attend a medical appointment without the employee's permission.

## **Management of an employee with a pre-existing injury.**

This is not dissimilar to managing someone on suitable duties.

- ▶ identify suitable duties either as part of the existing job or a modified role
- ▶ extra breaks
- ▶ job rotation to lighter work
- ▶ job rotation to office or supervisor position

### **Relevant issues**

- ▶ Make sure duties are in line with any medical practitioners advice regarding abilities & restrictions.
- ▶ If the person's injuries are so restrictive as to result in no possibility of managing the employee's physical restrictions then hard but necessary questions need to be asked whether this person is suitable for this type of work.
- ▶ May need to be an IR solution which depend on whether the injury is part of a claim or a pre-existing condition.

## **Second Question – John Oulton**

**An employee has a disease that he is trying to blame on work. The only way we could of known this is by doing a full MRI as pre-employment checks which wouldn't necessarily of picked it up. We are contesting it but what else can be done to avoid this in the future?**

- ▶ An important issue for employers in controlling workers' compensation liability is to have proper systems in place that confine their liability to injuries and illnesses actually arising from the work done by their business.

**Essentially the key issue here is how do you protect yourself as an employer?**

- ▶ It is critical in the pre-employment stage in any industry, particularly the timber industry where the job can be physically demanding for the employee to be clearly asked to disclose all pre-existing injuries or medical condition to their prospective employer that could be reasonably expected to be aggravated by performing the employment related duties.



## **A prospective employer:**

- ▶ may request a prospective worker to disclose all pre-existing injuries or medical conditions existing during the period of the employment process that could reasonably be expected to be aggravated by performing their employment related duties
- ▶ must request disclosure in writing and this request must be accompanied by details of the nature of the duties that are subject to the employment
- ▶ must advise prospective workers that if they knowingly supply false or misleading information, they will not be entitled to compensation or damages under the *Workers' Compensation and Rehabilitation Act 2003* (the Act), for any event that aggravates the non-disclosed pre-existing injury or condition.

## **A prospective worker:**

- ▶ must, where requested in writing by a prospective employer, disclose all pre-existing injuries or medical conditions of which they are aware, that could reasonably be expected to be aggravated by performing the employment related duties. If the prospective worker is engaged before making the disclosure (or being requested to make the disclosure), his or her entitlement to compensation is unaffected.

## **Key considerations for employers**

Employers considering implementing changes to their employment processes in relation to these amendments should note:

- ▶ it is the prospective employer's decision as to whether or not they request disclosure of pre-existing injuries or medical conditions from prospective workers during the pre-employment screening process.
- ▶ when providing details of the nature of the duties that are subject to the employment, it is important that this information is accurate and provides specific details of the nature of the duties. The prospective worker must receive information that will enable them to make an informed decision about whether their pre-existing injury or condition might be aggravated by the duties.

(extracts from WORKCOVER Queensland - 25/1/16)

## **Disclosure of pre existing injuries or medical conditions**

In bold letters on every pre-employment application form it should state:

- ▶ **“ENTITLEMENT TO COMPENSATION UNDER (*INSERT THE RELEVANT WORKERS’ COMPENSATION & INJURY MANAGEMENT ACT*) MAY BE JEOPARDISED IF YOU FAIL TO DISCLOSE TRUTHFULLY A PRE-EXISTING INJURY OR CONDITION BOTH ON THIS FORM OR AND/OR ANY PRE-EMPLOYMENT MEDICAL ASSESSMENT”**

## **A pre-employment health assessment**

- ▶ It is the responsibility of organisations to ensure that they do not place workers in a position that will put them at risk either of a new injury or aggravation of a previous injury or condition. One way that an organisation can manage the risk of aggravation is by implementing a pre-employment health assessment to ascertain if the worker has any issues which may increase the risk of injury or illness.

### **A pre-employment health assessment may include:**

- ▶ the completion of a confidential health questionnaire asking individuals about health issues relevant to the risks presented by a particular job;
- ▶ discussion regarding any health matters; and
- ▶ consideration of any health checks required as part of an on-going health monitoring programme required for the job such as a breathing health check if exposed to respiratory hazards.

- ▶ If a concern is raised during this internal assessment, an external assessment of fitness and medical suitability for the role should be made by a suitably qualified medical professional within a relevant occupational health service field.
- ▶ The pre-employment health assessment must focus on the disclosure of injuries or conditions which could “reasonably be expected to be aggravated by performing their employment related duties”. When in the pre-employment process it is important to have a conversation with the worker about the nature of the work tasks they will be expected to perform to enable them to decide if an injury or condition is reportable.

- ▶ Any information that is collected about a worker must be treated confidentially. The worker must be made aware of the purpose for the collection of this information, the source and manner of collection of the information, storage and access, security and disposal of the information. The process of disclosure may mean that the organisation collects certain types of sensitive information, i.e. medical information and this information must be secured and not used or disclosed except in line with the original collection. Having a privacy policy and a mechanism and procedure to resolve complaints should also be considered before implementing a process which collects sensitive information.

- ▶ If a worker discloses that they have a pre-existing injury or condition a determination should be reached based on the required duties and worker capacity as to the likely risk that this may pose. The pre-employment health assessment will enable a medically informed decision to be reached as to the worker's capability as one of the following:
  - ▶ The worker is medically fit to perform the required duties without risk to theirs or others health and safety;
  - ▶ With reasonable restrictions/modification the worker is medically fit to perform the required duties without risk to theirs or others health and safety; or
  - ▶ The worker is medically unable to perform the required duties without risk to the applicant's work health, safety and welfare, or poses a risk to others.



## **A pre-employment health assessment**

- ▶ This process is not meant to discriminate against workers who have pre-existing injuries or conditions. Discrimination would be if the information provided by the worker to the company results in an unjust or prejudicial distinction in the treatment of the person based on their disclosure.
- ▶ Rather the disclosure is to ensure the prospective employee will be safe to perform the work tasks and ascertain any reasonable adjustments that are required in the work environment to ensure safety.
- ▶ In fact, there is a strong argument to be made that failure to disclose a pre-existing disease and/injury may result in disciplinary action that could include termination of employment.
- ▶ If a claim is made, discuss with insurance company and/or WC authority that it was a pre-existing condition.

### Third Question – Julie McDonald

We have a 34 year old worker - on WorkCover from injury at work, that happened due to his carelessness. He had a number of operations and infections to his broken thumb and given lots of time off by the specialist. Then we find out he is out riding his BMX bike with his mates on the weekends, using concrete skate parks.

I spoke with WorkCover, saying I had facebook posts for proof, but facebook doesn't count and won't stand up in court they said.

When he finally came back to work, first thing he said to other employees was 'what have I got to do to get sacked around here', and 'don't want to be here'. We were concerned about what he might do, due to his not wanting to work. We had been talking about paying out his redundancy to get rid of him, but fortunately he finally resigned. Is there something here we could have done better?

- ▶ Facebook and social media posts: In a disputed case, social media (Facebook, Twitter etc.) is information that may be relevant and indeed damning to show an employee's behaviour is inconsistent with sustaining an injury and being unable to perform at your workplace.
- ▶ In terms of privacy, Facebook along with other social networking sites have a policy that informs the user that the company CANNOT GUARANTEE that only authorised users have access to their information.
- ▶ In reality the user doesn't really own their Facebook page or twitter account and this means it is open to be publicised and scrutinised by anyone including an insurer, government regulator or legal team.
- ▶ Gaining access to a person's social networking accounts is not a hard thing if a user has not taken steps to restrict access through privacy settings.

- ▶ It would be seen problematic to have to tell a doctor or lawyer that you had no alternative other than to go BMX riding with your mates with a broken thumb.
- ▶ Request insurance company to place him on surveillance. If they won't demand why?
- ▶ Request to go to the doctor's appointment with the worker. This can only be a request.
- ▶ Ask some of the fellow employees to document his comments about being sacked.

- ▶ Organise a meeting with a clear written agenda explaining that the situation is untenable and if he chooses to leave of his own choice an agreed settlement will be offered. This will not interfere with compensation from any existing claim he may have lodged.
- ▶ Look at the cost of the claim before making the employee redundant or terminating, as if the employee is still on workers' compensation there could be a significant hit to an employers premium.
- ▶ Also look at any, or seek advice, on any relevant state and federal legislation before terminating an employee with an existing workers' compensation claim.

## **Fourth Question – Christine Flanagan**

**As our workforce is aging, how do we manage the wear and tear workers' comp claims as these are more expensive than most claims and are ongoing due to nature of work.**

- ▶ According to the 2016 census, nearly one in every six people in Australia (16%) were aged 65 and over. Australia's ageing population has significantly increased over the past century and is expected to continue, with estimates showing that by the end of the next decade, one in three Australians will be aged over 55.
- ▶ These trends, together with today's high cost of living and inevitable increases in the eligible age for receipt of Australia's age pension, indicate that the number of older Australians participating in the labour force will continue to rise. At the same time, as Australia's demographics continue to change, it will also become necessary for businesses to engage and retain mature-age workers to reduce the impact of a large non-working population on the economy and welfare system.

- ▶ While Australians are living and working longer and are healthier than ever, even the healthiest workers will be impacted as they experience age-related declines in speed, physical strength and cognitive ability. Additionally, mature-aged workers are likely to have a greater desire for flexible working arrangements in order, for example, to be able to care for ageing parents (a reality for many in their 50s and 60s) or to transition to retirement.

### **BMW example.**

- ▶ When the company realised that many of its workers who were the company's most experienced at developing new production lines were becoming too old to physically cope with the demands of their jobs, it introduced simple modifications such as brighter lighting and seats so workers did not have to stand all day. This significantly improved productivity.



## **Assessing and discussing health and safety**

Supervisors should communicate directly and honestly with workers about health and safety concerns and should be aware of what options the Company can offer. For instance, if the worker is sick or has health concerns, the supervisor should know whether the Company can offer time off work, part-time work, workplace aids or assistance or changes in assignments.

## **Keeping it confidential**

Supervisors should make it clear that any information the worker shares about their health and safety will be kept confidential and will only be used to support the worker's needs or to modify their work situation.

## **Asking the right questions**

If health and safety concerns arise, a supervisor might ask questions such as the following:

- ▶ Are you clear what your responsibilities are?
- ▶ Do you have the training and equipment you need to do the job?
- ▶ Are there any health or personal issues that are preventing you from doing your job to the required levels or standards?
- ▶ Are you receiving the support you need?

## **Designing the workplace to fit the work**

There are many ways to design and rearrange workplaces, work procedures and equipment to improve:

- ▶ efficiency, including performance and productivity,
- ▶ health and safety,
- ▶ comfort and ease in doing the job.

- ▶ Ensure that a person (regardless of age) is suited to the task and can carry it out safely.
- ▶ Adapt duties to suit older workers' needs and abilities.
- ▶ Rotate physically demanding or repetitive tasks.
- ▶ Provide ergonomically designed workstations for all workers.
- ▶ Train all workers in injury prevention strategies – note that training requirements for older workers may be different, and training may require repetition.
- ▶ Ensure that workplace lighting is adequate for the job at hand.
- ▶ If appropriate to your workplace, offer older workers flexible work arrangements.
- ▶ Involve workers and tell them what is being done to reduce risks.
- ▶ Encourage two-way communication with workers so that they feel comfortable in discussing any potential issues.
- ▶ Have suitable duties available for injured workers to help them get back to work sooner and avoid long periods of time off work, which can result in feelings of alienation from the workforce. (Workcover Queensland 13/10/2015)

## **Fifth Question – Julie McDonald**

**Due to our plant using LOSP treated timber, employees are directed to wash hands regularly, especially prior to meal breaks. We have been assured that it is safe to use, per Safety Data sheets, but the employees are continually handling and breathing in the smell.**

**Should we be including something in our employment documentation to try to protect us? Should someone become sick in years to come and they try to blame the LOSP treatment, where do we stand? Obviously the diagnosis would need to be confirmed, but we don't want to see a situation arise like the asbestos scenario.**

- ▶ LOSP (Light Organic Solvent Preservative) is a white spirit based solvent containing chemicals to provide protection from insects and decay. It offers similar resistance to weathering and termites as CCA treated Pine using a lower impact preservative
- ▶ It contains waxes or resins to help make the timber water resistant.
- ▶ The timber is usually machined to the required lengths before the treatment is applied.
- ▶ Safety Data Sheets says it is safe. However it is possible some people may experience temporary skin irritation, headaches or light headedness when using LOSP treated timber. These effects are more likely if the timber is not solvent dry.

## HANDLING

- ▶ Make sure employees wear gloves and long sleeves when handling for protection against splinters and cuts.
- ▶ Wear protective glasses and a filter mask when sawing, sanding or machining treated timber.
- ▶ Working with solvent damp timber is inadvisable, however an impervious work apron must be used to protect clothing if direct contact proved unavoidable.
- ▶ If LOSP preservative or treated sawdust accumulates on clothes, wash separately before reuse.
- ▶ Always wash hands after handling LOSP treated timber, especially before eating.

- ▶ If smell is causing health effects then maybe the supplier is using too much LOSP in the timber. One of our members changed supplier and smell of LOSP was OK.
- ▶ Where possible store LOSP in well ventilated area. Make sure dust extraction of machinery is fitted. If major issue with employees then supply respirators to workers and dust masks when cutting.
- ▶ Do not transport LOSP treated timber in an enclosed environment.
- ▶ If undesirable effects occur cease handling or using the material and review your personal protection measures.

## STORAGE

- ▶ Always ensure LOSP treated timber is stored in a well ventilated space
- ▶ Wrapping should be removed off delivered material as soon as convenient to assist in the dissipation of solvent fumes
- ▶ Stored LOSP treated timber should not be in a confined area. Store only in areas that have double ventilated openings or an extraction system
- ▶ For future prosecutions relating to LOSP, the SDS says it is safe and that is the only information you have to go off. Major issue would be breathing in the LOSP dust. Make sure machinery has dust extraction.

(TTIA Safety Unit information/New Zealand Timber Preservation Council)



## **Employment documentation: LOSP**

- ▶ 'This to confirm that at the time of signing this employment contract, the use of LOSP is deemed by authorities and safety data sheets to be safe to use in the workplace subject to employees following clearly advised precautions when handling LOSP treated timber product. I have understood and read these precautions which are as follows:'

**(handling precautions - Slide 28)**

## **Sixth Question – John Oulton**

**Is a safety management system really worth the time and effort for a small business already drowning in government red tape & regulation?**

A Safety Management System (SMS) is a planned process or procedure for carrying out a certain activity in the workplace

- ▶ The reason you should implement SMS is to ensure that when a task is carried out in your workplace, every precaution has been taken to reduce the likelihood that leaves someone injured or worse
- ▶ An SMS is a systematic approach to managing safety, including organisational structures, accountabilities, policies and procedures. An SMS can be tailored to the size and complexity of your Frame and Truss plant.

- ▶ A company's Safety Management System (SMS) and the effective implementation of the SMS is very important and can prevent employers being taken to court in the event of serious injuries.
- ▶ It is well documented that safety management systems have the potential to improve health and safety performance. A 2013 study of major South Korean construction companies, over five years, showed that companies that implemented SMS had an average decrease of 67% in accident rates and 10% in fatality accident rates. Higher safety leads to lower medical and legal costs as well as improved company reputation.

## **Example:**

### **Forklifts and pedestrians using the same doorway - Result: Injury**

(Ian Markos v Rapid Refrigerated Transport 2010)

- ▶ Delivery driver seriously injured when he tripped on the forklift and fell to the ground hitting his head and other parts of his body.
- ▶ Driver continued to work for the rest of the day but in the evening started suffering incapacitating symptoms.
- ▶ Soon after, lost his license on medical grounds and his employment due to headaches, mild confusion, short term memory loss and pains in his neck, right shoulder and elbows.
- ▶ Injury occurred in a large curtained doorway of a large cold room. The magistrate heard it was common for the doorway to be shared by forklifts, employees and visitors.

- ▶ The company maintained that employees had been advised to approach the doorway from the side and to “peek” around the corner before entering the doorway and that it had been an undocumented system of work that required forklift drivers to sound the horn and stop before they proceeded through the doorway.
- ▶ Magistrate noted there was a risk every time a person entered or left the cold room so the risk existed on a daily basis and the company was fined \$24,000 for failing to maintain a safe workplace for a non-employee. He took into account the company’s early guilty plea and expression of contrition and reduced the penalty by 20%.

## **Following the incident, what did the company do to address the risk?**

The company implemented the following positive changes to address the risk:

- ▶ issued an instruction to ban pedestrians using the doorway, which it reserved exclusively for use by forklifts;
- ▶ commissioned a comprehensive risk assessment resulting in a thorough analysis and assessment of hazards and risks presented by the company's workplace and included appropriate risk control measures;
- ▶ attached improved signage to the building near the doorway to explain procedures and to instruct visitors where to report;
- ▶ placed safety chains and bollards around the outside of the door to prevent accidental collision from the side;

- ▶ installed new signs instructing forklift drivers to stop and sound the horn before moving through the doorway;
- ▶ incorporated these instructions in a new written safe operating procedure for forklift operators;
- ▶ replaced the curtain of old vertical plastic strips and introduced a regime of regular cleaning;
- ▶ pedestrian walkways were clearly marked in the yard and in the store;
- ▶ improved exterior lighting; and
- ▶ developed and implemented visitor site rules and induction.

This case reinforces the importance of a traffic management system that provides clear and safe walkways for pedestrians in which staff and visitors are regularly inducted and trained.



► **An SMS involves the following which all have to be documented:**

- Training - induction and SOPs and assessment of training to ensure competence.
- Risk assessment on all machinery and job tasks.
- Safety meetings.
- Injury and incident reporting and investigation.
- Hazardous substances registers.
- Maintenance registers
- Hot work permits
- Isolation procedures
- Alcohol and drug policies
- Plant and equipment policies

## **Safety benefits of an SMS:**

- ▶ A pro-active method of improving safety rather than a reactive approach, primarily after an accident.
- ▶ Reduce loss of life and injuries through prevention of accidents and incidents.
- ▶ Improve employee satisfaction through involvement in the process.
- ▶ More efficient interaction with regulatory bodies.

## **Business benefits of an SMS:**

- ▶ Stability, safety and customer support – customers are aware that some operations are safer than others.
- ▶ Potential reduction in insurance premiums through demonstration of control of safety risks.
- ▶ A pro-active approach to safety can be demonstrated with documented evidence in the event of an accident or incident.
- ▶ Improved staff morale and lower staff turnover, reducing costs.

- ▶ Finally, a key factor in creating a safer workplace is just how dedicated the employees in your Frame and Truss operation are to improving safety.
- ▶ Implementing an SMS creates a platform for safety involvement and the easier it is for employees to get involved in safety, the more likely they are to show dedication to creating a safer work environment.

## **DISCLAIMER:**

**THE INFORMATION PROVIDED HERE IS OF A GENERAL NATURE UNLESS SOURCE OTHERWISE QUOTED.**

**IT SHOULD BE NOTED THAT THE WORKPLACE HEALTH & SAFETY AND WORKERS' COMPENSATION LEGISLATION VARIES BETWEEN THE VARIOUS STATES AND TERRITORIES IN AUSTRALIA. SPECIFIC ADVICE WOULD NEED TO BE SOUGHT WHEN DEALING WITH INDIVIDUAL CASES.**