

Workshop V

Thursday, November 10, 8:30 – 11:15 a.m.

PRACTICAL AND EFFECTIVE RISK MANAGEMENT TECHNIQUES

Presented by



**Frank Keres
President
Construction Risk Associates Inc.**

While most risk managers have resources to advise them on coverage and legal developments, many have difficulty finding strategies for handling the day-to-day tasks of construction risk management. This session provides a hands-on, practical approach to construction risk management that will address not just “what” to do but “how” to do it. Fast-paced and broad in scope, this workshop will teach attendees strategies for many practical issues, such as managing workers compensation claims, detecting workers compensation fraud, investigating and settling claims, verifying compliance with insurance requirements, motivating employees to follow safety practices, preparing for litigation, selecting legal counsel, getting the most out of your information systems, and much more. This session is for anyone who is involved in construction risk, including contractors, agents and brokers, and insurers.

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Frank Keres
President
Construction Risk Associates, Inc.

Mr. Keres is presenting Workshop V, "Practical and Effective Risk Management Techniques," on Thursday. He is principal of Construction Risk Associates, Inc., with a main office near Chicago, Illinois, and another office in Brookfield, Wisconsin. Mr. Keres works with contractors and brokers, insurers, and owners who deal with contractors. He works on specific assignments, general consulting, and the majority of his work is as an outsourced risk manager. Before forming Construction Risk Associates, Mr. Keres was risk manager for Safway Services, one of the nation's largest subcontractors with more than 70 locations. Mr. Keres had also worked within Aon Risk Service's Construction Group, working with contractors on developing risk programs and with owners of larger construction projects. He was one of the earliest construction risk managers when he worked for James McHugh Construction Co. in Chicago.

Mr. Keres believes in the full integration of insurance, claims management, loss control, and operations to have a comprehensive and productive risk management program. He utilizes his legal training and background, a thorough knowledge of coverage, a realistic approach to claims, and his safety experiences to provide a unique focus to risk management. Mr. Keres is well recognized as a leader in the area of construction risk. Among the groups to whom he has made presentations are the National Safety Council, International Conference on Construction Safety and Health, National Inland Marine Underwriter's, Construction Safety Conference.

Mr. Keres holds a B.A. from the University of Notre Dame and a J.D. from John Marshall Law School.

Notes

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PRACTICAL AND EFFECTIVE RISK MANAGEMENT TECHNIQUES

Frank Keres
Construction Risk Associates, Inc.

These “techniques” are basically the result of 20+ years of working in the arena of construction risk. Admittedly, they are not all mine and many are the result of experience: what if I had done that?

We all hear the problems with additional insured, carriers, design build/construction management, indemnity, etc, etc. etc. These *are* concerns and have to be addressed. Yet, *what can you do?*

Included herein are some actual suggested things to *do*. They are usually simple, involve some action, and can be done all at once or one at a time.

A “fun” and easy way to look apply this is to look at it as a risk management punch list with all the aspects of a complete risk management program being the various rooms of the structure.

These suggested actions are not answers to major problems, but put together they might just be able to resolve major problems. These actions do, though, address specific problems we all face in administering a construction risk program.

Administration of a risk program is where you can put the “rubber to the road.” You can pick and choose among these to address specific problems.

How to use this handout: consider it as a punch list. If you already do one of these things, then cross it out. If you do not; prioritize your *need* to do this and schedule/implement.

These are details, things to do, not generalizations, not subjective. You might be a “big picture” person; these are the strokes of the brush that make a picture. Be an artist.

Remember, it is called risk “management”; not risk “elimination.” You must manage risk as best you can. Too many times we try to eliminate risk and we lose sight of the forest for the trees.

If there is one major technique: *manage risk*.

Safety

Safety is the base, the groundwork, the first part of any risk management program. Yet, many contractors do not treat safety as part of risk management. Part of what is suggested here will be very difficult to implement but I think you will find it very effective. Many will see these ideas as “crazy” as to safety. I do think you will find that these techniques strip away many of the barriers that get in the way of safety. These are very effective.

- Get rid of all your preconceptions about safety.
- Define the role of each safety person in writing in a document that is distributed to the entire company. This is necessary as the safety person can become an ombudsman, bad guy, enforcer; eventually he will be doing a hodgepodge.
- Safety is safety: it is not the payroll distributor or the delivery person. Safety personnel should act as safety personnel and not “buddies, friends, owe-me-ners,” etc.
- Define in writing to whom safety reports:
 - Should *not* be Operations or Engineering—conflict of interest. (As if the safety person could then deal with a problem? Nope.)
 - If you have risk manager, then to that person.
 - Must have direct access to CEO and there must be confidentiality when the safety director requests it.
- Do a time study: have each safety person do a time analysis for a 2-week period, by 15-minute increments. (You will be amazed by how little time is spent doing safety. Typically, more than 40 percent of a safety person’s time is spent on paperwork, follow-up, filling out RFPs, and all the other paper that falls.)
 - Tell them why, so they will do it.
 - Aim for 80 percent + on time spent on safety.
 - Consider clerical dedicated to safety. One accident prevented by a safety person being in the field can well be worth two or three times a clerical salary.

- If safety personnel are going to more than one association/trade group safety meeting a month, stop that. (I have been to many, they are many times sales pitches for safety equipment, there is no follow-up, and they are pretty basic.)
- Do not let your safety director handle/work on claims.
 - He/She does not know laws, coverage, payment provisions.
 - OSHA and insurance conflict. Safety lines with OSHA.
 - Conflict: Safety is judged by claim situation, so why let them handle?
 - They focus on denial of claims. (You know they do.)
 - They align with field personnel.
- This includes not letting safety administrator return to work.
 - They want worker back to work for OSHA.
 - They then have to “owe” someone.
- Safety survey: (See page 25.)
This is given to as many field management personnel as you can effectuate— at least all superintendents, foremen, project managers. Do anonymously (use broker or independent person) (tells you more than you could ever imagine).
- Safety committee: (I would rather have a risk management committee but we can all dream on that one).
 - Should have CEO, CFO, COO, chief super, risk manager as chairperson, safety director, at least four field personnel, and not all management).
 - Meet at least quarterly.
 - Publish minutes to company.
 - Review all accident reports.
 - At least every other meeting; have a guest speaker (lawyer on your claims, another safety person, a subcontractor or two, ...).

- Educate your safety personnel:
 - On risk: work comp, GL, auto.
 - On what is not covered: such as silica, mold, the length of certain watercraft, etc.
- Safety can be good “eyes” for risk.
- Expose safety personnel to the data on claims.
- Expose safety to more than other safety people. (Consider next year’s IRMI Construction Risk Conference.)
- Safety director to go over all plans/specs for bids: no plugging of a safety line item.
- With each bid, see if there is overtime included. If you are planning on “5-10’s” or on “6-8’s” you are asking for some losses. Use data to show estimators or even your client that this is not a good idea.
- Send “idle” sup’ts and foremen to another job:
 - To see how others in the company work. Then, have a meeting between the crews. Great to learn about safety and other areas.
- Sup’t as safety director. If you can do this, this is excellent. If a sup’t or a key foreman has 2 weeks or a month: then make that person work for safety. He/She will learn what a “hassle” it is to be on safety. He will learn quite a bit and once back in their original position they will see and effectuate safety much more agreeably.
- Pocket safety manual: signed by each employee. (Resource for them and might eliminate OSHA citation.)
- Web-based safety manual: more are doing it. Subs have to acknowledge it, clients can reference, and saves a ton of time and paper on revisions.
- Give a toolbox talk on insurance costs.
- Letter to spouse/significant others: to call in if employee had rough night, is taking medicine etc. No repercussions (just keep that employee “safe”; e.g., on the ground, doing cleanup, etc., and don’t tell him/her that spouse called).
- See if the local bar is cashing checks, if so, have safety in bar on payday.

- Once a year: all-day meeting for all employees on safety.
- Safety Stroll #1: *First thing* that any *management* person does when visiting a site is walk it with sup't for safety. Project manager to walk site every day for safety.
- Safety Stroll #2: Whenever a new subcontractor gets on-site, then safety personnel do a safety stroll with sup't of sub. This is of entire site, not just sub's work area. If no new subs, then select one every week.
- Blow it up, let it rip: explode a *small* oxygen/acetylene tank. For example, I once had several jobs with post tensioning. I had the supplier of the equipment to stage a "release." The cable went through a concrete parking block and some rebar. Employees paid attention thereafter.
- Incentive programs: (This will get you in trouble.) But do they really *work*? Getting a TV at the end of the year? Becomes more like a lottery. *Reward particular actions*. Have CEO or risk manager go to job site and give a jacket or special hard hat to someone who did some little thing: replaced a handrail that someone else removed, trained an apprentice, etc., etc. Word gets out.
- Salt tablets when it's 10 degrees below?
- Do not use canned toolbox talks. Use the safety survey to create your *own* talks (old habit).
- Safety suggestion box—have on site, it really does work.
- "The Old Man's Hammer": Sup'ts and foremen should lead by example. I once had a project with lots of nail puncture incidents. The sup't on that project was a curmudgeon to his crews. They called him the Old Man. I gave him a hammer and asked him to hit any exposed nails he saw and swear loudly for 3 days. He did. Nail punctures were eliminated.
- Safety pays but pay for safety? This is one that *works* but it might be hard sell at first. One contractor decided to "pay for safety." Each employee was paid \$0.25 more per hour when he/she started employment. If that employee had an accident, or was involved in an accident, the pay went to scale. This amounted to paying each employee about \$18 dollars more per week. He had about 200 employees. This amounted to about \$3,600 more per week in payroll. (Yes, about \$190,000 more per year.)

But his EMR went down by half, he did not buy TVs or other incentives, we calculated that if he had had a \$100,000 deductible/SIR on work comp, he would have saved money in the third year. Employees from other companies who had never been hurt came to work for him because they could get more

money, Production increased. His business development manager said that one thing got them on more bid lists than anything else.

- If you don't give your employees a gun, why do you give them cars?
- Your child is showing up to work tomorrow: would you let your child work for you? Just asking. Use this approach for attitude?

Accident Investigation

Why? Why have a risk management section on accident investigation? This should be a safety item? Shouldn't the insurance carrier do it, or the broker? (They both had this in their brochures.) But accident investigation should be a separate "part" of your risk management program. *Why?* Because it is too important to leave to others.

- *You should* control and perform all accident investigations. *Why?* Because you know more about your company, more about your operations, more about your people, and have more at *risk*.
- Do you really want your safety personnel to perform accident investigations? Think about this.
 - Trained to perform?
 - Conflict of Interest?
 - OSHA basis?
 - Think about this one seriously.
 - Who should do then? Risk manager should. He understands.
- Establish a written accident investigation procedure.
- On accident report form: Do not ask "how could this accident have been prevented?" Point a gun to your head instead.
- Learn root cause analysis:
 - Observe.
 - Ask questions.
 - Answer one question.

- Keep doing until there are no more questions.
 - Be Columbo.
 - Most experts say also look for the “corporate culture” that contributed to accident. Who cares and it just adds ammunition. See Exhibit (page 30) that gives some particulars
- Practice accident investigations (really, stage an accident and practice).
 - Consider having an attorney available; not for advice but for privilege.

Claims

Claims are in your control. Claims are living things, not something to be dealt with at various time intervals. Claims usually have too many “others” involved.

- Don’t wait. Accumulate: With every claim that might result in litigation, including WC cases that might end up in third-party actions, get all the paperwork together (contracts, payroll records, job site minute meetings, pictures, etc., etc.). Important for two reasons: you will have it all when subpoenaed (and not waste too much time trying to find it all after 3 or 4 years). Also, necessary to win any litigation.
- If before 8, investigate. If an accident happens early in the day, particularly a sprain, a leg injury, sore stuff, investigate: Is he a weekend warrior? Did he do something at home? Etc.
- If it’s Wednesday, it’s the “DAY”: a study for OSHA recently said more construction accidents happen on Wednesday. Anyone who “drives their data” knows this. When do you pay your employees? Many union agreements require payment 48 hours after the end of the week—Tuesday. So they might have been all night drinking, spending their check, etc. Go ahead, drive your data; betcha you have more accidents on the day after you pay. So: give your toolbox talks on Wednesday, tell supervisors to be more alert.
- Double dippers: check your unemployment claimants against work comp claimants. Bet you find some double dippers. In most jurisdictions that is a crime. Use accordingly.
- Merry Christmas: On all types of claims, consider settling on or around Dec. 12. It is amazing how many people will settle right around then and be ready to have the money paid immediately (you often even get a “cash discount”).

- Time (and use) med-index reports: Find out how your claims people get and use and the cost to use. Most adjusters order at time of claim. This can be fruitless as it takes time for data to hit the report. Also order again at 60 days; it's worth the \$25. The claimant might have gone to his own doctor for a bad back, but then found out he had to pay a deductible, etc. Cheaper to hit WC.
- Check the medical payments of the union benefit plan (you would have to get permission from employee, but maybe if you just ask for "payments?").
- Know your own EMR fix date: and aggressively have reserves reduced the month before.
- Have very specific claims instructions:
 - One adjuster for GL.
 - One adjuster for auto.
 - Set limit for payments without your permission.
 - Set notifications for increase in reserves.
- Counsel: he works for *you*.
 - Have your own counsel for WC and GL. Make sure he/she knows both construction and insurance. Educate him on your operations, contracts, situations, "politics," etc. Make sure your counsel is the litigator.
 - Have all documents copied to you.
 - Have written directions given to counsel (settlement amounts, etc.).
 - Promise prompt payment for reduction in rates.
 - If the attorney says he/she will "oversee" the "construction team," drop firm.
 - Ask for recommendation from a construction client
 - If in multiple jurisdictions consider having an attorney to assist in overseeing, communicating, and advising you. Helps to control (and gives you someone to blame).
 - Include in claims reviews or have separate reviews with him/her.

Drive the Data

- Data is probably the most underused but can be the most facile and important risk management tool.
 - Find out everything your risk information system can do.
 - Lean and use all the options.
 - *Play* around with the system.
 - Insist on optional fields with carrier/adjuster (job number, sup't number, foreman number, cost code, etc.).
 - Determine and use: average cost per accident (on each site).
 - Simple format: Divide the total cost of claims (or WC only) by the number of hours worked. You now have a simplistic valuation of cost per hour worked. Use for estimating and comparing sup'ts, etc.
- Develop your own reports:
 - Daily notes: best reading you will ever have. Make sure they are online.
 - Wednesday?
 - Time of accident to time of report.
 - Average incurred.
 - Average time between open and close dates.
 - What “operations” (cost code?) cause the most frequency, most severity?
 - Set financial “highs and lows” for job costing.
 - Big picture to little picture all possible data.
 - Do all that you can with data.
 - *No more important technique than using data.*

- Get the finger: as an example of how to use data. You can find out those employees who seem to get hurt a few weeks before top off, completion, etc. So, go to job site 6 weeks before and lay them off. Just part of the job is your reason. I did this and always got the finger.
- Work comp techniques:
 - Go to local hospital. Make a deal with them, promise prompt payment in return for prompt attention to your employees.
 - Tell adjusters (and hospital) that all referrals will be questioned. Don't let the Referral Monster catch you.
 - *Never* allow therapy referrals to a clinic owned/operated by hospital doctor.
- Therapy:
 - Why twice a week for 3 weeks, when three times a week for 2 weeks? Think of the cost savings on 1 week's indemnity.
 - Video your operations for return to work, lets them know what is expected *and* what employee might be able to do for light duty.
 - If using a local therapy provider for most injuries: supply them with equipment for evaluation.
- Medical adviser (your person):
 - Select an RN/OT and have them learn your operations, personnel (have them help create video).
 - Have them interpret to doctors and doctors to you.
 - Have them communicate with family.
 - They can select medical providers.
 - Have them approve any and all therapy.
 - Have them communicate what an employee can do under light duty to your field.

- Work comp administrator:
 - Consider having one who solely does WC.
 - Do not make it a part-time job for some clerical person in-house.
 - Train that person, include that person in reporting.
 - If you have SIR/deductible it could well be worth it.
- Claims payments:
 - Pay some of your own small claims, but be careful.
 - See about “notice only” reporting.
 - Have employees pick up their checks at your office or on the job site.
- Some “medical” things.
 - IME’s—use them. Use early to set the standard. Even if state only allows you one IME, it might be worth having another.
 - Have “medical permission slip” given to workers. It is a message to medical providers about your point of view.
 - Learn your own jurisdiction’s rules on selection of medical providers.
- Claims reviews:
 - Do not focus on those cases you think are problems but look at big picture (cooperate—don’t disintegrate the contractor/adjuster relationship).
 - Demand that summaries be sent a week before the reviews, not when you walk in the door.
 - Your broker, if they really know the claims, should be there, but on your side, not as an intermediary.
 - If it goes off course, “talk to your hand.”

- Claims reserving:
 - 30/60/90 days.
 - Claim is a living thing, so read the notes daily.
- Recalcitrant claimant:
 - The greeter: have employee who just can't cooperate on light duty/return to work to come greet and say hello to all employees every morning, and say goodbye at end of day. In between, he can clean up, watch others work. *Make him visible*. He will be off light duty very quickly. Try it.
- Go to a work comp hearing, it will surprise you and prepare you.
 - Go to work comp hearings on difficult, costly cases. It lets the hearing officer know you are involved.
- Surveillance: Use it when *you* and not adjuster deem it appropriate. Use common sense on when, where, etc. Hire your own investigator that you trust.
- *Notice*: Due to varied rulings on notice, send *notice* to umbrella/excess carrier on any major claim, as soon as you can. Better to be safe than have no coverage.
- Umbrella/Excess: compare what is covered under primary with umbrella/excess. More and more differences are appearing.

Insurance/Broker/Carrier/ Subcontractors/Contracts

These are the traditional “roles” of risk management. There is very much written, talked about on this. Yet, there are some specific things to do.

- Go to IRMI.com and look up the presentation last year (2004): “What Can Your Broker Do for You?” (See all the items on IRMI.com.)
- Prepare your own specifications for insurance; at least review what broker is submitting.
- Meet with carrier regularly.

- Talk with carrier on what coverage he can give, what he is hesitant to do, and what he can't do. (Thanks to Chris Dabovich of Zurich.)
- You actually might not be a design builder, but you might be. *Learn* about coverage, claims, etc.
- Accumulate all the data and information that is requested. Show carrier your willingness to partner.
- Ask lots of questions about the carrier's claim service.
 - What are their protocols?
 - See what part of your very detailed claims instructions they will do.
- "Shopping":
 - Do not shop your account to carriers, brokers every year.
- Per-project aggregate:
 - Can you get?
 - Limited number of projects?
 - Get full understanding
- Excess of wrap-up:
 - if you cannot get, you *have* to watch any wrap-up you are in for limits, claims, etc.
- Some coverage particulars:
 - Get SIR as opposed to deductible, ask lawyer in your jurisdiction how this affects tenders of defense.
 - Why do you want every add'l insured endorsement in the world? Some conflict with each other.
- Subcontractors:
 - Get actual endorsements.
 - Ask for loss runs on *your* jobs.

- Vendors:
 - Get insurance from your material suppliers. Very overlooked area.
 - Do you want a vendor's endorsement?
 - A warranty is not insurance.
- Contracts:
 - Most contracts have safety provisions. *Use them.* Backcharge for safety.
 - If you're a sub, put in your subcontract a provision that if a safety condition is reported and not corrected you can delay.
 - Check the "choice of law provisions."
 - Most contracts require subs to give you accident reports. So get them; do not pay until you get accident reports or statement of no losses.
- Indemnity: Examine the costs to you, etc., on this. If you have an SIR/deductible then you might be paying for litigation on the enforceability.
 - *Plan* for its being held invalid in the future.
 - Really, plan for it

- I. Double Dippers**
 - A. Comparing unemployment compensation to workers compensation
- II. Merry Christmas**
 - A. Three weeks before Christmas is a great time to settle those pesky claims where you are not far off
- III. Safety Stroll #1**
 - A. Project manager or office management person take a 10-minute walk around site
 - B. Shows employees that safety is a high priority
 - C. Management learns a lot
- IV. Safety Stroll #2**
 - A. GC, sup't, and one designated subcontractor sup't, take a 10-minute walk
 - 1. Not just in areas of subs' work but where other exposures might exist
 - 2. If a subcontractor, take a foreman or new worker
 - 3. Do at least once a week
- V. Near Miss Reports**
 - A. Document near miss incidents
 - B. Response must be immediate and documented
- VI. Incentive Programs**
 - A. Reward particular actions
 - B. Example: a worker replaces a handrail. Go to jobsite and give him a company jacket, or a special hard hat. Word gets out.
- VII. Before 8? Investigate**
 - A. Investigate incidents that occur before 8:00 a.m. They may have hurt it the night before.

VIII. Blow it up, Let it Rip

- A. The visual of potential accidents grabs employees' attention to create more safety awareness.

IX. Safety Suggestion Box

- A. Put on site, and have lock on it. It really does work.

X. The "Old Man's" Hammer

- A. Superintendents should lead by realistic day-to-day examples

XI. Don't Wait; Accumulate

- A. Accumulate all of the paperwork for claims that might result in litigation
- B. Better response to subpoenas
- C. More prepared for casework

XII. Check for Per Project Limits

- A. GCs should get the per project limit endorsement from their subs
- B. If nonexistent, are GCs happy with their limits?

XIII. If You Do Not Give Your Employees a Gun, Why Do You Give Them a Car?

- A. Prescreen and qualify every one who will drive a company vehicle

XIV. Time the Med-Index Reports

- A. Explanation of med-index database
- B. Example of how it needs to "catch up"

XV. There are other Subcontract Terms Besides Indemnity

- A. Most subcontracts have language about cleanup or more importantly getting accident reports, etc.
- B. Enforce these provisions, don't pay until you get reports or statement that there were no accidents.

XVI. Corollary to the above

- A. Back-charge for safety.
- B. Sub should bring it to GC's attention and if nothing is done, charge him

XVII. Go to a Work Comp Hearing

- A. A WC hearing is a short brief "hearing". Go and get an idea of the tone and atmosphere.
- B. On important matters, go and have the Hearing Office see that you are there as an employer. Their attitude can change to your benefit.

XVIII. Safety Pays; But Pay for Safety?

- A. Example: contractor paying for safety by scaling wages and linking to accidents or lack thereof.

Points To Ponder

The following are various points that come from some one-time occurrences that have happened to contractors. Also, these are some things you can do that really do not fit in any one of the above. Or, some of these need more space to explain them.

- Work on or near a school: You might want to do a sexual predator background check on your employees at that site (many states have Web site assistance on this. Check the attorney general Website of your state). (Thanks, Larry Bernetich, safety consultant in Milwaukee.)
- License to work (stole this from a contractor): Every employee has to take a safety class once a year and get a “license.” Main office employees maybe a class on CPR and fire safety for a half day. Sup’ts and foremen: 10- or 30-hour OSHA course and maybe a day on another item. Change curriculum every year. You can even use local OSHA or safety classes to send employees.
- A few good Web sites:
 - <http://www.mealeys.com/legalnews/construction.html> (also have on insurance).
 - <http://www.constructionchannel.net/> (this is a little gem; go to the Construction Cases section).
 - IRMI online resources. Really is a great resource and I am not just saying that.
 - Google News Alerts: Use these news alerts. Type in various names, including your own company name. You will get an e-mail every time that “name” hits any Website. Includes news channels, newspapers. Put in job site names, competitors, “construction accident,” etc.
- Equipment rentals: Tell your field personnel to not select the lessor’s insurance program. Typically, the claim will be denied and you get very little coverage.
- Use of equipment: if anyone wants to use your equipment you should have them sign a separate agreement. See Exhibit (page 27).
- OSHA or WC Loss Data?: You decide which is more important within your company. Yes, OSHA stats are important to clients, etc., but what is more important to you?

Work Comp: Listed States and Other States, 3(A) and 3(C) Problems

The Contractor's Work Comp policy under 3(A) lists STATE A, which is typically the office location for that contractor. 3(C) is left blank. This should be no problem. Yet, in a recent case, the contractor did work in STATE B. The broker issued certificates for the project. There was a claim made in STATE B, which the carrier paid. The carrier collected premium for work in STATE B. Yet, when a second claim occurred in STATE B and a claim made in STATE B, the carrier denied coverage and won in court. The contractor and the Broker had not officially "notified" the carrier under the other states (usually Part 3) of the policy which requires notice. Official notice was required despite the fact that the carrier had been given the certificates, had collected premium, and paid a prior claim.

1. You should get as many states listed as possible under 3(C). This should not be a problem at the inception of the policy.
2. Also, always give knowledge of any state where the contractor is exposed to a claim. *Remember*, in most states the injured employee can make a claim in the state where the injury occurred, the state where he resides, or the state of hire.

By the way, the contractor in the above case switched brokers and the initial broker's E&O carrier paid the claim.

Performance Specs: What Covers?

It is increasingly common to have "Performance Specifications" in construction documents. This is not limited to design/build projects but all forms of construction contracts. Assume in an HVAC spec, the designer has not specified three different manufacturers and delineated the delivery systems of vents, piping, etc. The spec says to supply a system that supplies "X" amount of BTUs, "X" amount of cooling, and to be delivered appropriately. In other words, the spec lays out a performance standard.

The contractor meets this spec and selects the equipment and establishes the systems, etc. Basically he had "designed" the system. Assume that prior to substantial completion, the system has a problem, such as a short or minor blowout, and injures four workers? Who pays?

The HVAC contractor did not have a specific policy for design, nor did it have an endorsement on its GL for limited coverage for design. It has no coverage. The general contractor has no coverage for design by others. Also, recent cases have ruled that the independent contractors coverage under the GC's liability policy does not extend to "professional" acts of its subcontractors.

1. Brokers should go over with their contractor clients what work they “design.” It is more common than one would think.
2. If there is design of any sort then the broker should acquire independent professional coverage or get a limited professional coverage on the contractor’s GL policy.
3. General contractors should evaluate which subcontractor is doing any type of “design” and establish internal risk control such as getting proof of coverage from that subcontractor.

Builder’s Risk: Make the Claim

Builders risks policies are the most underutilized coverage in construction. This may be because contractors do not understand what is covered; they might not be the entity that buys it so that it is just another contract term.

Assume that one of the contractor’s employees left a hose on at the end of the work week. For 2 days water flowed. On Monday, there was over \$50,000 of damage to the drywall, floors, open utilities, etc., on the floors below.

Typically, the general contractor will backcharge the subcontractor whose employee left the hose on. If it was the general contractor’s fault, it will try to find a way to pay it.

Yes, the responsible party’s general liability insurance should cover it. First of all, many contractors do not realize this. More importantly, why should the contractor’s GL pay? There is builders risk which should pay this claim. Builders risk is a property policy. Better to have this claim made against the builders risk, which is typically not a policy bought by a subcontractor and, if the contractor is the GC, it is probable that the owner bought the policy. Why should the contractor’s GL policy pay and why have this loss on the contractor’s history?

And most construction contracts’ builders risk provisions contain a waiver of subrogation. Thus, the claim will not hit the contractor’s GL policy.

Thus, contractors and their brokers should first look at the builder’s risk policy to cover any damage to work.

1. The broker should educate and inform the contractor about builders risk coverage.
2. Make the claim; it does not hurt the contractor and might even benefit over the long term.

Exhibits

SURVEY

1. What are your five biggest concerns as to employee safety?
2. What are your five biggest concerns for the safety of others, such as subcontractor employees, the public, etc.
3. What are your five biggest concerns for safety of third parties?
1. How do you think we can improve as a company in the area of safety?
 - Field operations
 - Office operations
 - Materials
 - Work habits
 - Safety personnel
 - Management
2. What types of support would you like to have, or have available, in the area of safety?
3. What would be your opinion if the company started a safety committee?
4. If there were such a committee, what suggestions would you have?
1. What would your opinion be if the company were to start a program of evaluating projects on work comp, liability, and auto claims and claims payments? Evaluation would be based on dollar volume and hour volume.
2. What would your opinion be if this evaluation had financial ramifications?
3. What information about the company's insurance program would you like to know?
1. What can risk management do to improve its service to you?
2. What do you believe the functions are of risk management?
3. What information would you like to know about the risk management function?

Procedures

Please indicate your opinion of the following procedures. Do they meet the purpose and are they workable?

- Accident reporting procedures
- Certificate of insurance

What type of education/training would you personally like to have?

- Contracts
- Insurance
- Safety
- Other _____

Specific Areas:

1. How do you realistically implement fall protection and what is your opinion of tie off?
2. What can we all do to improve auto safety?
3. What amount of deductible that the employee would have to pay would you advise?

In as much detail as you care to provide, relate your comments, suggestions, and observations as to how the company presently handles and can improve in the areas of risk and safety.

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SAMPLE PREPARED BY CONSTRUCTION RISK ASSOCIATES, INC.

USE OF EQUIPMENT AGREEMENT

THIS AGREEMENT, made between _____, hereinafter called First Party, and _____, hereinafter called Second Party,

WHEREAS, First Party erected one or more scaffolds, cranes or hoists and has various items of equipment such as trucks, mobile cranes, generators etc. (hereinafter "Equipment") for its own use and convenience in connection with the work performed or to be performed by it on the _____ building located at _____; and

WHEREAS, _____, desires to use First Party's equipment in the performance of its work at said location;

NOW, THEREFORE, First Party hereby consents to the use of such equipment by Second Party at the convenience of First Party, subject to and on the following terms and conditions:

1. The Second Party shall pay to the First Party the sum of \$ _____ for the use of _____. Payment shall be due within five (5) working days of invoice and if payment is not made, all rights of the Second Party to use the equipment shall cease.
2. Second Party agrees to defend, indemnify and save First Party harmless against any and all loss, damage or expense sustained by First Party at common law or by reason of any statute arising out of any personal injuries or property loss of the parties hereto, or their employees or of any other person, firm or corporation because of the existence, maintenance or use of said equipment by Second Party.
3. Second Party further agrees to maintain insurance acceptable to First Party covering the Second Party's liability under the Workmen's Compensation Act, and to maintain public liability insurance covering Second Party's public liability, including the contract liability assured by Second Party in the preceding paragraph in connection with the operations of Second Party at the premises described above, and agrees to furnish First Party certificates of insurance showing such coverage naming First Party as Additional Insured.
4. First Party does not guarantee the equipment or suitability of any equipment for the purpose of Second Party nor does First Party agree to leave in place or to put in place any particular equipment at any particular time for Second Party's use.
5. Second Party accepts the equipment "as is" and shall return them in as good condition as received.
6. Second Party shall assume responsibility for any and all injuries to any persons, including operators of any said equipment, while said persons are working under the direction of Second Party. At the very minimum these persons will be considered "loaned servants" of Second Party.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement in duplicate by their duly authorized representatives this _____ day of _____, 20____.

NAME OF COMPANY: _____ NAME OF COMPANY: _____

BY: _____ BY: _____

Accident Investigation

The Three “C”s: Necessary to do your Investigation



- **CONTROL:** All reporting, information, comes to YOU. YOU have the authority to do whatever and to tell others what to do.
- **COOPERATION:** You might have to delegate some actions and duties. You will have to interact with others: such as insurance , lawyers etc.
- **COMMUNICATION:** Those you Control and Cooperate with must be able to Communicate your requests. You might need to access people or resources.

1

Pre-establish the 3 “C”s



- Unless you are the main person, the big cheese, the head honcho AND everyone in the Company knows this THEN

PUT TOGETHER A WRITTEN POLICY ON ACCIDENT INVESTIGATION, NOT JUST REPORTING.

Most companies have a written accident reporting procedure but NOT accident investigation

The policy should establish the 3 “C”s

2

First Steps



- Typically, you are not at the site so assume control from wherever you are:
 - Select the one person at the site to take control until you get there
 - All employees who witnessed or could have witnessed to be taken off site. If there are two or more people who are eye witnesses, separate them and do not let them talk to each other
 - Leave everything the way it is. No one to move or touch anything.

3

WHEN YOU GET TO THE SITE



- Select one person in the site office to relay communications through from main office, outside sources, etc. In other words: to man the phone
- Select one person, usually your key person on site, to be with you and do whatever you tell them. Tell them to Listen and DO what you tell them, not what he thinks or heard from others.
- Have a Camera (VIDEO is a great asset), Pad of Paper.

4

How to find the Root Cause



- OBSERVE
- ASK ONE QUESTION
- GET ONE ANSWER
- ELIMINATE YOUR QUESTIONS

THAT'S ALL THERE IS TO IT!!!
SOUNDS SIMPLE, BUT IT REQUIRES
PATIENCE AND OBJECTIVITY.

5

OBSERVATION



- Start with a WIDE perspective
look from outside the site, encompass the whole scene. See where the site is. Be a WIDE ANGLE LENS. Get this perspective first. This will provide perspective and framework. AND remember, who knows what you might see.
You might have questions such as what is that crane, what is the stage of the project, what were others doing above. Write your questions down. Don't ask anyone. Let your senses and your brain tell you first.

6

Approaching the Accident location



- Continue Observing as you get to the actual location on site of the occurrence. Note where things are, what is on the ground, what is above. ABSORB. Determine access points, look for things out of place. Little things can count.

For eg: a hammer on the ground when the accident was above. Who's is it? Could it have been the injured persons? Write down your questions

7

Observation Continued



- Observe EVERYTHING. Go look at everything. Work your way to the Accident Location. When you get to the Location itself, look again like a Wide Angle lens. The whole floor if a structure, what's there, what is out of place.
- At the actual location. Observe, further and further to the actual place where the accident occurred, where the person was when injured AND where he might have ended up. (Fall?)

8

Observation Hints



- In many cases, things were moved. From looking at dragging marks, such as clean floors where a person was moved, or materials pushed out of the way, determine where was the injured person and where were the materials. (Hint: if material was moved, what is on top of the pile was on the bottom at the time).
- Look for personal items of an injured person, such as tools, hard hat. These are very helpful as to their location and condition.
- Look above and below
- Take Pictures of EVERYTHING: wide to items. Whatever you see should be photographed.
- Look at equipment: is it still running, was something removed from an item (cable cuts, forklift tines, etc. etc. etc)
- Look at the other "trades" work. What were they doing?

9

ASK QUESTIONS The most difficult aspect



- As you observe, ASK YOURSELF QUESTIONS:
 - Question the things you are seeing, the objective simple questions,
 - How did that get there?
 - Why is it in that condition?
 - Why is that "thing" in that position?
 - If a person is injured, where did he fall, where was he when injured, how did he get there?
 - Why is that there and why is he there.
 - If this is here and that is there, why?
- QUESTION EVERY THING YOU SEE,

10

ANSWERS



- IF YOUR MIND IS OPEN AND YOU ARE OBSERVING EVERYTHING YOU WILL HAVE QUESTIONS:

ONLY ANSWER THE QUESTIONS THE FACTS SUPPORT.

YOU WILL STILL HAVE QUESTIONS WITH NO ANSWERS.

11

The Unanswered Questions



- GO BACK, OBSERVE AND ANSWER THE QUESTIONS.
GO BACK TO WHERE YOU STARTED AND BEGIN AGAIN.

DOING IT TWICE IS NICE!!!!!!!!!!!!!!!!!!!!!!

DO IT AGAIN. YOU MIGHT FIND SOMETHING AS YOU DO IT AGAIN

DOING IT AGAIN WILL ANSWER THE UNANSWERED QUESTIONS.

12

More on Unanswered Questions



- IF you end up with unanswered questions, then put these down. THEN, put down ONLY those possible ANSWERS that the FACTS SUPPORT.

THEN: go back and find FACTUAL support for those alternative possible answers.

BUT, IN THE END

IT IS OKAY TO HAVE UNANSWERED QUESTIONS.