Minimising the Risk of Common Law Claims in the Accommodation and Food Services Industry

Tony Park & Kara Thomson – Cooper Grace Ward Lawyers

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Facilitator: Good morning everyone. Welcome to WorkCover Queensland's webinar and thank you for joining us today as we discuss how to minimise the risk of Common Law Claims with a focus on the factors that drive these claims.

[Refer to Slide 2.] My name is Melissa Steadman. I'm an Industry Manager within our tourism industry at WorkCover Queensland and I'll be your moderator for today's session.

[Refer to Slide 3.] So after the webinar as I said a recording and presentation slides will be available along with any of those questions that we don't get to. And at the end of the session we do ask that you complete a short survey just so that we can follow up on your feedback and help us improve webinars and identify potential topics for the future.

[Refer to Slide 4.] So getting into the reason why we are here today. Looking at the accommodation and tourism industry, accommodation and food services, this graph shows the number of statutory and common law claim numbers by industry for the 2014 and 2015 financial year. And this is based on WorkCover Queensland data. So for this financial year the total claims for all industries was just under the 79,000 claims which was down a bit compared to the previous year. So for accommodation and food services our statutory claims is just over the 5,000 number and what we're here today for though is that orange bar that you see along for commercial food services, the common law claims which for that financial year represented 148 claims.

[Refer to Slide 5.] So accommodation and food services specifically is a very dynamic market with the youngest age profile of any industry in Australia. But even with the best training safety policies and experience, accidents do unfortunately happen. A supportive culture and effective rehabilitation plans can help workers return to work quickly and safely.

According to the Australian Government Department of Employment the Australian Jobs 2014, accommodation and food services represents 7% of the Australian job market. Fifty-eight percent of those workers do not have any post-school qualifications and the vast majority of the positions are that of wait staff followed by kitchen hands and bar attendants. But as you can see from the WorkCover Queensland statistics that we have up on screen this industry has the youngest profile age of industry groups with 43% of the workforce between 15 and 24 years of age and 22% being 45 years or older.

When it comes to injuries according to WorkCover Queensland statistics the majority of injuries in accommodation and food services relate to musculoskeletal injuries closely followed by your wounds, lacerations and burns.

[Refer to Slide 6.] Today's webinar will be presented by Tony Park and Kara Thomson of Cooper Grace Ward. Both Tony and Kara have extensive experience in workers' compensation claims and are briefed by WorkCover to manage common law claims on our behalf. So they are aligned with the accommodation and food services industry and have a vast knowledge of the key trends and experiences in this industry. And with that I'll hand you across to Kara and Tony.

Tony Park: Thanks very much Melissa. Thanks for inviting us along this morning and good morning to everyone and thank you also for listening in. I'll just give you a brief overview of the presentation that Kara and I are going to provide this morning. Look we're firstly going to look at some recent legislative changes. We're going to look at what a common law claim actually is. We're going to discuss the concept of negligence and why sometimes the odds seem a bit stacked against employers when claims go to a court situation. And then and probably most importantly we're going to look at a number of decided cases and some claims that Cooper Grace Ward have run and try to identify some lessons learned in terms of minimising common law claims.

[Refer to Slide 7.] Melissa has given you the statistics for the past financial year. I thought I'd just make a few comments in relation to those. But there's no doubt that your industry attracts a lot of claims as indicated over 5,000 statutory claims last year which I can see is more than the retail trades and the transport industry.

For those claims, the statutory claims, the average cost has been a little bit more than $5,000 each and the focus today though is on the 148 common law claims that have been received in the industry. They cost more than $18 million so the cost of those is more than $120,000 per claim.

It makes it pretty simple to see that if you can reduce the number of statutory claims that actually translate to common law claims then you'll really be in a position to better your premium situation.

Now with the legislation itself the slide talks about the changes that were made in October 2013. Now the principle change there was the introduction of a 5% threshold for a degree of injury. Now that disqualified injured workers with less serious injuries for making a claim at common law and that did mean that injured workers with minor soft tissue injuries, aggravations of pre-existing conditions, things like carpal tunnel syndrome and most lacerations and burns were excluded from even a potential common law claim.

Now look it's a bit coincidental but at the moment a bill is before the state parliament and the debate on the bill began late last night and is continuing this morning. Now there are some substantial changes likely if that bill is passed but at the moment we don't know the detail. But it's fair to say that probably by the end of the day we will.

I think the prime message in all of this is pretty simple, that we really do need some action in relation to common law claims. The likelihood is that the numbers are going to increase and it's very clearly a good time for action to be taken to minimise common law claims.

I'll hand over to Kara for the next slide.

[Refer to Slide 8.]

Kara Thomson: Okay. So what is common law? Common law is essentially law developed by the courts not by governments. It includes the court's interpretation of legislation such as the Workers' Compensation and Rehabilitation Act. A common law workers' compensation claim must be based on fault, specifically the concept of negligence or in other words breach of the duty of care owed by employers to their workers.

So a common law claim is quite distinct from normal statutory compensation under the Workers' Compensation and Rehabilitation Act which is a completely no fault system.

[Refer to Slide 9.] At the conclusion of a workers' compensation claim the worker is entitled to request an assessment of their permanent impairment which may result in an offer of lump sum compensation. On receipt of that assessment which is contained in a document called a 'Notice of Assessment' the worker must make an irrevocable election to decide whether they wish to accept the lump sum offer or instead lodge a common law claim for damages. Common law claims are stressful for both workers and employers. They can result in disruption to the business whilst the claim is investigated, the requirement to deal with lawyers and at time safety audits for example by Workplace Health and Safety.

There is also the risk of fellow employees becoming involved as witnesses and issues being played out in a public forum with workers sometimes going to the media to tell their story and having an impact on the employer's brand.

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Tony Park: The next slide deals with the definition of negligence. Before I get to that I'd have to say that when discussing the concept of negligence with employers often the impression I get is the term is understood in the sense of some gross failure to consider a worker's safety, almost amounting to criminal negligence. In fact that is very rarely the case. The reality is that the common law imposes very strict duties on employers in relation to devising and enforcing systems of work. Often an employer's shortcoming will not involve any obvious or wanton disregard for a worker's safety but instead a failure to meet the very high standards set by the courts.

Now you can see the definition in the slide is "A failure to exercise the care that a reasonably prudent employer would exercise … having taken into account the potential harm that it might foreseeably cause to workers." Look I think that can even be simplified further to this expression that an employer will be exposed to a common law claim where the employer can reasonably

predict that an injury might occur, there were steps that could have been taken to prevent or minimise the risk of injury but no action is actually taken.

[Refer to Slide 11.] On the next slide I start with a reference to a section in the Workers' Compensation and Rehabilitation Act which is Section 305B. Basically that section tries to redefine the duty of care but the principle legal concept that we're looking at here is the reasonable foreseeability of injury. Can you as an employer reasonably predict that a worker might be injured performing a particular task?

Now not surprisingly that's a concept that's been considered by the Australian High Court on a number of occasions but to take out of that a couple of things, firstly it's an objective test of what a reasonable employer would predict and what action a reasonable employer would take. And the High Court has gone further and said that a risk is reasonably foreseeable unless it is far-fetched or fanciful. Now look I'd suggest that's a pretty tough test on employers and the test that's in the legislation - Section 305B possibly softens the test somewhat. And in that respect the risk of injury must be foreseeable, the risk of injury must be significant and again a reasonable employer having foreseen this significant risk would have taken action to prevent or minimise it.

And the way the courts look at these things, the more obvious the risk and the more prospect that a worker might be seriously injured, the more obvious it is that preventative steps need to be taken. And look a simple example might be a solo lift of a 40kg weight. Clearly that's going to be a foreseeable risk, a risk of some serious lumbar injury perhaps where the preventative measure would be to – perhaps it's an equipment thing. It might be a two-person lift. It might be a matter of eliminating the task altogether.

Another example I thought about was a simple example, is use of ladders in the workplace. Obviously falls from height can cause significant injuries but in the context of a proper ladder for the task it then comes down to fairly simple measures such as training in relation to the three points of contact when using ladders. But it's just surprising how often we encounter these cases where that sort of training hasn't been given.

I'll hand back over to Kara.

[Refer to Slide 12.]

Kara Thomson: There are ways to minimise risks. The Work Health and Safety Act provides tools and guides for employers to measure and minimise risks. There are many codes of practice which outline the risk management process for specific and some non-specific tasks, for example managing the risk of falls in the workplace, hazardous manual tasks, managing risks of hazardous chemicals in the workplace, managing the work environment and facilities. Each code contains useful tools, checklists and examples of reports as to how to identify risks in the workplace and manage them appropriately, whether it be through documented training procedures, supervision, on-the-job training or use of job hazard analysis worksheets.

As you will see through the upcoming examples it is crucial not only that you perform a risk assessment but that the assessment be documented and retained.

[Refer to Slide 13.]

Tony Park: Now the first example is a manual handling example which manual handling is a topic in itself. But the slide contains the basic facts of a fairly recent Queensland Court decision in a case called Dank against Tabcorp. Now the claim involved a worker lifting a box of paper which weighed just under 14 kilograms. The box was situated however under a desk and involved an awkward lift. Now you might suggest that lifting a weight of 14 kilograms, a fairly moderate weight, less than say a carton of beer, wouldn't result in an employer being at fault.

However the fact is that Ms Dank succeeded in this common law claim because there was no evidence of any manual handling whatsoever. She said she twisted during the lift which was contrary to normal manual handling protocols and the court simply held that if she'd been trained in those techniques it was likely she would not have been injured.

I probably should say that the court makes these findings on the balance of probabilities - what's more likely than not - and look it could be seen as a tough decision. The claimant Ms Dank was an administrative officer. She didn't

normally have to lift things but occasionally she would and the court held that there still had to be the basic manual handling training in those circumstances.

I would suggest that the reality is that most manual handling tasks do involve a reasonably foreseeable risk of injury and I can give you an extreme example where Cooper Grace Ward is currently defending a claim where the item being lifted was only two kilograms. Now although we think it's an outrageous claim the matter is going to trial because the claimant's obtained some support from a safety expert who supports the case.

Now having said that only last week in the New South Wales Court of Appeal a claimant lost her claim relating to lifting a nine kilogram weight and the Court of Appeal there accepted evidence that the risk of injury lifting weights under 10 kilograms was not particularly high. Now I would say and there's a lot of cases decided in the New South Wales jurisdictions they tend to be a little bit more sympathetic to employers than the Queensland court. So that might not be a lot of help to most of you but it's an observation I've made.

I think it's also important to realise there are no maximum weight limits stipulated in the Workplace Health and Safety legislation or by the courts. Using the simple carton of beer example, if a worker is trained in manual handling techniques and lifts a weight of 14 or 15kg then this is generally considered to be a safe task but even this can become less clear if the item is lifted at height, say at or above shoulder height or at particularly low levels as well.

Another consideration would be if there's a repetitive nature to the task and then it might be a matter of really looking at the time allocated to the task or in allotting additional workers to reduce the repetitiveness.

[Refer to Slide 14.] That takes me to the next slide which deals with training and proof of training and really from the last discussion it is very clear that a crucial aspect of defending manual handling claims and other common law claims for that matter comes back to the existence of proper training. But more than that it is essential you are able to prove what manual handling training has occurred. Ideally the training should be signed off by each worker and with enough detail so you can say what that training did involve.

Now if there are different versions of the training created over a period of years you also need to retain copies of each version and you need to bear in mind that a worker has three years in which to bring a common law claim. There's also some capability to extend the period of limitation and also some claims are brought over a period of time. So it could get back to a question if we're talking about training that's happened three to five years ago would you be in a position to prove what training was given and what that involved? Now if the answer is "yes" that's great but you might be in the minority.

In relation to your particular industry I do think special challenges do arise in relation to the larger percentage of younger workers and workers for whom English may not be their first language. Specific consideration needs to be given as to how you best communicate your training and also how you prove it has been done. This may involve more practical training including on-the-job training. Also the training documentation may have a more visual element to it. Images of correct and incorrect manual handling techniques seems a pretty common way to do that.

If the training is on-the-job consideration needs to be given to completion of job observation sheets or some similar document to confirm the worker's understanding of the training and the tasks have been carried out in accordance with that training. Refresher training also is worth mentioning in relation to manual handling tasks. Large organisations often have that refresher training on an annual basis but probably every couple of years will suffice.

[Refer to Slide 15.]

Kara Thomson: Turning to the next example there's obviously no surprise that a common occurrence in commercial kitchens is a slip and fall due to something being dropped and causing a wet floor. Recently we managed a claim where a worker had walked through a kitchen area to collect a plate of food for a customer and slipped on oil that had been dropped by the cook onto the floor. Rather than the cook taking corrective action to warn the worker of the presence of the oil by placing for example a sign in the area immediately or cleaning the oil, the cook continued to work thinking that they would get around to cleaning it some time later.

In this example the employer was found to be vicariously liable for the negligent act of its cook. The worker suffered a significant shoulder injury which ultimately required her to cease work as a waitress. She received damages totalling $180,000. The key learning from that case focused on the fact that there was no evidence that the workers had been trained in the risks associated with slips and falls in the workplace and how to prevent or minimise same. Further there was no training in relation to the need to be on the lookout for such risks and to take steps to clean up or cordon off the area once the spill was observed. If there had been some training associated with this then the cook might have moved to take corrective action rather than continue with cooking and risk serious injury to his co-worker.

[Refer to Slide 16.]

Tony Park: The next slide deals with another slip and fall example that our firm recently ran. In this one there was evidence of a number of previous complaints to management that a tiled kitchen area was too slippery. The only response from the employer was a verbal direction to purchase different shoes. Now this basically wouldn't have solved the problem and didn't solve the problem. Oil and fat would continue to build up throughout a shift on the shoes. Also there had been previous falls and that was the reason there'd been those complaints. And the employer had actually provided some mats in those areas but as the mats wore over time they were discarded and not replaced.

Now you can probably anticipate that in those circumstances where the mats had actually been removed we really had nowhere to go in terms of defending the claim. That's somewhat of an extreme example but we certainly need to avoid situations where some proper risk mitigation measure is removed without any explanation.

I had just a further observation on slips and falls more generally and that is that a pretty common system I see is that everyone's trained to deal with spillages as they occur in the workplace. Now the risk in that is that what should be everyone's job becomes nobody's job and it really does all come back to establishing a safety culture where workers are looking out for one another.

[Refer to Slide 17.] Now that very coincidentally leads me to my next slide which is establishing a safety culture in the workplace. Look I've suggested that workplace safety has to be a core value. It requires very strong leadership and walking the talk. There has to be the trust that safety complaints will be taken seriously without recrimination and acted upon. And this may be even more of a challenge dealing with young workers and foreign workers.

Now in the slide it also highlights that work practices need to be consistent with your documented systems and businesses can have great documented systems of work however if those are not actually enforced in the workplace there will be no way to defend a common law claim that arises out of that type of situation.

I had a recent example. It related to the manual handling of wooden pallets. You're probably aware that they can be quite heavy. Depending on the type a wooden pallet can weigh over 30 kilograms, sometimes closer to 40 kilograms and in the documentation it was sensibly described as a two-person lift. I personally investigated a claim where the claimant alleged lifting and dragging a pallet contrary to the documented instruction. But when I attended the workplace I immediately observed the pallets being lifted and dragged by individual workers.

I had thought that we had a good defence when the claim began but eventually I was obliged to settle the case having that extra information and this situation really is very difficult for WorkCover and its lawyers where the documents say one thing but the practical reality is quite different.

I'll hand over to Kara.

[Refer to Slide 18.]

Kara Thomson: So turning to another example then it's common industry practice for kitchen and catering staff to unpack, to deconstruct for example pallets of food, produce and equipment. Often there can be hundreds of kilograms of stock to be moved with large boxes or awkward items which are required to be unpacked in a very short amount of time due to quality control issues. We sometimes see such cases with catering staff who work remotely and in isolated situations for example in mine sites. This is an obvious area of

potential risk for employers in terms of musculoskeletal type injuries and something we often come across.

In one such example the worker was required to unpack pallets loaded with goods weighing up to 800 kilograms on a daily basis within a 15 minute period. The goods included 25 kilogram bags of potatoes. The injured worker sustained a shoulder injury over a period of time as a result of the repetitive nature of the task noting that when unpacking he would be lifting above shoulder height and bending down to below waist level as well. In that case the employer was able to demonstrate that the worker had been provided with co-workers to assist with the unpacking and deconstruction of the pallet.

However there had been no evidence of any training being provided to the worker to alert him to the particular risks associated with manual handling tasks or how to perform same in a correct or safe manner. During investigations it became apparent that the training provided had been of a generic nature only. Whilst we might say from a common sense perspective that loading 25 kilogram bags of potatoes at around waist height might be appropriate investigations revealed that it was actually an accepted practice in the workplace to stack them on shelves above shoulder height or at floor level. This of course creates extra forces or stressors on the body and increases the risk of injury to sometimes more than what could be considered insignificant.

The real take-away from that case related to the need to not only just rely on generic training for employees which might address all aspects of the business but to actually take some time to consider what the specific tasks are that the workers are going to perform in their individual roles so that the particular risks of their role can be identified and explained to the workers as to how to minimise it. For example the manual handling requirements of a waiter are likely to be vastly different to that of a housekeeper or grounds keeper. There may be examples where rostering additional co-workers for assistance with heavier deliveries might be of benefit in reducing the risk of injury but that cannot be looked at in isolation. There needs to be consideration of the specific tasks the workers are performing such as in this example by looking at the way workers are placing or lifting loads particularly when items are heavier.

[Refer to Slide 19.] Turning to the next example housekeeping roles are often the source of repetitive strain injuries. These types of claims generally arise as a result of repetitive cleaning duties whilst under time pressures with workers allocated a large number of rooms to clean in a relatively short amount of time. It is important to ensure that the tasks allocated to these workers are assessed for their risk and appropriate systems of control implemented. For example it might be that there is a second worker provided for particularly heavy tasks, different tools provided which lessen the requirement for scrubbing of surfaces, review of the cleaners' trolleys to ensure that they are not too heavy or adjusted to suitable height for the individual worker.

We have found that in general accommodation services are much more savvy in recent times to the need to assess these risks, provide training and follow up with employees. In a recent case though a worker who had limited English skills was required to clean rooms in a very fast and repetitive manner. In the process of doing so she sustained an injury. The employer was exposed to a finding of negligence. Whilst some limited training had been provided it had never been followed up and supervisors did not check compliance with policies other than to confirm once rooms had been completed.

The claimant in that case felt that she could not raise her concerns with her supervisors directly and had failed to understand the reporting processes. As we have previously highlighted one of the key learnings from this case was the need to ensure that the workers understand and feel as though they can approach supervisors or other management to address any concerns or difficulties that may be experienced in the workplace. In this example the worker had been of the belief that to do so would label her a "trouble maker" and that she might lose her job. And as a single mother she could not afford to do so. So instead she continued to work in unsafe conditions until she could no longer work due to her injury.

[Refer to Slide 20.] In another example we talk about young workers. Now they're not immune to workplace injuries and are prone to moments of inadvertence and inattention. The kitchen can be a dangerous place for this to occur. In a recent example a young male apprentice claimed over $200,000 following a laceration to the tendon in his non-dominant hand as a result of being required to cut plastic trays with a knife. At the time the apprentice was engaged in a conversation

with a co-worker and as he briefly looked up in the direction that he was talking with his hand – talking, his hand with the knife slipped sorry and he severely cut the tendons in his hand which required several surgeries.

The employer had a system of requiring apprentices to wear a mesh glove when using knives. Unfortunately though whilst the apprentice had purchased gloves there was never any direction or actual requirement for him to wear them. Whilst it may seem to be common sense that if you as an employer required your employees to purchase and have on their person PPE such as mesh gloves this does not mean that they will wear it. Employers need to be vigilant in ensuring the use of PPE and where it is clear that an employee refuses to do so consider whether other action might be warranted to require compliance including disciplinary action in some cases.

[Refer to Slide 21.]

Tony Park: Now the next example deals with a psychiatric injury. Again pure psychological or stress cases are a complete topic in themselves but the most important message I think I can convey in relation to this type of claim comes from a recent Queensland Court decision in Keegan against Sussan's. This involved alleged bullying and harassment by a manager who had only supervised the claimant Ms Keegan for a period of 11 days. However in this very short period, day four in fact, Ms Keegan had not only complained about the manager's behaviour, she had also reported suffering - significant psychological symptoms as a result of the behaviour.

Now despite this complaint the employer did not immediately apply its bullying and harassment policy. The Supreme Court in Cairns found the defendant to be liable and awarded Ms Keegan $304,000 in damages. Now look the message in this is also pretty clear that it's crucial to act and act very quickly once an employer is aware of work related psychological symptoms.

[Refer to Slide 22.] Now the next example is basically an armed robbery example. Hopefully this is a topic that hasn't personally affected too many of you but common law claims can arise out of armed robberies at hotels and bottle shops etc. The injury type is sometimes physical, often psychological, sometimes both. Look the ordinary principle of law is that an employer is not liable for the criminal conduct of a third party. However there are certain circumstances when a

worker will have an arguable claim. Cooper Grace Ward managed a file fairly recently where the injured worker sustained a quite severe psychiatric injury as a result of a series of armed robberies at the same bottle shop.

The worker had complained on a number of occasions and had asked for additional security measures. Whilst liability was still by no means clear the degree of risk of further criminal activity required that the employer take all available measures into consideration. And some of the things we considered in that claim were visible CCTV cameras, also signage warning of CCTV, signage warning or advising of limited cash being kept on the premises, installing a thing known as a drop safe, perhaps closing the bottle shop at an earlier time in the evening and only running a drive-through late at night, employing a second staff member to dissuade this type of activity, actually limiting access to the till area and providing duress alarms.

Now a number of those measures had been provided and although those measures will not eliminate the risk of robbery they will tend to minimise that risk and provide a basis to defend the claim. Now in our situation because of the repeated robberies we were very vulnerable to the accusation the employer had not done quite enough in the circumstances.

[Refer to Slide 23.] Now the next slide deals with – I could say it's a hot-off-the-press item because it's a decision only last week in the Magistrate's Court where a common law claim was rejected. Now the claim was made by a barman at a boat club. The barman had juggled what was alleged to be a hot and wet champagne glass. He tried to stop the glass hitting the floor by trapping it between his abdomen and a bench. The glass broke and he suffered a penetrating wound.

The claimant alleged that either toughened glass or plastic glasses should have been used and there was also a great deal of debate in the evidence as to how hot the glass was after it had rested in a fridge or on a bench for more than 15 minutes. The claimant did fail to show that the heat of the glass was a factor in the injury and fortunately the court also found that there was no need to use only plastic glasses in an establishment such as this boat club. And also the use of toughened glass was rejected as a reasonable requirement.

Now I can say that in all of the other examples we've given and the decided cases the claimant received a judgement or a settlement but I thought I would end the examples on a positive note and this is one that WorkCover was able to successfully defend. And I should also say that WorkCover's got a pretty good record of defending claims and particularly over the last few years.

[Refer to Slide 24.] Now the next two slides we've just tried to draw together the various lessons learned from the cased examples to create something of a checklist for minimising the risk of common law claims. To recap we have looked at the need to document risk assessment, systems and procedures, to implement training and follow up to ensure compliance, to tailor your training to meet your employee demographic – cater for educational and language barriers for example, to try to create a safety aware workforce - to change the culture if necessary. That requires acting decisively on safety concerns or complaints and also where workers repeatedly fail to comply you must consider disciplinary action. And I've also mentioned there the need to support workers to return to work.

[Refer to Slide 25.]

Kara Thomson: So continuing on with that list then there's a need to review tasks to ensure that systems and procedures are kept up to date, consider whether tools or equipment might be required to assist the workers, act promptly where there are signs of psychological injury and take appropriate action. If there is a history of criminal activity for example a history of robberies in the workplace consider what available security measures there are.

Consider the timing of breaks for workers performing repetitive duties particularly in examples of housekeeping roles. Take into account inadvertence but especially from less experienced workers. For example we've listed there limiting the use of mobile phones in the workplace and never lose sight of an employer's strict duty of care. Common sense is not a one size fits all. That is what is common sense to you might not be common sense to your workers.

[Refer to Slide 26.]

Tony Park: Now in the last slide we've put together a further checklist of things that can be done at the time of an incident which can greatly assist us in defending a

claim particularly if it's three years down the track. We have listed you should document the injury and cause in a proper incident report. It's important also to identify witnesses and again if possible capture their recollection in writing. Now I appreciate sometimes it's difficult to do that in every case but if it can be done it can be very important in defending a claim.

If the incident is captured on CCTV retain the footage. Now that should be a no-brainer but I had a recent case where the footage I'm told would have been very helpful to the defence of the case. It was looked at by the employer at the time and then discarded. We've listed that it is beneficial if items lifted can be identified, their weights identified, the type of equipment used specified and if possible take a photograph of these things and attach them to the incident report. Also if an incident occurred due to external factors for example a spill, identify whether there might have been a third party involvement, for example again cleaners or other contractors.

Now the point of that is that WorkCover can bring contribution proceedings which can limit the spend on a common law claim and can reduce premiums. I've said keep diary notes of rehabilitation and return to work and also record if a worker has had similar incidents or injuries in the past, whether or not they're the subject of claims.

Now we've got a question here which is "Can you provide any tips on managing an ageing workforce that is involved in heavy manual handling activities?" Well look I suppose – one of the things we see a lot is upper limb injuries in claimants who are getting close to the age of 50, certainly in their late 40s and 50s. So I think one very specific thing is the susceptibility of workers to those sorts of injuries particularly shoulder injuries and upper limb injuries. So I think you really have to be alive to manual handling at height in those circumstances. Kara might have some other ideas about that?

Kara Thomson: Yeah. Look in terms of ageing workforce many of the principles that we talk about for the younger workers also apply for the ageing workforce and it's really just ensuring that the workers who are participating in heavy manual tasks are suitable, that there is appropriate assistance provided and that you are turning your mind to those individual specific requirements for the role as we've mentioned throughout those previous examples.

We've also received a question in relation to whether we can comment on some reasonable management action and what that means for employers. That's largely a topic in of itself so we probably can't deal with that in the time that we have today. I would just say though that we do revisit those issues in terms of the common law claim and that if a claimant is pursuing a reasonable management action type case we do also for a common law claim require that the claimant has sustained a psychiatric injury as opposed to a stress related injury. So there is a bit of a difference between the statutory claim and common law claim entitlements in that respect.

[Refer to Slide 27.]

Tony Park: Now I appreciate there may be some further questions at the end but we've come to the end of the slides that we are going to deal with. I thought I would conclude with just one further comment and that is really that the best practical way to minimise common law claims is not to give injured workers a good reason to see a lawyer. Now the best way of doing that quite honestly is to work very closely with WorkCover to get your injured workers back to work.

Now I'll hand over to Melissa.

Facilitator: Great. Thank you very much Tony and Kara. So we do have time for a couple more questions and we're starting to get more through now. So please keep those coming. As I said if we don't actually get to them today we will be able to provide some answers to those on the website after the webinar.

So what we wanted to cover off here as well is what an employer can do if an injury does occur in the first instance before we get to the point of a common law claim. So immediately after an injury there are some practical steps that an employer can take when dealing with a workplace injury for the first time. So talk to your employee. Let them know that you are there to help. Don't blame and just support them through that process. Get them the medical assistance they need whether that's some immediate first aid and early intervention really is important there.

During that recovery phase do what you can to offer as many return to work options. So it might be in a different area of the workplace. It might be in some lighter duties or it might be rotating to different duties during the day. Keep

talking to the worker about their progress as well. So staying in touch with them is really important so that they maintain that connection with the workplace given that that's where we spend the majority of our day. Plan for their return to work. So develop a list of duties based on what their skillset is and you might even take that opportunity to cross skill them in a different area of the business that might suit with what their restrictions are.

Get input from the worker and their doctor so that we're covering off on what they can do during that return to work process and make sure that we're upgrading that through the return to work process. The actual return to work – so supervisors and co-workers need to understand that they are injured and they may still have some limitations. So making sure that that culture within the workplace where they're returning is supportive and that they're not going to be asked to do things outside of those restrictions.

Reviewing and improving – so an employee's feedback is useful to improve any systems or processes in the workplace. So if you do happen to sustain an injury get their advice on how that process went and how we could improve that if an injury was to occur again in the future.

One of the questions coming through we've had as well is on the manual handling side of things. So certainly a lot of information available on a program called PErforM that Workplace Health and Safety provides information on their website and we can provide some links to that information in the post webinar information as well.

Another query we've had is on the slides and whether they'll be available after today. As I've said we will provide a copy of the webinar on the website afterwards. So watch out in the next few days for that. We'll have hopefully a copy of the slides and a recording of the session as well.

Kara Thomson: Just to address some of the questions that are coming through, one that we've received is whether training attendance sheets being signed by a worker is enough. I think through the examples that we've given we've highlighted that it is good evidence to show that they have actually attended training by having them sign those sheets. But it's useful for us to know what actually the content was of that training so that we can use that for the purpose of defending a

claim and discharge or show how the discharging of the duty of care comes into play in terms of any claim.

Did you want to add anything Tony?

Tony Park: No Kara probably not. But there's another question here. It's "What do you do if a worker gets hurt and doesn’t ever come back, no medical certificate given to an employer? How does a WorkCover claim get made?" Look there are probably a number of aspects to that I suppose but you can't force the worker to bring a claim but certainly you would record. If you genuinely think that a worker has been hurt at work you would do a report in relation to that. If the worker doesn't bring a statutory WorkCover claim they might still at some later stage try to bring a common law claim.

They would still have to demonstrate that they had suffered an injury within the meaning of the Act. But if you've got some documentation of it – it may be a matter of communication as well, talking to the worker and just seeing what's going on, whether they're coming back to work and really what their story is. But I think in that situation initially it's a question of documenting what you do know at the time and you can't work miracles but it's important to have that at least if it does arise again further down the track.

Facilitator: Could you even say in that example Tony that having the clear processes of reporting of an injury and documenting of that and evidence that that process is followed in the workplace then the absence of any documentation in itself says something about the injury not being reported?

Tony Park: I'd agree Melissa and I've had this situation where a claim eventuated some six years after an event where there was no recording and it made it very difficult and of course recollections fade. So it's evidence of a good system if you've got this type of incident report as you go along even though there isn't a claim.

Kara Thomson: The other question that we've been handed is the cleaning of spills in the workplace where the employer is engaging contractors to come in and undertake tasks in relation to cleaning it up. What would be considered a reasonable time in relation to the cleaning of those spills and how should they be documented? To give you an example shopping centres often have checklists. So the cleaners will walk around and they'll complete checklists as

they go to document what they have actually inspected and what action they've taken. It might be the case that in a shopping centre environment a rotation of the inspection of around 15 minutes or so. Maybe something a little bit less might be reasonable.

In terms of an employer - employee relationship the duty is much stricter in terms of what an employer is obliged to do. So it'll be relevant to ensure that you've actually shown the workers what the risks are and the need to keep an eye out and if they do notice something what action to actually take. So it's a little bit different in that respect and the documentation that you would have may not necessarily be a checklist if your workers are walking around the workplace and ticking off on it. It might be documented training and incident reporting or a diary management system so that the workers have somewhere to record where there has been some issues and what action has been taken.

There's no real set time limit in relation to those rotations and it will depend on each individual workplace as to what might be appropriate as to how often a worker might actually walk around and inspect the floor.

Tony Park: I'd agree with that Kara. It does depend. If you're talking about a place where spills are really prevalent that you would need a rotation that is a fairly short duration and that 15 minutes has come up in a few cases.

[Refer to Slide 28.] Look there's another question here. "If a worker continues to work when instructed by their doctor not to are they considered to be contributorily negligent in aggravating their injury?" Look it's possible that a finding could be made. It's difficult to establish contributory negligence generally against claimants. But if it was a flagrant disregard for example someone had had lumbar surgery and was really precluded from manual handling work and they've persisted anyway and needed surgery again, I think you would have a serious argument. I know that's a fairly extreme example but you would probably need that sort of situation to be confident of a finding. I hope that answers that question.

Kara Thomson: The next question we've received is "If training is evident how does the employer prove that the employee understands their obligations in relation to that training?" That's a very good question. It's all well and good to have your documentation all in order saying that you've provided the relevant training.

The way that you might prove how they understand it is perhaps talking to the other workers in the workplace and gauging how they actually perform on a day to day basis.

So if for example in that case a common law claim had been pursued it might be that we would talk to their supervisor or a co-worker and ask them questions about how they perform day to day tasks and whether they had previously reported any incidents or engaged in any of those policies or procedures that the employer might have. And that would be a way that we could demonstrate that whilst the training had been given there had been a clear understanding of what their obligations were as they've complied with them in the past as well.

Tony Park: Look the only thing I'd say in addition to that is that we act for a large retailer who have great systems and they have periodic job observation sheets where they just go around and look at the core tasks. And they do it periodically. They might do it every 12 months or 18 months so they can see if there's any deficit between the training and systems and what's happening at the coal face. So that's another way of having a look at that.

I think we might be out of questions at the moment Melissa.

Facilitator: Yep. No that's great. Thank you very much Tony and Kara. I want to thank you for coming along and thank you everyone for joining us this morning and taking the time to listen in and share your questions as well. As I said if there are some additional questions we haven't got to we will share those on the website in the coming days with the slides and the recording of today's session.

[Refer to Slide 29.] Before ending the webinar though we would ask everybody to take a few moments to provide feedback on today's session and any suggestions for topics or formats for future sessions. So please take five minutes to pop your answers through that short webinar feedback information.

Take a look on our webinar and event videos on the website to learn more on similar topics. There are some other webinar recordings on common law topics specifically if that's what you are interested in and certainly we will take a look at the feedback particularly for accommodation and food services when

we're looking at any future planning of events. So please take the time to pop that in and give us your feedback on what you'd like to hear from us about.

Thank you very much Tony and Kara again. Thank you everybody for joining us.

Tony Park: Thanks Melissa.

Kara Thomson: Thank you.

Tony Park: Okay. I hope everyone has a good morning.

[End of Transcript]