WELCOME TO JOHN GEANEY'S
New Jersey
WORKERS' COMP BLOG

Fitness-For-Duty and Functional Capacity Exams: Important Tools in Reducing Workers' Compensation Costs

John H. Geaney May 12, 2016 Controlling Costs 0 Comments

We have all seen this situation: an employee with a physical job has major surgery and is given restrictions by the treating doctor, who issues an MMI note (maximum medical improvement). When temporary disability benefits are stopped, the employee immediately calls to see about returning to work. The employer indicates that it cannot take the employee back with such heavy restrictions. The next day the treating doctor issues a note clearing the employee to return to work with no restrictions. One month later the same employee reinjures his back at work severely, leading to another surgery and hundreds of thousands of dollars or even total and permanent disability. The hit to the employer's workers' compensation budget becomes astronomical.

What went wrong? *Why does this sort of thing happen so often*? This is the first of a two-part series on the critical importance of fitness-for-duty exams and functional capacity evaluations in the New Jersey workers' compensation system. In this blog, we will focus on mistakes employers make and why fitness exams can result in enormous savings for employers. The next blog will focus on how to do fitness exams correctly and how to avoid law suits when arranging fitness exams.

Every insurance adjuster in the state can tell you about a claimant with 10 or even 20 claim petitions against the same employer over a period of many years. Employers throw up their hands and ask, "How can the judge let this guy return to work after all these accidents?" The answer is that the Judge of Compensation has nothing to do with the decision to allow an employee to return to work. That decision is made by the employer and is outside the realm of workers' compensation. Many times the person handling the workers' compensation case for the company is not in touch with Human Resources, with the result that the return-to-work issue may be missed entirely.

Most of the problem cases stem from injuries that result in surgery to the spine, shoulder, knee and hand, which comprise the majority of orthopedic claims in New Jersey. The dynamic that frustrates the employer is that the employee will give a host of complaints to the IME doctors and the Judge of Compensation in support of a high partial permanent disability award, but then turn around and tell the employer or supervisor that there are no problems doing the job.

For example, a DPW worker has fusion surgery followed by pain management, and eventually he reaches MMI. There is no fitness exam requested by the doctor or employer, and the employee returns to work. Now the comp case continues: the petitioner's attorney sends the employee to his or her IME, and the respondent's attorney does the same. At the IME the petitioner complains about severe pain lifting anything over 15 pounds, difficulty bending or lifting at work, trouble getting dressed, throwing a ball or the like. The job requires regular lifting over 50 pounds. The case settles for 40% of partial total or $111,360, and at the time of settlement the employee is asked by the Judge of Compensation for his or her complaints at work and outside work. The employee says that work is very painful, and at times, others have to help him get through the day. He adds that there are many tasks that the employee can no longer perform. All the while, the employer has no idea that the employee is complaining about problems on the job or telling the IME doctors about difficulties doing routine work tasks. Shortly thereafter this employee performs a relatively minor task on the job when he experiences incapacitating pain in the back leading to a long period of work absence followed by another award in workers' compensation court.

You can see from these scenarios what the major mistakes are:

- Employers seldom request fitness-for-duty exams and FCEs before returning the injured employee to work, perhaps because they do not know they can do this, or because they mistakenly think the workers' compensation third party administrator or carrier will do this for them. *Adjusters do not handle employment issues*.
- The carrier or defense attorney does not send the IME report or the summary of testimony at the settlement to the employer to review. Instead it just goes to the adjuster without a copy to the actual employer. So the employer never realizes that their employee is complaining about having problems on the job.

- The workers' compensation manager in the company may not be familiar with employment issues. Workers' compensation may be a separate silo from HR, so no one really analyzes the question of whether the employee can safely perform the job functions.
- Treating doctors are often too eager to return a patient to work when asked by the patient for a full-duty clearance rather than deal with what could become an angry patient.

If a fitness-for-duty examination or an FCE is done properly and timely, the employer will have the opportunity to make an informed decision on whether to return the employee to work with or without accommodations. If there is an ADA issue, the fitness process will help address it. If the employee cannot perform the essential job functions, that employee may have to be terminated or reassigned to a position within the restrictions. When that happens, the risk of reinjury is much lower, and workers' compensation costs are greatly reduced. For this reason, it is quite fair to think of fitness-for-duty examinations and FCEs as powerful cost-saving tools in workers' compensation. Employers with dozens of workers' compensation claims could save hundreds of thousands of dollars, if not millions, by doing timely fitness examinations. Unfortunately, however, fitness examinations and FCEs are grossly underutilized.

There was a time in 1979 when workers' compensation rates amounted to $40 per week for permanency. An award of 50% of partial total was $12,000. Those days are long gone. Now a 50% award amounts to $174,300. An award of 70% amounts to $341,460 in tax free dollars. Every large employer has multiple employees at work who have such high awards where the employee has given a plethora of complaints about work and non-work activities in workers' compensation court.

Workers' compensation medical costs have risen much faster than the rise in permanency costs. A two-hour fusion procedure may result in a payment of $40,000 to the surgeon, plus fees for the assistant, hospital/surgery center and anesthesiologist. So the employee who gets back to work but who cannot safely perform the job duties only to be reinjured can cost the employer quite literally half a

million dollars in no time at all, considering the medical, temporary disability and permanency costs.

It goes without saying that an employee who cannot safely perform the job duties should not be on the job. The ADA does not require removal of essential job functions. An employee must be able to perform the assigned job duties with or without reasonable accommodation. The fitness assessment must be made only with medical analysis usually informed by functional capacity examinations, which compare the physical abilities of the injured worker with the actual job duties. A good FCE will provide tremendous guidance for employers in determining how much an employee can lift, bend, kneel, push or pull. There are talented New Jersey physicians who do many fitness-for-duty assessments and are quite adept at helping employers decide whether the employee can perform safely the essential job functions.

Consider this advice: employers should rethink the way their workers' compensation programs function if injured workers who simply cannot do the job any longer routinely get back to work doing the very same job that caused their initial injury without having undergone a fitness examination. In the next blog, we will discuss the basic rules for doing fitness examinations and traps to be avoided.

Share / Save

Tags: Fitness-for-Duty Examination, functional capacity exam, temporary disability

When Should an Employer Order a Fitness-For-Duty or Functional Capacity Exam?

John H. Geaney May 15, 2016 Controlling Costs 0 Comments

This is the second article devoted to fitness-for-duty examinations and Functional Capacity Exams (FCE) in workers' compensation. The first segment focused on how such examinations can lead to significant cost savings for employers and common mistakes that are made by employers. This segment will focus on when to order a fitness exam or FCE and how to avoid conflict with the FMLA and ADA.

http://njworkerscompblog.com/fitness-duty-functional-capacity-exams-important-tools-reducing-workers-compensation-costs/

A fitness-for-duty examination must be job-related and consistent with business necessity according to the relevant EEOC Guidance. When an FCE is ordered by a physician as part of a workers' compensation case, it is generally related to medical care or to determining return-to-work status. When a physician requests an FCE, more often than not, it is because the physician is not sure that the injured worker can perform light duty or full duty work. Under those circumstances, the FCE is job related.

Many employers also request FCEs or fitness-for-duty examinations on their own when an employee has been out of work for a lengthy period of time, usually following surgery. This is particularly true where the employee has a physical job, like maintenance, custodian, construction or the like. An employer's request would meet the job-related standard if the employee has certain restrictions imposed by the treating physician, or if the employee has requested accommodations at work. Employers should be aware, however, of one limitation on such exams: namely those that occur during the 12-week FMLA period. All workers' compensation lost time cases are generally FMLA events, and most employers designate the absence from work as FMLA leave. They run FMLA time concurrent with workers' compensation absences. The FMLA does not permit second opinions on return to work. So if the treating doctor issues a return-to-work note, stating that the employee can perform the functions of his or her job, there is no right to a fitness exam within the 12-week FMLA period.

After 12 weeks when FMLA has expired, an employer has more leeway in requesting an FCE or fitness examination. The employer must still show that there is a job-related need for the FCE or fitness examination. That could be satisfied by observations that the employee is having problems walking or getting around. Alternatively, the employee may speak to supervisory staff indicating that he or she is not sure about being able to perform the essential job functions. The employee may ask for assistance in doing certain essential functions should he return to work or request that certain functions be eliminated. All of these reasons justify a fitness-for-duty examination or an FCE.

It is very important to make sure that the physician who is performing a fitness-for-duty examination is familiar with the essential job functions. The same is true of physical therapists who are performing FCEs. Functional job descriptions are of great value to

doctors and physical therapists. The examination should be tailored to the injury that the employee has and should not be focused on long-standing medical conditions that have nothing to do with the work injury. The physician should address the ability of the employee to perform essential job functions as well as the direct threat standard.

Sometimes employees do not recover adequately from work injuries to be able to return to work and perform their job functions safely. Before making such a determination, the employer should carefully review the FCE or fitness assessment and then meet with the employee to engage in an interactive dialogue with the employee. Because the ADAAA so widely expands ADA disability coverage, it is better to assume that the injured employee following surgery or significant injuries is potentially covered under the ADA. In that meeting, the employer will be able to hear first-hand whether the employee is requesting reasonable accommodations that would allow the employee to perform the essential functions of the job. It is the employee's responsibility to make the request for the accommodation, not the employer's job to guess what they might be. However, it is the employer's obligation to decide which accommodation would work best and whether the accommodation poses an undue hardship.

Sometimes treating doctors give short shrift to the return-to-work process and issue full clearance notes without the benefit of an FCE. The result is that many employees in New Jersey who have had some serious injuries with lasting complaints of pain and limitations may struggle with work duties. When an employer has job-related reasons to require a fitness examination of an existing employee, the employer should utilize the FCE or fitness-for-duty process. If an employee in a factory setting with very physical job duties comes into work limping and in pain, the wrong thing to do for the supervisor is to walk past the employee and bid him or her a good day. That is exactly the circumstance that may justify a fitness-for-duty examination.

Employers should also take note that when a workers' compensation case is settled in the Division, the employee has to provide his or her complaints on the record to support the award of disability. The only time this does not happen is when the settlement is under *N.J.S.A*. 34:15-20. All orders approving settlement with percentages of disability are premised on proof by the employee of either a substantial limitation in working ability or a substantial impact on non-work activities — or both. Seldom are employers

in court to hear these complaints but the defense lawyer should provide details in the closing letter to the client so that the employer is aware that an employee may be complaining of physical problems in doing the essential job functions. If that is the case, the employer has a right to obtain a fitness-for-duty examination. An employer can also ask for a copy of the transcript of the testimony before the Judge, as this is sworn testimony.

In this practitioner's opinion, the reason there are so many re-injuries in New Jersey is that there is not enough attention to the issue of fitness for duty. Unlike other states where employees settle their cases and agree as a condition of settlement not to return to work, almost every employee in New Jersey returns to the former job because New Jersey is a functional loss state in contrast to Pennsylvania, which is a wage loss state. Re-injuries are expensive and often lead to much higher awards and sometimes total disability awards costing the employer millions of dollars. The cost of an FCE or a fitness examination, by contrast, is very modest but that well-timed examination may save the employer tens or even hundreds of thousands of dollars down the line.

Share / Save

Tags: FCE, Fitness-for-Duty Examination, functional capacity exam, return to work issues

About the Author:

John H. Geaney, an executive committee member and shareholder with Capehart Scatchard, began an email newsletter entitled Currents in Workers' Compensation, ADA and FMLA in 2001 in order to keep clients and readers informed on leading developments in these three areas of law. Since that time he has written over 500 newsletter updates.

Mr. Geaney is the author of Geaney's New Jersey Workers' Compensation Manual for Practitioners, Adjusters & Employers. The manual is distributed by the New Jersey Institute for Continuing Legal Education (NJICLE). He also authored an ADA and FMLA manual as distributed by NJICLE. If you are interested in purchasing the manual, please contact NJICLE at 732-214-8500 or visit their website at www.njicle.com.

Mr. Geaney represents employers in the defense of workers' compensation, ADA and FMLA matters. He is a Fellow of the College of Workers' Compensation Lawyers of the American Bar Association and is certified by the Supreme Court of New Jersey as a workers' compensation law attorney. He is one of two firm representatives to the National Workers' Compensation Defense Network. He has served on the Executive Committee of Capehart Scatchard for over ten (10) years.

A graduate of Holy Cross College summa cum laude, Mr. Geaney obtained his law degree from Boston College Law School. He has been named a "Super Lawyer" by his peers and Law and Politics. He serves as Vice President of the Friends of MEND, the fundraising arm of a local charitable organization devoted to promoting affordable housing.

Capehart Scatchard is a full service law firm with offices in Mt. Laurel and Trenton, New Jersey. The firm represents employers and businesses in a wide variety of areas, including workers' compensation, civil litigation, labor, environmental, business, estates and governmental affairs.

More blog posts from John H. Geaney.