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Slip, Trip, and Fall – Managing These Cases in a Retail, Restaurant or Hospitality Environment

Slip, trip, and fall incidents are common in the retail, restaurant, and hospitality environments. How can they be prevented and what factors are involved in determining the liability for any claimed injuries by employees? This session addresses those topics and more as it provides a better understanding of how a biomechanical engineer evaluates slip, trip, and fall cases specific to employees in retail, restaurant, or hospitality environments. We will also look at the engineering codes and standards and labor laws for different scenarios. Proactive measures for safe working environments as a documentation for liability will also be discussed.

I. Risk Transfer Strategy

Pre-Accident Planning

While in the planning stages of any new project, it is critical to envision the various “what-ifs” that could create liability stemming from the use of your products, from your property, from your employees, or from your vendors and guests. One of the best preventive measures is the use of clear contractual language in dealings with tenants, contractors and suppliers. But too frequently we see a contract that the proponent has revised so many times over the years that it has inadvertently create a Frankenstein monster. Thus, the importance of reviewing, streamlining, and updating your contracts cannot be overstated.

Understanding the Threats

In the realm of insurance and indemnity, change is constant for insurance policies and the way the case law interprets those policies. So too your contracts should evolve not only to *adapt* to the new normal, but to stay ahead of it. Moreover, it is common for your risk transfer target to resist your efforts, and disagree with what you believed to be a common understanding of the contract requirements.

Planning for Solutions

Part of the solution is understanding indemnity clauses, including the use of consistent triggers, compliance with anti-indemnity statutes, and avoiding outdated language. Another part of the solution is understanding the insurance procurement issues, the ISO coverage triggers, and additional insured coverage triggers, and incorporating this knowledge into your contracts. Further, the inclusion of particular terms and language—language that may appear insignificant or address issues that appear beyond debate—can be extremely worthwhile.

II. Initial Investigation Strategy

Return on Investment is high from retention of a biomechanical expert

Case outcomes are typically enhanced when appropriate experts are retained. Biomechanical experts are key to best outcomes on slip and fall cases, especially in a retail, restaurant or hospitality setting given the multitude of consideration factors and potentially responsible parties. An expert should be retained immediately before evidence is lost or degraded. By determining, scientifically, the most probable cause of the fall, liability can be appropriately allocated, optimizing outcomes. Early assessment by an expert can also result in early ADR which also optimizes outcomes, especially if accompanied by additional leverage (e.g. motion for summary judgment, cross-complaint, offer of judgment, etc.).

The return on investment from biomechanical expert retention is clear, especially given the high dollar amount of medical specials assessed for even minor injuries, driving up plaintiff demands and verdicts in some venues. Causation assessment of the injury can span beyond the specific cause of the fall at a location. In some cases, there is a question whether the injury occurred on premises and a biomechanical expert can assess the possibility and probability of same, precluding payment when there is no duty to indemnify and assisting in the industry's pursuit against fraudulent claims.

Favorable responses from viable risk transfer and an investigation cornerstone

Many pursuits to transfer risk receive a delayed or unfavorable response, often due to a burden of proof argument. A comprehensive biomechanical expert report, allows for immediate and effective risk transfer as the standard for meeting the burden of proof of another's responsibility is much more likely to be met. Tenders may be as an additional insured, contractual, or equitable. Early tenders may transfer attorney fee responsibility at the onset of a case, allow the responsible party to avoid coverage issues by placing its carrier on immediate notice and conduct its own investigation before evidence is lost. An expert report can clarify whether a contract provision to defend, indemnify and hold harmless is invoked, whether "sole negligence" language in an additional insured endorsement applies, priority of coverage and allocation between multiple tortfeasors, etc. The breadth of responsible parties can include a tenant, an architect or builder, subcontractor such as for flooring, railing and lighting, a vendor such as snow removal, etc.

The biomechanical review is also a cornerstone investigation item. It supplements photographic and video evidence, weather reports, evidence in a smart phone or on social media posts, measurements, etc. Statements can be procured while witness memory is fresh and before potential witnesses become difficult to locate. An expert report can provide support and connect the dots between evidence regarding a fall.

Connection between a zealous defense and reputation

Insureds are more likely to stay with a carrier who they feel fully supported their best interest in a claim, and particularly in a litigated claim. As a lawsuit is public records, it can impact an insured's reputation, ability to secure a loan, allow for invasive discovery, etc. Retention of a biomechanical expert can satisfy an insured that a zealous defense is being pursued, all evidence is being given its appropriate weight, and all responsible parties are being pursued. With the proliferation of "reptile theory" tactics by plaintiff counsel, the expert approach and report can also refute those non-scientific approaches and support appropriate, limiting motions in that regard.

The carrier will also enhance its reputation with plaintiff attorneys that it will investigate each claim with appropriate experts and expect all responsible parties to pay their fair share, including plaintiffs relative to comparative liability.

II. Reducing Risk of Workplace Accidents Slip/Falls

While accidents can happen anywhere, the risk of an accident can be reduce with planning and prevention process. The retail, restaurant and hospitality industry faces more risk than many other industries for workplace accidents. The National Floor Safety Institute (NFSI) found that over 3 million employees are injured each year from slip and fall related accidents costing employers \$70 billion annually. In fact, the Occupational Safety and Health Administration (OSHA) says slip-and-fall accidents cause 15 percent of all accidental deaths, about 25 percent of all workplace injuries and more than 17 percent of all disabling injuries on-the-job.

According to OSHA, most slip-and-fall accidents that occur in the workplace are avoidable. In addition to carrying adequate worker's compensation insurance, safety should be a priority to avoid claims and reduce the chances of accidents.

Inspections and training

Staff training is central to reducing accident risks. Also, routine and regular inspections to ensure a safe work environment is critical to minimizing risks of employee injury.

Slips and Falls

Kitchen areas in restaurants carry high risk of injury. Kitchens often have slippery floor areas, debris, and grease buildup that contribute to slips, trips, and falls. If not maintained, serious injuries can follow. Important Mitigation Steps Include:

- Placing warning signs regarding slippery floors;
- Keeping countertops and walkways free from clutter and debris;
- Cleaning food spills and debris as soon as possible; and
- Checking all water sources, drainage and plumbing systems for leaks and immediately rectify any issues.

Key points to reduce workplace slip and falls to prevent and/or mitigate against Employee accidents:

1. Design the workplace to prevent slipping and tripping hazards.
 - Have well-lit work areas, aisles and paths that workers travel well lit
 - Have sufficient lighting and hand rails in stairwells

- Have slip-resistant flooring on stair treads, ramps and other high-risk areas.
- Make sure step edges and elevations changes are brightly marked.
- Utilize non-slip mats where employees may encounter wet flooring, such as at entrances, particularly in winter months, kitchens and employee restrooms or around sink areas.
- Entrance way mats should be secured to floors and should be large enough for several footsteps to fall on the mat before shoes contact bare flooring.
- Floors and wall openings in work areas should have railings, markings, toeboards, and covers, as required by OSHA regulations.

2. Design work systems/processes to prevent potential exposures to slipping and tripping hazards.

- Equipment that discharge liquids, oils, or particles should be designed to prevent slipping hazards on workplace floors.
- Work surfaces should have raised or lipped edges to contain spills.
- If jobs require working with fluid, provide platforms on which to stand, non-slip mats, or other dry places to stand.
- Cords, cables, hoses, and tubing should not cross walkways creating trip hazards.

3. Housekeeping and grounds-keeping should work to prevent slip, trip and fall hazards.

- Maintain housekeeping and grounds-keeping schedules, sound policies and adequate staffing levels that ensure worksites are routinely inspected in a timely manner.
- Keep work areas clean and dry.
- Remove obstructions from walkways, and corridors.
- Provide and require that workers use fall protection equipment for work on roofs, ladders or other elevated surfaces.
- Gravel, stone, mulch and other bedding materials should be kept out of walkways. Avoid using gravel or stone in landscaping due to tendency to scatter.
- Repair broken or loose paving stones, bricks, tiles, and flooring to prevent trip hazards.
- Place signs and well-marked barricades around holes or ditches to prevent falls.

4. Have adequate plans for snow and ice removal.

- Have sufficient staff and scheduling to remove and abate ice and snow hazards in parking lots, walkways and garages.
- Utilize additional mats in entrances during winter months and when it rains.
- Use clearly labeled bins filled with ice melting chemicals and tools in areas of heavy pedestrian traffic to ease use for all employees in abating snow and ice in high traffic areas.
- Communicate with employees concerning winter weather warnings via text, email or other means to alert them to snow and ice possibilities and proper footwear and precautions.

4. Conduct employee training on slip-and-fall and trip-and-fall accident risks prevention. Focus should be on:
 - Avoid hurrying and/or rushing.
 - Avoid engaging in horseplay.

III. Causative Factors of slip, trip and fall incidents

Slip, trip, and fall incidents are common in the retail, restaurant, and hospitality environments. Understanding the causative factors involved for any claimed injury will help to reduce the occurrence of those incidents. Investigations of slip, trip and fall claims typically address the cause of the accident and the claimed injuries. Each case must be decided upon based on the specific facts incident while taking into account the claimant's behavior. Accidents, including those in the retail, restaurant, and hospitality industries, involve a number of factors related to engineering, biomechanics, human factors and the environment, such as building codes, the weather, and illumination. A comprehensive analysis of these factors can help evaluate the cause of the slip, trip or fall accident and if there is any objective evidence to support or refute the claimed injuries. If there are objective findings to support the claimed injuries, the analysis will then determine the proximate cause of the claimed injuries.

Human Factors and Gait

Understanding the manner of the fall incident is the first step in investigating a specific claim. This includes the difference between the mechanisms associated with a slip and trip as well as the kinematic differences for each event. Biomechanics research shows that walking has a predictable pattern. During normal walking, a slip occurs when there is insufficient friction between heel of the leading foot and the walking surface, causing the foot to slide forward. When this happens, body's center of mass is behind the base of support and therefore the body will fall downward and rearward. When a trip occurs, the swinging leading foot is impeded by an obstruction. The body's center of mass continues to move forward past the base of support. If balance cannot be restored, the body will fall forward.

Environment

Premises such as retail stores, restaurants, and hotels can reduce the risk of slip, trip and falls as well as mitigate liability by following building codes, design standards, and maintenance practices. Specific to slips and trips are codes and standards addressing the slip resistance of walking surfaces, like ramps and stairs, and floor levelness that reduce obstructions along the travel path. As it pertains to the incident investigation, it is important to refer to codes from the year a building was built or part of a building was renovated. In addition, states or even cities may adopt codes with amendments specific to their jurisdiction. Other standards specifically address work environments and guidelines for safe working conditions. Finally, understanding the mechanism of the fall is important in identifying the particular codes that may or may not have been violated.

Understanding how an employee is using the work space is a key factor in reducing the risk of injury. The use and job tasks within a space should dictate the design and maintenance of a space, not only for a patron, but for employees as well.

Injury Biomechanics

An injury mechanism is the mechanical process that causes a specific injury to occur. An injury mechanism takes into account the direction and magnitude of the load applied to cause physiological trauma. It is important to recognize the typical areas of the body that may be injured for each manner of falling. The body falls rearward when a slip occurs, therefore injuries are typically on the posterior side of the body, such as the head, wrist, elbow, and low back. When a trip occurs, the body falls forward, therefore injuries are typically seen on the anterior aspect of the body, such as the knee, elbow, shoulder, and wrist. Obtaining information in regards to activities of daily living will establish the injured party's personal tolerance for a person specific analysis as well as identify alternative injurious activities.

It is important to keep in mind that some work activities are repetitive in nature and therefore may contribute to certain types of injuries. Identifying those workloads as well as using the proper form when performing these tasks will ensure that they are within the physiological limits of the specific tissues involved.