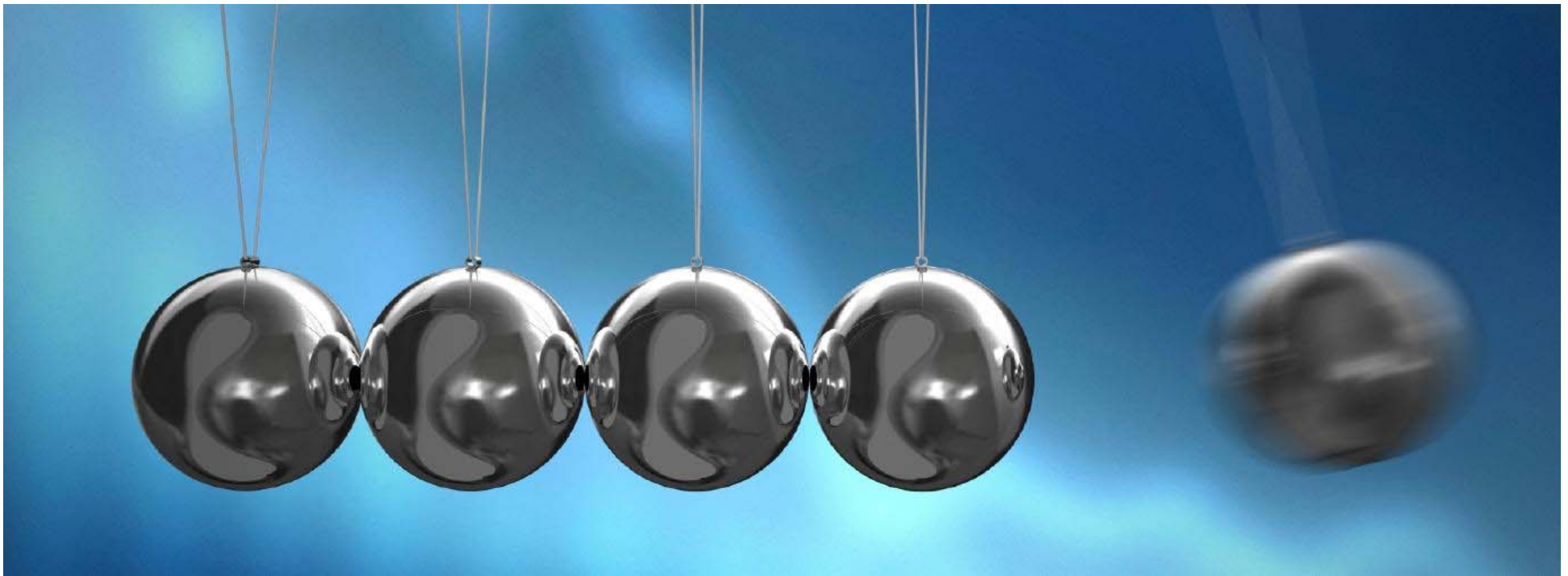


# WHILE YOU WERE SLEEPING: FATIGUE MANAGEMENT AND THE LAW



Date: 29 March 2010

Presenters names: Robert Lilburne and Sarah Harrison

## Why addressing fatigue is difficult

- Identify the ways in which the issue of fatigue is different from other risks that employers have to deal with.
- Why is addressing fatigue difficult?

# Why addressing fatigue is difficult

- Hard to identify
- Effects people differently
- Can be caused by work related factors eg
  - ⇒ hours of work - overtime
  - ⇒ roster
  - ⇒ heat
  - ⇒ FIFO
- Can be caused by non-work related factors eg
  - ⇒ sleep disorders
  - ⇒ family situations
  - ⇒ noisy sleeping environment
- Risks for employer are not only at work- extends to getting employees home safely
- Also, applies to contractors working on an employer's site in relation to matters over which they have capacity to control
- Not necessarily caused by inappropriate acts of employee (cf Drug and Alcohol) – employee usually well motivated

## Why is this is a greater issue now?

- Working longer hours
  - ⇒ move from 8 hour day to 12 hour day
- Move to Fly In/Fly Out (**FIFO**)
  - ⇒ longer working hours
  - ⇒ greater breaks between rosters
  - ⇒ travel time
- Less statutory/industrial restrictions on working longer hours
  - ⇒ averaging of working hours permitted
  - ⇒ MSI Act 13 working day cap removed
- Greater awareness of the effects of fatigue

# Topics of Discussion

- What is fatigue?
- What are the effects of fatigue?
- What are the factors involved?
- What are the legal duties owed?
  - ⇒ employer's duties
  - ⇒ employee's duties
- Scope of the duties – plus case study
- How to manage fatigue to make it a 'Fitness for Work' issue
- Disciplining employees for non-compliance - plus case study
- Where and how can the levels be set?
- Ways to minimise liability

# What is fatigue?

- Fatigue is a state of impaired physical and/or mental performance and lowered alertness resulting from inadequate restorative sleep and/or physical or mental exhaustion
- Working hours and types of working arrangements will have a significant impact on the risks of fatigue within a workplace as long hours and interrupted patterns of work (e.g. alternating rosters of day and night shifts) limit the time available for sleep
- Fatigue can be caused by both work related and non-work related factors
- Work related fatigue is that associated with work time arrangements and can be monitored and managed at the organisational level ie. by continually monitoring working hours and rosters
- By contrast, non-work related fatigue is that associated with factors outside of the working relationship such as family and social pressures. These factors are initially managed on a personal or individual level however the employer needs to monitor the employees and employees and supervision need to be trained in identifying and addressing the issue

# What are the effects of fatigue?

- The severity of fatigue increases the longer a person is exposed to fatigue-causing factors and can operate on individuals differently. However, some recognisable symptoms include:
  - ⇒ reduced concentration
  - ⇒ impaired attention
  - ⇒ poor judgment of own performance
  - ⇒ inability to assess problems and determine solutions
  - ⇒ impaired decision-making
  - ⇒ slower reaction times
  - ⇒ poor hand-eye coordination
  - ⇒ poor communication skills
  - ⇒ impaired short-term memory
  - ⇒ mood swings
  - ⇒ loss of situational awareness
  - ⇒ tiredness or general lethargy
  - ⇒ greater tendency to fall asleep or 'nod off' at work

## What are the effects of fatigue...cont.

- These impairments have serious consequences and increase the risk of work-related incidents
- One of the most dangerous aspects of fatigue is the limited ability humans have to recognise when they are fatigued
- Studies have shown that the effects of remaining awake for
  - ⇒ 18 hours is similar to 0.05% blood alcohol
  - ⇒ 24 hours is similar to 0.1% blood alcohol (twice the legal limit for driving in most of Australia)

# What are the duties owed?

## 1 Employer's duties

- Under the *Mines Safety and Inspection Act 1994 (WA)* (**MSI Act**), employers must:
  - ⇒ take all reasonable steps to identify and control potential hazards in the workplace. This includes consideration of
    - ← work rosters
    - ← length of shifts
    - ← work breaks
    - ← travel arrangement for FIFO
  - ⇒ provide the education and training necessary and practicable to enable them to identify and manage risks of fatigue in the workplace including non-work factors that can induce fatigue and provide options for the management of these factors
  - ⇒ policies and procedures which prevent or at least minimise to the extent possible the potential causes of fatigue
    - ← need to audit to ensure applied
- Civil liability – potential liability in negligence if fatigue foreseeable and likely to cause damage
  - ⇒ WA Code of Practice not enforceable but may be used by Courts as the standard against which practices are measured

# What are the duties owed?...cont.

## 2 Employee's duties

- Employees have a legal duty to take reasonable care of themselves by ensuring that they have adequate rest between shifts.
- Potential criminal liability – dangerous driving if fatigue impaired
- As employees they have a duty to attend for work ready, willing and able to work safely if not the employer may
  - ⇒ refuse to pay them until they are fit to work; and/or
  - ⇒ discipline them

## Case Study 1: Employee's Duties

- An employee of a large mining company in the north of Western Australia works 1 week of night shifts, 1 week of day shifts and has 1 week off work. He has been working to this roster for a while and has always been employed in shift work arrangements and always makes sure he gets enough rest on his week off, and between shifts so that he is not tired at work. There are some posters around the tea-room about fatigue, employees know that if they are too tired they shouldn't work, that it is their responsibility to turn up fit and ready to work, and employees are required to take two short breaks and one longer break over the course of their shift. However he has never received any specific fatigue training
- On the day that his night shift rotation begins, the employee has to be in the city (about 2 hours away) for a doctor's appointment. As a result he does not get home again until 2pm, and only manages to get about 2 hours of sleep before he starts work. The employee knows that this is less than desirable, but unavoidable and goes to work feeling fine. He is not feeling tired so he does not think to mention the fact that he is probably not as fit for work as he usually is

## Case Study 1: Employee's Duties

- About half way through his shift he decides not to go for his break and instead stays in the machine he has been operating. He falls asleep while the machine was in gear and when he wakes up he realises the machine has accidentally travelled some distance injuring a fellow worker and causing substantial damage to the equipment around him.

*Is the employee or the employer liable for what happened because the employee only obtained 2 hours of sleep?*

## Case study 1: Employee's Duties - Comment

- In the case the actual damage caused was only property damage and knocking over a tree. If actual personal injuries had been caused it is likely that the employer may also have been charged for failing to properly train the employee and possibly for not properly monitoring the work and identifying the risk
- It has been found in similar circumstances that the employee has a responsibility as an individual to recognise the symptoms of fatigue and to take appropriate action
- This suggests that by failing to adequately prepare for his shift, and by failing to inform his supervisors that as a result of his medical appointment that he was unable to do so, he breached his duties of care to the employer and to other people affected by his work. In addition deciding not to take the requisite break knowing that he was likely sleep deprived adds weight to this argument
- Appears the employer has appropriate policies and practices in relation to fatigue. However, no specific training provided nor is it clear that the employer properly monitored the work – potential employer liability

## Case Study 2: Scope of Duties

- An employee working FIFO has worked three 12 hour night shifts on this roster and just finished his fourth. He did not feel tired and decided to take one of the department vehicles back to the camp instead of riding in the company provided bus
- On his way back to camp, he veered into the gravel and swerved the car causing him to lose control and collide with an on-coming car resulting in the death of the driver of the other car. Where the accident occurred was not on a declared mine site
- *Was the accident one that had to be reported to the DMP and were the company or employee liable to be prosecuted under the MSIA for the incident?*

## Case Study 2: Scope of Duties - Comment

- As the accident did not occur on a mine site, the MSIA did not apply and the DMP did not investigate. It is, however, prudent to notify the DMP orally of the incident
- The employee was charged with dangerous driving under the criminal law
- The prosecution called a fatigue expert who gave evidence that the tyre marks and shift work made it highly likely that the worker was fatigued which caused the accident based purely on the employee working 12 hour night shifts
- The employee's evidence that he was swerving to avoid a kangaroo was accepted by the jury and he was acquitted

## How to manage fatigue to make it a Fitness for Work issue

- Studies show that reliance on self-monitoring by employees of fatigue is unlikely to be an effective way to accurately monitor and address fatigue risks in the workplace
- Making fatigue a Fitness for Work issue allows the causes of fatigue to be assessed and addressed by both employers and employees directly rather than simply 'reacting' to situations of developed fatigue
- Fitness for work can be defined as the capacity of an individual to perform their job safely and competently. A management plan that addresses fatigue as a Fitness for Work issue can look at the interconnected range of factors that can place workers at risk and can assess the potential and actual risks of fatigue
- To make fatigue a fitness for work issue a requirement to not attend for work fatigued should be included in employee's conditions of employment

## Case Study 3: Disciplining for non-compliance

- A mining company had an employee on a three week shift cycle of five eight hour shifts from 3.00pm to 11.00pm i.e. a 38 hour week
- The employee organised his family activities to after school hours when he was not rostered on
- The company reorganised the rosters to a 44 hour two week rotating cycle of three 12 hour shifts and one eight hour shift
- The employee refused to change work hours on the grounds of fatigue
- *Was the refusal reasonable and what can the company do?*

## Case Study 3: Disciplining for non compliance - Comment

- Expert evidence was lead at the hearing that hours in mining industry ranged from 7.5 hours to 12.75 hours i.e. a 35-36 hour week
- The roster provided for between 12 to 16 hours off between shifts and two to four days on weekends between cycles. This was enough time for rest and recovery and the extra hours were reasonable
- It was held in the case of *MacPherson v Coal & Allied Mining Services Pty Ltd (No 2)* [2009] FMCA 881 that failing to follow a lawful direction to work reasonable additional hours was sufficient to suspend an employee unless and until they agreed to work to those terms
- An employer is entitled to insist upon compliance with its procedures and policies in relation to risk management including fatigue and discipline for non compliance. It is important to be mindful that any disciplinary action for failure to comply with a fatigue policy is appropriate and proportionate having regard to the particular circumstances of the case, in accordance with industrial laws

## Where and how can the levels be set?

- The levels must be managed so that any hazards created by fatigue are managed to as low as is reasonably practicable.
- The risk management guidelines that accompany the WA Code of Practice on working hours provides a useful tool to assist in assessing the hazard factors and risks to be addressed in the policy and procedure.

## Ways to minimise liability

- Secure and maintain senior management commitment
- Develop a company fatigue policy and procedure – see WA Code of Practice
- Communicate with the workforce and train them in the fatigue policy and procedures
- Manage fatigue and alertness in the workplace using the fatigue policy and procedures
- Use the continuous improvement cycle of monitoring, reviewing and modifying to maintain the effectiveness of the fatigue policy and procedures
- Need to monitor the application of the policies and procedures to ensure properly applied

## Industrial considerations

- National Employment Standards (**NES**) commenced 1 January 2010 and include a requirement that the employer must not request or require an employee to work more than 38 hours per week plus reasonable additional hours (as defined)
- Modern Mining Industry Award and Modern Hydrocarbons Industry (Upstream) Award commenced 1 January 2010 - can impact on working hours

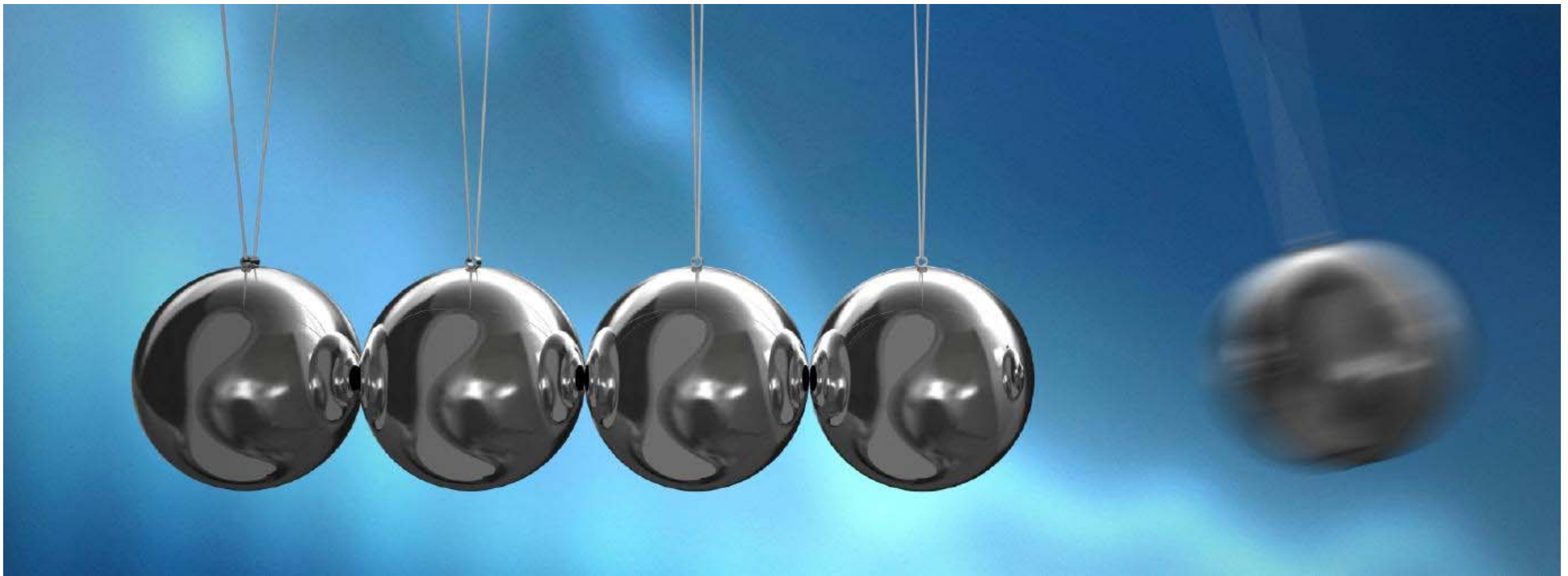
# What are reasonable hours?

- The National Employment Standards in *Fair Work Act 2009* provide as follows:

(3) In determining whether additional hours are reasonable or unreasonable for the purposes of subsections (1) and (2), the following must be taken into account

- (a) any risk to employee health and safety from working the additional hours
- (b) the employee's personal circumstances, including family responsibilities
- (c) the needs of the workplace or enterprise in which the employee is employed
- (d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours
- (e) any notice given by the employer of any request or requirement to work the additional hours
- (f) any notice given by the employee of his or her intention to refuse to work the additional hours
- (g) the usual patterns of work in the industry, or the part of an industry, in which the employee works
- (h) the nature of the employee's role, and the employee's level of responsibility
- (i) whether the additional hours are in accordance with averaging terms included under section 63 in a modern award or enterprise agreement that applies to the employee, or with an averaging arrangement agreed to by the employer and employee under section 64
- (j) any other relevant matter

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