

Root Cause Analyses: When Safety and Legal Concerns Collide for Marine Employers

Article By:

Matthew S. Lejeune

A primary component of many safety management systems is a root cause analysis (RCA). Following incidents and near misses, factual investigations are conducted. The findings of the investigation, as well as an analysis of the cause of the incident, are documented in an RCA. The RCA also typically recommends modifications to safety policies and procedures designed to prevent similar accidents from occurring in the future. The implementation of the recommendations of the RCA allows marine employers to constantly improve their safety processes, thereby mitigating risks.

RCAs do have potential drawbacks, however, particularly when litigation arises as a result of an incident. Plaintiffs routinely request copies of documents related to investigations of the incident, including RCAs. Because RCAs may contain findings that can be utilized in an attempt to establish that the marine employer's safety policies were less than perfect, RCAs are often used by plaintiffs as tools to establish the liability of a marine employer in personal injury cases. Refusing to conduct an RCA because of potential litigation risk is typically not an option because of the value of RCAs in ensuring the safety of marine workers. For this reason, marine employers should be aware of when an RCA may be discoverable and what information within an RCA may be admissible at trial so that the RCA process and drafting can be tailored accordingly.

Many marine employers involve in-house or outside counsel in the drafting of RCAs regarding major incidents from which litigation will likely arise. This is sometimes done in an attempt to create a privilege over the documents, which would prohibit the discovery of the RCAs. Courts have, however, found that such RCAs, even if drafted with the assistance of counsel, may not be privileged depending upon the facts of the case. There are two privileges that may apply to RCAs: the attorney-client privilege and the work product privilege.

RCAs, and communications made in connection with the drafting of RCAs, are protected by the attorney-client privilege only if the communications are made (1) between an attorney and a client and (2) for the purpose of obtaining and providing legal advice. The work product privilege shields from discovery the materials prepared by or for an attorney in anticipation of litigation. A document is considered to be prepared in anticipation of litigation if the primary motivating factor behind the creation of the document is to aid in possible future litigation. Factors routinely considered by courts in determining the primary motivating factor of a document are whether counsel is retained, whether counsel is involved in the generation of the document, and whether it was a routine business practice

to prepare that type of document. The work product privilege does not protect materials assembled in the ordinary course of business or related to the underlying facts of the litigation.

Transocean Deepwater, Inc. v. Ingersoll-Rand Company, 2010 WL 5374744 (E.D. La. Dec. 21, 2010) and *Chevron Midstream Pipelines LLC v. Settoon Towing LLC*, 2015 WL 65357 (E.D. La. Jan. 5, 2015) are two cases that clearly illustrate those RCAs that may be protected by privilege versus those that may not be protected. In *Transocean*, the RCA investigation was led by outside counsel. Counsel guided all activities and engaged in the drafting of the RCA by reviewing the initial draft, making revisions, and relaying the revisions to the client. Although Transocean prepared RCAs in a variety of situations, including those that did not involve litigation, the court found that the RCA was privileged. The court reasoned that because attorneys participated in the investigation and engaged in the drafting of the report, disclosure of the RCA would reveal the mental impressions of the attorneys.

In contrast, *Chevron* involved an RCA that was initiated by in-house attorneys through a "legal charter," which was a document organizing the RCA team and instructing the team to keep all investigation materials confidential. Testimony by Chevron employees established that Chevron routinely conducted RCAs in the ordinary course of business following any incident, and that the purpose of the RCAs was to prevent similar incidents in the future. A Chevron company newsletter was also circulated in which the RCA was cited noting that lessons learned from the incident would be applied. The RCA was the only internal investigation of this type being conducted, and outside counsel was conducting a parallel investigation simultaneously with the RCA investigation. Based upon these facts, the court found that while the RCA was, in part, prepared in anticipation of litigation, the primary motivating factor behind the RCA was to prevent similar future incidents. Thus, the RCA was not privileged.

In the event that a marine employer's RCA is determined to be nonprivileged and must be produced in discovery, certain information contained in the RCA may be inadmissible at trial. Subsequent remedial measures are not admissible at trial. Fed. R. Evid. 407. The purpose of this rule is to encourage companies to take steps to enhance safety. The application of the subsequent remedial measures rule to RCAs and similar investigative documents was addressed in *Walker v. Pioneer Production Services, Inc.*, 100 Fed. R. Evid. Serv. 851 (E.D. La. 2016). In *Walker*, the defendant sought to exclude from trial the admission of certain statements contained in a safety alert issued by the defendant after the incident. Such safety alerts are typically based upon recommendations found in RCAs. In finding that the exclusion of the recommendation found in the safety alert furthered the policies of Fed. R. Evid. 407, the court excluded statements regarding (1) how the incident could have been avoided had the crew taken certain safety measures, (2) reminders to follow certain safety procedures, including steps to be taken to ensure compliance, and (3) instructions to identify similar potentially hazardous conditions and methods to mitigate same.

In the event of a major marine incident, marine employers are often compelled from a safety perspective to discover the cause of the incident and implement measures to help prevent the occurrence of similar events in the future. It is important for a marine employer to contact in-house or outside counsel immediately following an incident and prior to the initiation of an RCA investigation to determine the best way to balance the safety of its employees with the legal exposure of the company. The involvement of outside counsel at the outset of an RCA investigation may prevent disclosure of such RCA reports.

Source URL: <https://natlawreview.com/article/root-cause-analyses-when-safety-and-legal-concerns-collide-marine-employers>