



Litigation Report

Federated's Litigation Report provides you and your staff with an opportunity to review actual claims and their outcomes. Due to the personal nature of the information contained in these reports, we request that they not be disbursed beyond your organization and are shared only with appropriate personnel. The names of the cooperative, staff, and members have been changed.

We hope that these examples provide you with information you can use to eliminate or minimize serious safety events and that it becomes an important tool in educating your employees and promoting safety throughout your system.

We suggest you review this claim as an educational topic for management and supervisory personnel as well as during safety meetings.

Situation:

John Doe was electrocuted while trimming trees when a limb fell on an ABC Electric line while also in contact with his pole saw. Jenny Safe at ABC Electric went to the scene to gather information, including measuring the lines in question. She also notified Carrie Terry at the statewide organization and asked that she help her with the investigation. Terry went to the scene and took her own measurements and photos. After the initial site visit, Safe then notified Federated, who retained defense counsel to direct the investigation. Unbeknownst to defense counsel, Safe and Terry continued to correspond about the accident and subsequent investigation. Terry ultimately prepared a report which documented her measurements and as well as the distance between the trees and lines. Her report noted that ABC's lines did not violate any provisions of the NESC but recommended that ABC inspect its lines more frequently and implement a more aggressive vegetation management program. In response to this report, Safe emailed Terry to say that she appreciated her input and that it looked like ABC "missed this section of line for whatever reason." She also forwarded defense counsel's thoughts on the accident to Terry. During discovery, ABC was forced to produce not only the emails between Safe and Terry and between Safe and defense counsel (with Terry copied), but Terry's report which pointed out potential flaws in ABC's vegetation management program.

Lessons Learned:

The above scenario illustrates potential issues that can arise when third parties are involved in accident investigations on liability claims. Occasionally, statewide personnel are requested to attend or assist with a site inspection or accident investigation. By itself, this is not a bad thing and may be helpful if cooperative personnel are inexperienced or unfamiliar with accident investigations. However, when a third party organization such as a statewide is involved with the investigation, there are some special considerations. Initially, please notify Federated first

before contacting the statewide organization or another third party (including another cooperative). Some other potential issues are highlighted below:

1. Regardless of who is involved in the investigation, it is important to keep in mind that investigations should always be limited to facts only along with photographs and maintaining any equipment or other physical evidence being removed from the scene. Any analysis of the facts should be done in conjunction with or at the direction of defense counsel. If Federated has not retained defense counsel (because the claim does not appear severe, etc.), any sort of root cause analysis should wait until the statute of limitations runs or the case is settled (which most likely will involve defense counsel). For most electrical contacts and other accidents involving serious injuries, Federated will retain defense counsel. If Federated has not retained defense counsel and you feel that would be beneficial for any reason, please let us know and we almost certainly will retain counsel to assist with the investigation. As an aside, when defense counsel is involved, there will frequently be downtime in depositions, mediations, inspections, or car rides. This is the time to get free legal advice and pick defense counsel's brain(s) on best practices, etc.
2. Please also keep in mind that any conversations between cooperative personnel and the statewide or other third parties are not subject to any sort of privilege. In the above case, any correspondence sent between Safe and Terry involving the accident would be discoverable. Copying defense counsel on communications to third parties does not invoke the attorney-client privilege since the communication involves a third party in addition to the attorney and client. Please discuss with defense counsel before communicating or sharing information about the claim with third parties.

The law differs by jurisdiction for communications between an insured, its insurer, and the attorney. However, a majority of states hold that communications involving the insured, insurer, and defense counsel are privileged. This is not an issue that comes up often, if at all, and we rely on defense counsel to advise us as to whether the jurisdiction has specific rules related to those communications.

3. In addition to the issues above, when more people are involved in the investigation, there will necessarily be more witnesses and more potential for conflicting or harmful testimony. Two people at the scene could obtain slightly different measurements or testify differently with regard to the NESC. In short, the more witnesses that testify, the higher the likelihood of unfavorable testimony (in addition to higher expense). Preparing a witness from a third-party organization can also be logistically difficult. Conversations between defense counsel and the statewide or other organization are not privileged and one of Plaintiff's counsel's first questions will be to ask what that third party witness discussed with defense counsel. This makes it more difficult to present a united front or consistent theme for the defense. Lastly, the more the

statewide or other organization's involvement is highlighted, the more likely it is that Plaintiff's counsel may try to add the statewide or other organization as a defendant.

In conclusion, when an accident happens, please notify Federated as soon as possible. Any investigation should be limited to facts only, irrespective of whether a statewide or other third party is involved. Please do not communicate with third parties about active litigation or open claims without first consulting with defense counsel or Federated. While the above scenario and issues generally apply to public contact/injury claims, it is still important to be mindful of the issues above when communicating with a third party about workers' compensation claims. If you have any questions or would like more information, please contact your Federated Safety & Loss Prevention Consultant.