

# BEST PRACTICES FOR HANDLING ACCIDENT INVESTIGATIONS

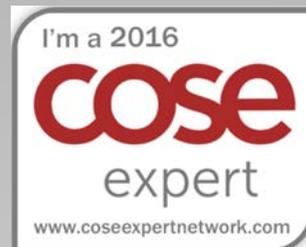
NEO Safety Council Meeting

November 9, 2016

*Julie Sumner, Principal & Founder*

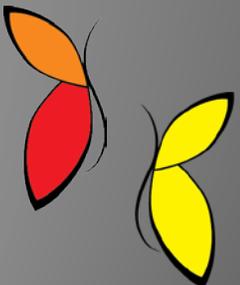
Monarch Endeavors, LLC

Monarch Safety

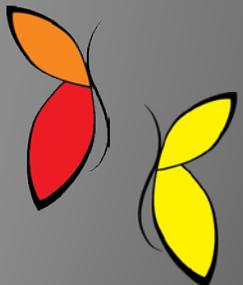


# IMPORTANCE OF PROMPT, THOROUGH INVESTIGATIONS

- Increasingly litigious society
- Most lawsuits do not get filed until years after an accident or injury
- Memories fade, people disappear
- Can be a defense
  - OSHA investigations/citations
  - Intentional tort claims
  - Negligent investigation claims
  - Negligent hiring, retention, or supervision claims
  - Whistleblower claims

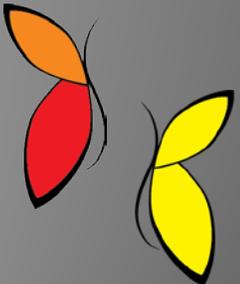


# INVESTIGATIONS – GENERAL GUIDELINES



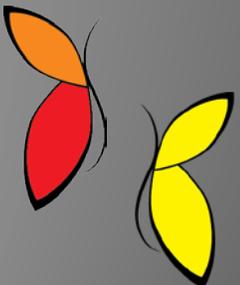
# INVESTIGATIONS - GENERAL GUIDELINES

- Understand – and FOLLOW – your Company’s procedures for investigating an accident or injury
  - If you do not follow the process, that fact alone may come back to haunt you
  - Conduct all investigations consistently – same process, same manner, same format for all documents
- Make sure your procedure also includes:
  - Process for collecting and storing physical evidence
  - Documenting the scene of the accident when you cannot close off the area or have to put the equipment back into service
  - Placing machines/equipment back into service
  - Notifying any parties of the accident prior to putting equipment back into service



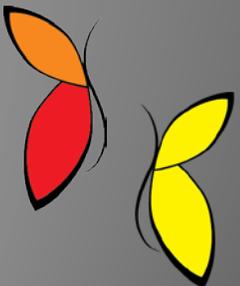
# INVESTIGATIONS – GENERAL GUIDELINES

- Be careful about jumping to conclusions
  - Stick to the facts; do not add opinions or guesses
  - If you must (i.e., root-cause analysis), use hedging language:
    - “Based on the information available at this time . . .”
    - “Our initial investigation reveals that . . .”
    - “We have not yet completed a full investigation. As such, the conclusion(s) reached in this initial report may change as the investigation progresses.”
  - Run draft investigation reports past counsel to ensure that minimizing risk of liability
- Do not make snap decisions regarding discipline, termination, etc.
- Remember – all documents associated with an investigation are not confidential
  - Think about who will/could see them one day
  - Attorney-client privilege
- Notify insurance carrier, if applicable, as soon as possible



# INVESTIGATIONS – INITIAL STEPS

- Obtain emergency assistance if necessary
- Contact company's emergency response team (if not on the scene)
- Evacuate the area and cordon off the accident site
- Preserve the scene and any physical evidence
  - If OSHA has been notified, leave as is before continuing with internal investigation
  - Take necessary precautions re: bloodborne pathogens
- Photograph/video as much as possible
- Isolate witnesses (if possible)
- Consider implementing crisis communication plan



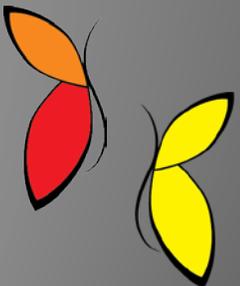
# PHOTOGRAPHS – IMPORTANCE

- Provide direct, neutral evidence of what happened
- Last long after memories fade
- Can provide perspective versus recollections from memory
- May capture details that did not seem important at the time, but later turn out to be critical
- May serve to rebut unfounded allegations
- Can minimize risk of spoliation claims



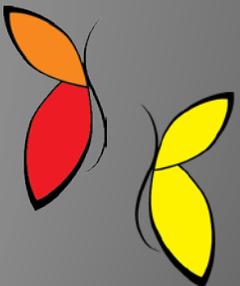
# PHOTOGRAPHS – WHAT TO TAKE

- The scene – put it in context
- Injuries (if feasible)
- Weather conditions
- Damage to property or equipment
- Distance between objects
- Size of objects
- Lack of anything that should be present (i.e., employee not wearing proper PPE, not locking out machine, removed guard, etc.)



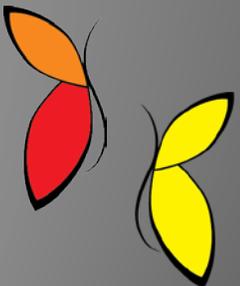
# PHOTOGRAPHS – RECOMMENDATIONS

- As soon as possible after taking photographs:
  - Print them off and write down descriptions on back (or upload to software program that lets you add notes)
    - “This photograph was taken standing at the east door of Plant No. 1, looking northeast toward the mold line.”
  - Include notation regarding what you were trying to capture (particularly if it is not apparent from the photograph)
  - Time-stamp the photographs if the camera/software program does not
- Download photos onto flash drive or secure server
  - Make sure only those with “need to know” have access
- Ask employees to forward photographs that they took



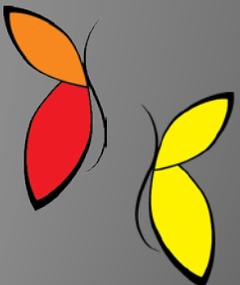
# PHOTOGRAPHS – WORDS OF CAUTION

- Could show a biased investigation if only taken from one perspective or certain pictures omitted
- Much harder to “impeach” a photograph than a witness
- To minimize the potential for this to occur:
  - Make sure photos clearly depict what they are supposed to depict, i.e., distance is accurate, picture is clear, etc.
  - Review photos to ensure that witnesses’ recollections correlate with the photos – use the photos during witness interviews
  - If a witness references a photograph in a statement, attach a copy of the photograph to the statement



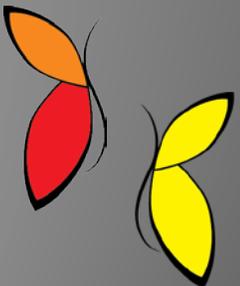
# VEHICLE ACCIDENTS

- Company vehicles should include accident kits:
  - Disposable camera (or employees can use their phones)
  - Checklist of information to obtain, i.e., insurance information, names, phone numbers, make and model of car, etc.
  - Contact numbers for supervisors or others who need to be notified
  - Contact numbers for tow trucks, AAA, etc.
- Take photographs of cars involved from every angle
  - Use landmarks to give perspective
- Have employee evaluated by a physician
- Caution employees against admitting fault to minimize risk of waiver of insurance



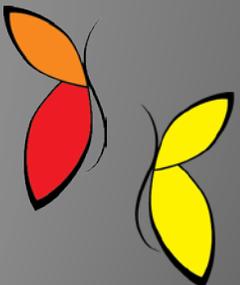
# WITNESS STATEMENTS - IMPORTANCE

- Locks the witness into facts at the time
- Help to substantiate what happened (or did not happen)
- Minimizes a plaintiff's ability to change the story during a subsequent lawsuit
- Demonstrates the evidence upon which the results of the investigation were based
  - Important because may allow company to avoid liability based on allegations or evidence produced after the investigation was concluded



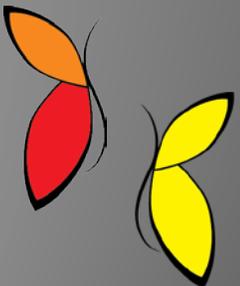
# WITNESS STATEMENTS – A FEW WORDS ABOUT THE INTERVIEW ITSELF

- Do NOT ask employees to keep the interview or the investigation confidential
- Do NOT promise confidentiality to any witness
- Weingarten rights
- Garrity Rule
- Having another person present in the interview room
- When to have an independent third-party conduct the investigation/interviews
- Make sure to cover retaliation with each witness



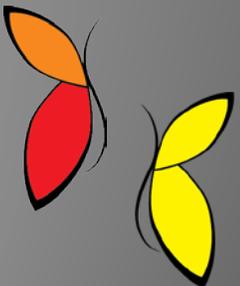
# WITNESS STATEMENTS – GENERAL GUIDELINES

- Should be as detailed as possible, but limited to what was actually observed – NO OPINIONS!
- Best if in the person's actual handwriting – harder to dispute later
- Signature and date
- Notarized or witnessed
- Statement that voluntarily and freely given, as well as complete and accurate
- Use consistent format for all witness statements



# WITNESS STATEMENTS – WHO TO OBTAIN THEM FROM

- People involved in or witnessing the accident or incident
- Person reporting the accident or incident
- Anyone accused of or suspected of wrongdoing or misconduct
- Any third parties involved in the accident or incident
- Any other person with information potentially relevant to the incident



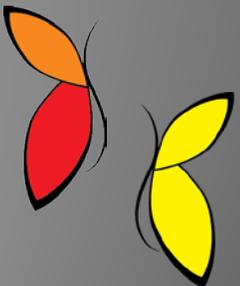
# WITNESS STATEMENTS – COMMON MISTAKES

- Nickname or only first name used
- Printed name not included – illegible signature
- Use of acronyms or company terms known only to those in the industry or company
- Jumping to conclusions
- Not amending statement if further investigation reveals inaccuracies, inconsistencies, etc.
- Not incorporating photographs or other physical evidence into statement
  - Attach copies and refer to it in statement (i.e., “See Photograph A, attached)”)



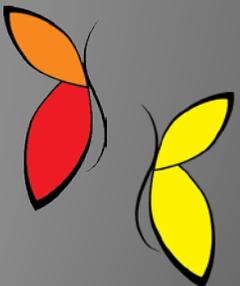
# PHYSICAL EVIDENCE – GENERAL GUIDANCE

- Preserve it!
- Use Ziploc bags for smaller items and label accordingly
- Store in weather-safe environment
- Create a chain-of-custody log
- If you cannot store it, document thoroughly with photographs, video, etc.
- If multiple parties involved, use an Evidence Preservation Agreement



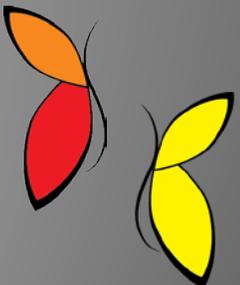
# DOCUMENTARY EVIDENCE

- Could include:
  - Work rules
  - Training documentation for individuals involved
  - Safety meetings, toolbox talks, etc. that reference any issues involved in the incident
  - Job-safety analysis/Job-hazard analysis
  - Time records
  - Video surveillance
  - Photographs taken by other employees
  - Prior disciplinary records of involved employees



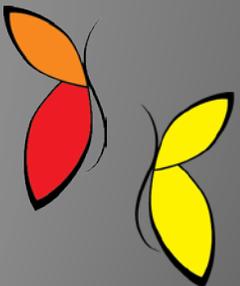
# HOW TO KNOW WHEN YOU'RE DONE

- Suspected causes have all been fully investigated
- All identified witnesses have been interviewed and re-interviewed (if necessary)
- All evidence has been collected
- Inconsistencies have been resolved
  - If cannot be resolved, an explanation has been obtained for the inconsistency (i.e., difference in eye-witness testimony)
- Question to ask:
  - If a jury or a plaintiff's attorney was reading the report, would they say: "Why didn't they . . ."



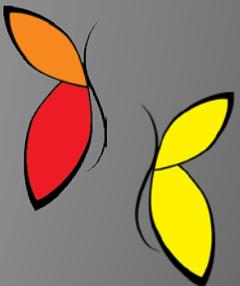
# IMPORTANCE OF THE REPORT

- Identifies the important information that was collected
- Ensures that important information is collected while fresh
- Cements facts as they occurred at the time
- May be used years later in a lawsuit
- Can be used to support company's defense
- Can show the intention of the company at the time
  - Double-edged sword



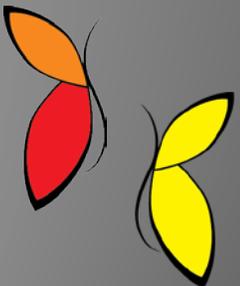
# THE REPORT – GENERAL GUIDELINES

- Information that should be recorded :
  - Who, what, where, when, how and why
- Write it as though someone with no familiarity with your industry is reading it
  - Spell out acronyms (at least the first time used) or include a glossary
    - Monarch Endeavors (“ME”)
  - Describe location
    - “The Pit”, located in northern most point of Plant No. 1, next to the molding area.”
  - Use full names – no nicknames, first names only, etc.
  - Use position titles



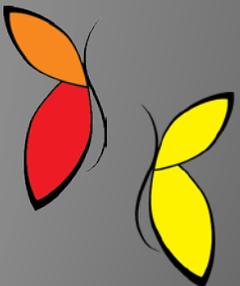
# THE REPORT – GENERAL GUIDELINES

- Make sure date, including the year, is included on the report!
- Proofread for typos, grammatical errors, etc.
  - Remember, a jury, judge, plaintiff's attorney may be reading it someday
  - Silly errors can reduce credibility
- Make sure that any inconsistencies are explained (or investigated further)
- Review for thoroughness
  - Any holes that haven't been filled or explained?
  - Any questions left unanswered?
  - Any necessary witnesses not yet spoken to?



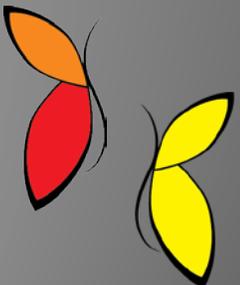
# THE REPORT – SUGGESTED FORMAT

- Description of what happened
- Person(s) involved and position titles
- Date and time
- Suspected causes
- Company policies/procedures implicated
- Investigative actions
- Investigative findings (lined up with suspected causes)
- Conclusion
- Recommendations going forward



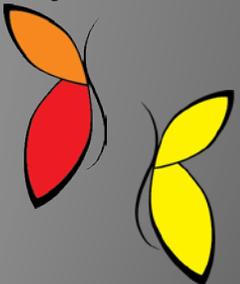
# THE REPORT – DISCLOSURES/LABELS

- May need to be marked “Attorney-client privileged”
- May need language indicating “To be viewed by authorized personnel only”
- Should have statement at the top that reads: “NOT TO BE PLACED IN EMPLOYEE PERSONNEL FILE”
  - Disciplinary documents can be placed in employee personnel files, but ONLY the disciplinary documents



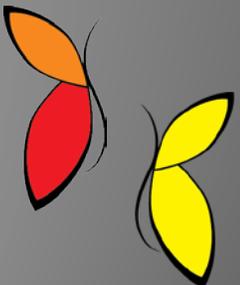
# AFTER THE INVESTIGATION

- Communicate the results of the investigation to pertinent individuals
  - Injured employee
  - Anyone disciplined
- To other employees, let them know the investigation has concluded and any changes to any procedures or policies that are being made
- If you recommended that any actions be taken, make sure you follow through and complete them
  - Document that you did so!
- Follow up with injured employee and affected employees periodically afterwards



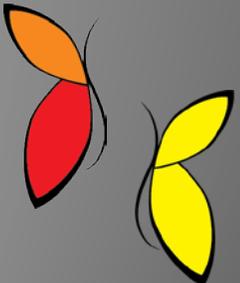
# LIABILITY

- Company versus Individual
  - Generally only company can be held liable
  - Some causes of action can be pursued against an individual employee (generally of management level)
    - Ohio Revised Code Chapter 41 defines “employer” as “any person employing four or more persons or anyone acting directly or indirectly in the interest of the employer”
    - Intentional tort suits
    - Accidents involving third-parties (not co-employees)
    - Defamation
    - OSHA criminal penalties
  - Subsequent remedial measures



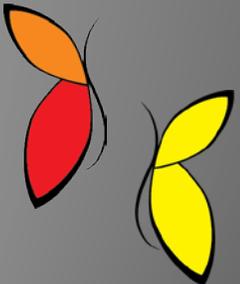
# OUTSIDE INVESTIGATIONS

- Review and check what others publish
  - Subcontractors, insurance carriers, manufacturer, repair company, etc.
  - Subcontractors and vendors – put in contract/service agreement that they are obligated to share reports with you
- Do not assume that what others publish is complete or accurate
- Correct and supplement any inaccurate publications in a timely manner
  - If cannot do publicly, at least document internally why it is incorrect
- A belated response is typically deemed as self-serving or unreliable

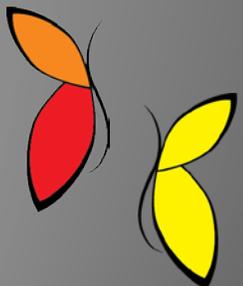


# CRISIS COMMUNICATION

- Have a plan in place BEFORE a bad accident occurs
- Elements of a crisis communication plan:
  - Point person for contacting family of injured employee
  - Point person for interacting with the media
  - Security issues regarding premises (keeping camera crews out, where employees and family members can congregate, etc.)
  - Point person for contacting authorities
  - Contact information for authorities, counselors, etc.
  - Process for issuing press releases, including identification of who has to approve (should also be run by counsel)
  - Process for notifying employees of developments
  - Process for notifying customers of incident, any adverse impact on business, and actions company is taking to rectify

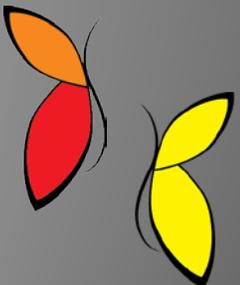


# INVESTIGATIONS – OSHA CONSIDERATIONS



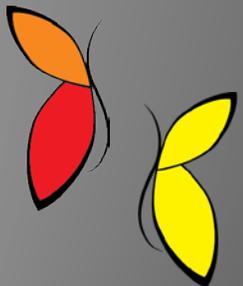
# INVESTIGATIONS – OSHA CONSIDERATIONS

- Current Reporting Requirements
  - Fatality – within 8 hours of the fatality or when employer learns of fatality
  - In-patient hospitalization, amputation, or loss of an eye – within 24 hours of the incident
  - Can be fined for failing to report
    - Recent willful citation issued to Cotton Commercial (Texas) for failing to report an in-patient hospitalization within 24 hours
      - Company waited three days before reporting
      - Proposed fine of \$70,000
- If any doubt – report
- If you are not obligated to report, but OSHA is likely to receive a call from someone else, it is better if it comes from you



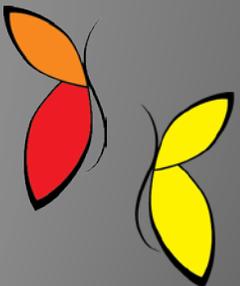
# INVESTIGATIONS – OSHA CONSIDERATIONS

- Electronic Submission of Records
  - Employers with 250 or more employees:
    - Will have to submit information from 300a by July 1, 2017
    - Will have to submit information from 300 log, 300a, and 301 reports by July 1, 2018
    - Annually thereafter by March 2<sup>nd</sup>
  - Employers with 20-249 employees:
    - Will have to submit 300a by July 1, 2017 and again by July 1, 2018
    - Annually thereafter by March 2<sup>nd</sup>
  - Employer must have “reasonable reporting requirements”
  - New anti-retaliation provision included in new regulations
  - Guidance on mandatory post-accident drug testing



# INVESTIGATIONS – OSHA CONSIDERATIONS

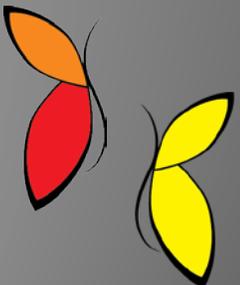
- While OSHA is on the premises:
  - Accompany the OSHA investigator at all times
  - Take notes of any questions asked by the investigator
  - Take photos or videos of anything OSHA photographs or videotapes
  - If OSHA identifies a potential hazard, fix it immediately and obtain acknowledgment from OSHA that it was corrected
    - If it cannot be fixed immediately, do it as soon as possible and send the OSHA investigator proof
  - Be honest and cooperative, but do not volunteer information



# INVESTIGATIONS – OSHA CONSIDERATIONS

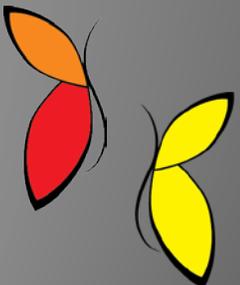
- Multi-Employer Policy:

- Creating employer – the employer creating the hazard is liable regardless of whose employees are exposed or injured
- Exposing employer – an employer who exposes its employees to a hazard is liable if it:
  - Knew of the hazard or failed to exercise reasonable diligence to discover it;
  - Failed to take steps to protect employees;
  - If the employer had authority to correct the hazard, it must have done so;
  - If no authority, employer must have:
    - Asked the creating/controlling employer to fix the hazard;
    - Informed employees of the hazard; and
    - Taken reasonable alternative measures to protect employees



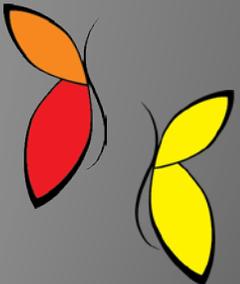
# INVESTIGATIONS – OSHA CONSIDERATIONS

- Multi-Employer Policy:
  - Correcting employer – if an employer is engaged in a common undertaking on the same jobsite as the exposing employer and is responsible for correcting the hazard, the correcting employer must have taken reasonable care in preventing/discovering violations
  - Controlling employer – if an employer has general supervisory authority over jobsite, the employer must have exercised reasonable care to prevent/detect violations on the jobsite
    - Reasonable care is determined by whether the employer:
      - Conducted periodic inspections of appropriate frequency;
      - Implemented an effective system for promptly correcting hazards;
      - Enforces other employers' compliance of health and safety requirements with effective, graduated system of enforcement and follow up



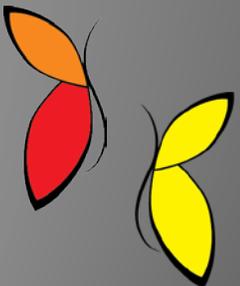
# INVESTIGATIONS – OSHA CONSIDERATIONS

- Affirmative Defenses:
  - Impossibility/Infeasibility of Compliance
    - Compliance with the requirements of a standard is impossible or would prevent the performance of required work
      - Employer must show that it took reasonable alternative steps to protect employees, or that no alternative means of protection was available
  - Greater Hazard
    - Compliance with a standard would result in greater hazard(s) to employees than would noncompliance
      - Employer must show that it took reasonable alternative steps to protect employees, or that no alternative means of protection was available
      - Must also show that an application for a variance is inappropriate



# INVESTIGATIONS – OSHA CONSIDERATIONS

- Affirmative Defenses:
  - Unpreventable Employee or Supervisory Misconduct or “Isolated Event”
    - Employer must show:
      - It has a work rule adequate to prevent the violation;
      - The work rule was effectively communicated to all employees;
      - The employer had methods for discovering violations of the work rule; and
      - It effectively enforced the rule when violations were discovered



# QUESTIONS?

- Feel free to contact me:

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