

South Dakota Chamber of Commerce and Industry
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BUSINESS CONTINUATION
SERIES: FATALITIES

South Dakota has an average of 23 people
die at work each year.

The common assumption that a workplace death is the result of an industrial accident is mistaken. Traffic accidents and heart attacks account for a significant number of workplace fatalities.

While the causes vary, the result is the same. One of your employees is deceased and everyone else, including yourself, is traumatized. What can you do in this darkest of employment situations? This newsletter has great advice from experts in dealing with the situation from legal to psychological and from insurance to medical. We start with some thoughts from members who have been immersed in the living hell of losing someone in their business.

Lessons Learned from Experience

Get help immediately. – Make sure someone has called 911. See notes from EMT on page two.

Notify the family of the victim. – It is the toughest call anyone has to make but it must be done.

Call your insurance providers. – General liability carrier and work comp carriers should be notified as early as possible.

Document the accident. – It may be your insurance agent or someone on your staff, but make sure pictures are taken of the accident area and observations are written down.

Don't clean up too soon. – If the fatality is the result of an accident, the police will need to do an investigation and most likely you will receive a visit from OSHA.

Be with the family and offer comfort. – In the case of small businesses, where you know the family, no one else can provide the kind of help you can in this most difficult time. Be at the hospital, take food to the home, and spend time with the family. It is wise to deflect detailed questions by saying something like “there will be a time to sort all of this out, right now let's focus on getting through today.”

Secure professional counseling. – Please refer to the Human Resources article by RSM McGladrey (p.3) that addresses critical incident debriefing. Everyone involved in the accident or close to the person that has passed away will benefit from counseling. The members we interviewed about their experience each said those closest to the accident eventually left their employment, but that counseling helped the others and helped the business move on.

Tell Others in the Business. – If you have several shifts, meeting with them at the start to candidly explain what happened will get you ahead of the rumor mill and show employees you are willing to

address questions and fears. In the case of a small business, you may want to make calls or have a special meeting to discuss exactly what happened with your employees.

Stay with Details. – South Dakota does not have a record of litigation beyond the exclusive remedy of workers compensation in cases of workplace fatality. You can expect the family to explore options that are best for them. Helping them with details of the work comp benefits will show them you do care about the future of your employee’s families. Let your attorney handle any questions directed at you from a potential legal advocate.

Don’t forget to take care of yourself. – Include yourself and other executive staff in counseling. Most all who have been through a workplace fatality will tell you that it is possible to move ahead. The desperate and depressed feelings will cease. There will be better days again.

Lessons from the Emergency Medical Technician (EMT)

Whether it is an accident, a fatality resulting from an accident, or someone collapsing, you will need the emergency assistance of the EMT. In most cities these people are part of the fire department and may also be affiliated with an ambulance service.

Here is a checklist of things we learned from an EMT with the Sioux Falls Fire Department.

First – and most important – MAKE SURE SOMEONE CALLS 911.

It is a common problem for everyone in the vicinity of the victim to assume someone else has already called. Too often this results in the loss of valuable minutes in getting aid to the victim.

DON’T HANG UP. The 911 operator has a set routine of questions to ask. This list has been carefully developed to get essential information. You may not know the answers to many of the questions and think they are stupid in the middle of an emergency – don’t hang up. 911 cannot help if you just yell “We need help at Dan’s House of Saddles” and hang up.

Questions they will ask you about the victim include – age, whether or not they are breathing, whether or not they can talk, and their home address.

Half of the emergency calls to 911 come from cell phones; the systems most cities use do not have a caller ID function that works with cell signals so they cannot figure out where you are through automatic means.

THINGS TO TELL 911. What kinds of injury or injuries will they find – “Someone has collapsed” is much different than “We have had an explosion.”

NOW MANY PEOPLE ARE HURT. During the interview the EMT recalled a story where EMT responders found several people that had been overcome by fumes inside a business. They started working on these victims only to be told several minutes later that there was an explosion and another victim was trapped in the basement with major injuries.

NATURE OF THE INJURIES. Never, Never, Never assume someone is dead. There have been many cases where even professional EMTs have been wrong in the first assessment of a victim. Our

interviewee commented “There is a general rule these days that says as long as the head is still attached to the rest of the body, assume they are alive or can be revived.”

WHERE THE ACCIDENT IS AND WHICH ENTRANCE TO USE. It is most frustrating and a waste of valuable time for EMTs to run to several doors or through hallways looking for the victim. Be as specific as possible by saying, “use the door under the big sign” or “use the door on the north side of the building”. Terms like the “main door” or “service entrance” can mean too many different things to different people.

AFTER THE 911 CALL – STANDBY THE DOOR. Make sure someone stays at the entrance given to the 911 operator. Valuable minutes can be saved if someone can take the crew to the right place. If special keys are needed, make sure the person by the door has them.

IT MUST BE SAFE. Understand that there are limits to the kind of risks EMTs can be asked to take. If toxic fumes are still heavy in the area or worse, if someone has a gun and is still lurking in a building, the medical staff will standby until it is safe to enter.

The Use of Portable Defibrillators

During the 2000 Legislative Session, South Dakota passed legislation that limits the liability for anyone using portable defibrillators. These defibrillators come in small cases that look like thick briefcases and are designed for use by lay persons. Many of the units will start verbal instructions with pictures on a screen as soon as they are turned on. The machine will show where to place several small pads then will do a diagnosis of the patient and administer shock as needed.

Businesses wanting to place portable Defib units in their buildings need only notify emergency services, and a medical advisor (the Fire Department in several cities has a doctor that will serve as an advisor if you don’t know one) and have several staff go through basic training. Prices for the units range from \$2,000 – 4,000.

Minutes Count

There is a general rule that for every minute heart attack patients go untreated, it takes 10% off the chance of survival. Think through the normal emergency call.

1 minute for others to realize the person needs help

1 minute for things to settle down and for someone to call 911

30 seconds to give the information to 911

3 minutes and 30 seconds for the average response time of city emergency services

1 minute to get the EMT to the victim and start treatment

7 minutes reduces survival chances by 70%!

Portable Defib units could start treatment within those first 2 or 3 minutes increasing the survival chances from 30% to over 70%.

This also underscores the importance of making sure emergency crews know where to go so you don’t lose another 2-3 minutes looking for the victim!

HUMAN RESOURCE COLUMN

When and How to Conduct Critical Incident Assistance

By Jim Books and Jolee Thurn

RSM McGladrey, Inc.

Sioux Falls, SD

Human Resource Managers are frequently asked to step in and provide immediate assistance when a crisis affects employees in their workplace. This assistance can range from utilizing a previously well-designed Emergency Preparedness Plan to dealing with a “Critical Incident” that may have a major emotional impact on the entire organization. It is now common for organizations to have plans in place for dealing with any number of critical incidents ranging from a crime of violence in the workplace to the suicide of a fellow employee.

A Critical Incident may be defined as a workplace event that is out of the ordinary, which has the potential to produce significant reactions on the part of employees and family members. These reactions may manifest themselves as physical, cognitive and/or emotional responses that may be experienced almost immediately or may be delayed days, weeks, or even months.

On December 26, 2000, a Wakefield, Massachusetts high-tech employee distraught over his company’s cooperation with an IRS garnishment of his wages went on a shooting rampage that left seven of his fellow employees dead. This is an extreme example of a Critical Incident warranting immediate formal assistance.

THE OBJECTIVES OF CRITICAL INCIDENT ASSISTANCE ARE AS FOLLOWS:

- De-escalate the Situation
- Provide Reassurance
- Provide Support to Management
- Conduct a Debriefing
- Assess the Emotional Damage
- Link Employees with Additional Help
- Offer Follow-up Support

Although well-trained Human Resource professionals can handle many of these objectives, it is usually in the best interest of the organization to have an Employee Assistance Provider or other professionals trained in providing Critical Incident Assistance involved in the process. Where employees have been significantly traumatized, the outside professional should, at a minimum, conduct the debriefing meeting, assess emotional damage, and link employees to additional help.

Many times, the most significant step an employer can take is to have an outside professional conduct a Critical Incident Stress Debriefing meeting within 48 hours of the incident. The purpose of the debriefing is to desensitize the situation and the emotions associated with it from taking root. Debriefing is not counseling and it is not long-term therapy.

In 1995, the Sioux Empire Critical Incident Stress Management Team was started under the direction of Dr. Marcie Moran, Director of Behavioral Health Services at Avera McKennan

Hospital & University Health Center. Since that team's origination, debriefing teams have also been established in six other cities across the state—Madison, Mitchell, Pierre, Watertown, Rapid City and Yankton.

These debriefing teams are composed of both master's prepared mental health personnel and "first responders" such as firemen, policemen, highway patrol, EMT personnel, nurses, National Guard members and others whose very occupations bring them into life and death situations on a frequent basis. Mental health care providers from Avera McKennan Behavioral Health, Sioux Valley Behavioral Health, Southeastern Behavioral Health, Lutheran Social Services and other agencies volunteer their time to serve on these debriefing teams.

Debriefings are usually conducted early morning, late afternoon or in the evening depending on the availability of the employees involved. There is no charge for any debriefing and debriefings typically last approximately two hours. Debriefing teams usually go out in groups of four at a time.

Any employee who feels he/she has been directly or indirectly involved in a critical incident in the workplace can participate in the debriefing. For example, after a bank hold up in Sioux City, Iowa, three debriefing meetings were offered so that employees on all three shifts could participate. In some way, all bank employees had been touched by the threat of violence that took place in that incident. The ultimate goal of any debriefing is to prevent the critical incident event from becoming an ongoing stressor or from leading to "traumatic stress response" which in turn can cause an employee to quit his/her job.

To begin the debriefing, the following structured introduction may be helpful:

- An executive should introduce the meeting, give its purpose, and stress confidentiality.
- An executive should introduce the debriefing team facilitator and leave.
- The meeting should have a comfortable atmosphere with refreshments and the participants should be free to walk about the room as necessary.
- The facilitator should let the participants know that experience has shown it has been beneficial for those involved in similar situations to discuss what has happened.
- Encourage those less impacted to participate because what they may say might be extremely helpful to someone else who is having a more difficult time in coping with the experience.

The actual debriefing will progress through the following six phases:

FACT PHASE:

This will allow group participants to identify who they are, what their jobs are in the company and what happened during the critical incident. It is important that those who were directly involved talk about the incident in as vivid and complete a picture as possible. Each person should be encouraged to describe what he or she did during the incident.

THOUGHT PHASE:

During this phase, individuals will discover that their colleagues had some similar and some unique thoughts while the incident was occurring. "What should I have done? What is going to

happen next?” During this phase, the debriefing team asks participants, “After you went off auto-pilot, what thoughts went through your mind?”

REACTION PHASE:

There is typically more emotion (fear, anxiety and guilt) in the reaction phase than evidenced in the thought phase. Individuals will cry and talk more freely with one another. They may ask, “What was the worst part of the incident for you?”

SYMPTOM PHASE:

At this point, the debriefing team will ask participants to describe their cognitive, physical, emotional and behavioral signs at the scene or within 24 hours. Are they still being experienced? Symptoms may include disturbances in sleep, nausea, nightmares, a preoccupation with the event, nervousness, being short-tempered, susceptible to trigger noises/scents and flashbacks.

TEACHING PHASE:

In the teaching phase, the emphasis is on returning the individual from an emotional level to a more cognitive level of dealing with the incident. Individuals learn the feelings they have are normal and will usually subside after a few days. Coping strategies are typically discussed and supporting handouts distributed for future reference. For someone experiencing nightmares, the debriefing team may work on relaxation techniques to use before bedtime.

RE-ENTRY PHASE:

This phase brings closure to the debriefing. Participants will summarize the incident and decide what they can do now to go on with their lives.

After the debriefing meeting, it is important for the company to provide employees with a contact person responsible for offering ongoing support and assistance. This may include continued contacts with employees to see how they are doing, controlling the rumor mill and assisting employees in getting psychological care or counseling.

A company cannot afford to underestimate the impact a critical incident such as a serious fire or the death of a fellow employee can have on those who were directly or indirectly affected. Having a well-designed process in place to provide reassurance; de-escalate fear and anxiety; and provide debriefing, emotional assessment, and on-going counseling and support has proven to help organizations and employees survive, cope and overcome workplace trauma.

For more information on scheduling a debriefing, contact the Volunteer and Information Center in Sioux Falls. This number is answered 24 hours a day: 605-339-4357.

Jim Books is an Organizational Consultant and Jolee Thurn is a Human Resources Consultant with the Sioux Falls office of RSM McGladrey, Inc. We want to thank Dr. Marcie Moran, Director of Behavioral Health Services at Avera McKennan Hospital & University Health Center and George Demers, M.S., Instructor in the Negotiation and Management of Aggressive Behavior, South Central Minnesota, Region 9, for sharing their expertise and Kristina F. Steffer, SPHR, for the article she submitted to SHRM on “Conducting A Critical Incident Stress Debriefing”, 1998 which served as an additional resource for this article.

LEGAL REVIEW

Softening the Impact of Workplace Fatalities

By Rob Anderson

May, Adam, Gerdes & Thompson, Pierre, SD

A fatality at the workplace is likely to be devastating emotionally for all concerned. Knowing some basic rules can minimize the overall impact on both the deceased employee's family and the employer involved.

If one of your employees suffers a fatal illness or injury during work hours or while otherwise performing duties of employment, he or she is likely to be covered by South Dakota's worker's compensation laws. For injury or death arising out of and in the course of their employment, employees are entitled to worker's compensation benefits which are controlled by South Dakota law. With rare exception, if an employee is entitled to worker's compensation benefits for a work-related illness or death, the survivors of that employee are prohibited from bringing any type of lawsuit or death claim against the employer. This is due to a rule known as the "exclusive remedy" doctrine.

If an employer is exempt from or for some reason does not comply with South Dakota's worker's compensation law, the exclusive remedy doctrine does not apply. In addition, the doctrine does not apply to some others who may be injured at your workplace or on your premises. These might include independent contractors or employees of others who happen to be working on your premises.

THE EXCLUSIVE REMEDY DOCTRINE

South Dakota law states that the rights and remedies granted to employees injured or killed due to events arising out of and in the course of employment shall exclude all other rights and remedies other than those arising from intentional tort. SDCL 62-3-2. This is the basis for the exclusive remedy doctrine. If an employee or his survivors are entitled to worker's compensation benefits, they do not have the right to bring suit against the employer or any fellow employee.

The theory behind the exclusive remedy doctrine is that worker's compensation laws are designed to provide an injured worker benefits quickly, without regard to fault - that is, without regard to whether the employer caused the injury or the employee himself caused or contributed to it by his own negligence. In return, the employer is protected from the broader liability which could be imposed through a traditional tort or wrongful death action.

The intentional tort exception has been applied very seldom. South Dakota case law has consistently held that workers may bring lawsuits against their employers at common law only when an ordinary, reasonable, prudent person would believe an injury was substantially certain

to result from the employer's conduct. Jensen v. Sport Bowl, Inc., 469 N.W.2d 370 (S.D. 1991) It is not sufficient that an employer knows or appreciates that a risk exists. There must be something akin to actual intent to cause injury or death in order to avoid the exclusive remedy defense. *Fryer v. Kranz*, 2000 SD 125, 616 NW2d 102.

In the **Fryer** case, a supervisor exposed an employee to acid in a small, unventilated room. The Supreme Court held that although the supervisor may have been clearly negligent, probably reckless, and possibly wanton in his actions, it did not amount to an intentional tort and that the exclusive remedy prevented the injured employee from bringing a lawsuit against the employer or his fellow employees.

IN THE EVENT OF A WORKPLACE FATALITY

Assuming all possible first aid and medical treatment has been made available to the injured worker and appropriate law enforcement officers have been contacted, there are some measures which all employers should follow.

First, make immediate contact with the employee's family. Exactly how this is done may well vary from case to case, the nature of the incident in question, and the relationship between the employer and the employee's family.

Second, the employer should contact its attorney. An honest and candid review of the facts relating to the incident should be given to the attorney so that the appropriate advice can be given.

Third, the employer should contact its insurance agents, including both agents for worker's compensation insurance coverage and general liability coverage. Most insurance policies require prompt notification of a loss, and early notice will protect both the employer's right to coverage under the policy and the insurer's ability to conduct a thorough investigation.

WORKPLACE FATALITY INVESTIGATIONS

A workplace fatality may prompt an investigation not only by the employer's insurance company, but by various law enforcement or regulatory agencies. OSHA is the first that comes to mind, but there are others. In such a case, the question arises (hopefully earlier rather than later) of "exactly what should I say?"

The context of how a workplace fatality can occur is limited only by one's imagination. Whether employers or fellow employees are exposed to potential criminal proceedings as the result of a fatality will vary on a case by case basis. For this reason, it is essential to contact the employer's attorney, have an open and honest discussion about the incident, and then obtain advice as to how the employer should proceed. In such situations, it is possible that individual employees and management personnel may have personal concerns which differ from those of the employer entity.

In such cases, the individual employee should be clearly advised that they have a right to consult with their own personal lawyer, and that the lawyer for the employing entity is just that - the

lawyer for the entity and not necessarily the lawyer for the individual. This is a complicated area which should also be discussed with the company's attorney.

Protecting the employer's interest can be consistent with compassion. Extending your sympathy to the family of a deceased employee need not involve detailed discussions about the incident which led to his or her death. In most cases it is probably counterproductive for a variety of reasons. Nothing should prevent an employer from assisting the employee's family, conveying its condolences, or acting as a good community citizen. One thing which the deceased's family will ultimately be concerned with is whether there are any type of worker's compensation benefits available as a result of the incident.

If an employee leaves a surviving spouse, child, or children, the spouse will receive regular weekly worker's compensation benefits based on the deceased's earnings. These benefits will be paid throughout the life of the spouse or until the spouse remarries. In the case of remarriage, the spouse receives two years of benefits in a lump sum. Surviving children receive benefits until age 18 or until age 22 if the children are enrolled as a full time student in any accredited educational institution, or for life in the case of children who are physically or mentally incapable of supporting themselves. In addition, burial expense, the expense of a headstone, and transportation are paid in a sum not to exceed \$5,000.

CONCLUSION

When prevention fails and workplace fatalities occur, take prompt action to obtain immediate advice from your attorney on how to handle the situation. In most cases, the worker's compensation laws will take precedence over others.

INSURANCE ISSUES

By Glenn D. Gardner, B.S. Mechanical Engineering Senior Loss Control Representative & Phillip J. DeGreef, M.S. Industrial Management Claims Supervisor, Berkley Risk Administrators, Pierre, SD

According to the South Dakota Department of Labor statistics, there were 116 reported job-related fatalities during a five-year period from 1996 through 2000. The true sad part of this statistic is that some of these deaths could have been prevented through improved safety and loss control programs. The National Safety Council has calculated that the real cost of injuries is four to twelve times the "hard cost". The hard cost encompasses only the medical, funeral expense and wage replacement benefits for the worker. The real cost includes other factors such as lost production, replacement employees, additional training, overtime for other employees, and increased insurance cost. When a safety program is adopted, regular management principles should apply. Set your goals, design a plan, communicate and provide the tools and training to implement the plan, monitor it, and measure the results. Prior to implementing a plan, management should research similar businesses and look for positive results achieved in their programs. There are many sources which provide information and statistics such as the Bureau of Labor Statistics, the National Council of Compensation Insurance, the National Safety Council and the U. S. Chamber of Commerce.

Due to the many different types of businesses and industries, the safety programs must be tailored to the type of work performed. Some examples are as follows:

PERSONAL PROTECTIVE EQUIPMENT

Personal protective equipment (hard hats, goggles, hearing protection, clothing and foot protection).

FALL PROTECTION

The Occupational Safety and Health Administration (OSHA) has specific requirements in order to prevent falls from certain elevations. This can include open sided floors, leading edges or roof work, and open floor holes which can require guard rails for as little as four feet, depending on the type of business. General industry and construction may have different regulations so this should be verified to assure the business is in compliance. During the past five years there were six fatalities in South Dakota involving employees falling from elevations.

LOCKOUT/TAG-OUT

OSHA requires that certain type of machines be shut down and protected so they cannot be activated while maintenance or setup is being performed. The above are just a few of the regulations set by OSHA for the purpose of preventing injuries and fatalities.

An excellent program is available at no cost to employers through the Engineering Extension Department at South Dakota State University. The Occupational and Health Safety Consultation Program is funded through the U.S. Department of Labor. No fines or citations are given. A consultant will perform an on-site evaluation of your workplace. Following the visit the employer will receive a report concerning certain hazards. Corrective action on certain hazards is a required part of the program. For additional information on this program contact the office of Engineering Extension at 605-688-4101.

The South Dakota Office of Risk Management and the State Library through a joint project established loss control training resource center. For information concerning training videos and books you can contact the State Library at 605-773-3131 or 800-423-6665.

According to OSHA regulations, all fatality and multiple hospitalization incidents (three or more employees requiring hospitalization resulting from the same accident) , the incident must be reported to OSHA within 8 hours after the occurrence. This can be reported to the Bismarck, ND regional office, 701-250-4521, or the OSHA 24 hour Hot-Line, 800-321-OSHA. Employers should also report all injuries to their insurance company as soon as possible in order to assure a timely investigation is conducted and proper benefits paid.