Fitness-For-Duty Exams in Workers' Compensation

The words “fitness for duty” do not appear in the New Jersey Workers’ Compensation Act, but the issue is of paramount importance to employers and employees in many workers’ compensation cases. In New Jersey the need for a fitness exam is often compelling because medical and temporary disability benefits end at maximal medical improvement often without any comment from the treating physician about whether the employee can return to work. When workers’ compensation benefits end, the focus often turns next to whether the employee can return to work and perform the essential job functions. This is not for the Judge of Compensation to decide in New Jersey.

When can an employer require a fitness-for-duty examination in a workers' compensation setting?

Practitioners must differentiate between employees who are out of work and employees who are working. When an employee seeks to return to work following a workers' compensation absence and there are restrictions imposed by the treating doctor, a fitness-for-duty exam is appropriate. In fact, New Jersey physicians often seek guidance from FCEs, functional capacity examinations. In contrast, when an employee with a workers’ compensation claim is working, an employer cannot request a fitness exam absent a business reason. A medical evaluation of an employee can be required by an employer under the Americans with Disabilities Act and under state disability law. The ADA standard is “job related and consistent with business necessity.” 42 U.S.C. 12112(d)(4). In other words, the employer must have a legitimate reason to require an existing employee who is working to attend a fitness exam. Examples might be if the employee is expressing difficulty or pain on the job, is limping while working, or is asking for accommodations.

It is important to appreciate differences between the New Jersey Workers’ Compensation Act and laws in other states. Many states have a requirement for vocational rehabilitation. New Jersey does not. Awards for partial permanent disability in New Jersey are not generally dependent on how long an employee has been out of work but on the level of functional loss in the injured body member. New Jersey compensation law does not provide job protection, except against retaliation for filing a workers' compensation claim. Temporary disability benefits and medical benefits end at maximal medical improvement in New Jersey. Whether the employee returns to work may not matter all that much as far as the outcome of a workers' compensation claim but it matters to the employee and employer for obvious reasons.

Workers’ compensation cases suddenly merge into labor law at the return to work stage. It is outside the power of a Judge of Compensation to order an employer to return an employee to work. However, employees have rights under the Americans with Disabilities Act, the Family and Medical Leave Act, and the New Jersey Law Against Discrimination that impact on return-to-work status. Many workers’ compensation claimants are covered under the ADA and NJLAD but these laws do not automatically mean the employee must be reinstated. An employee with a disability must be able to perform the essential functions of the job with or without reasonable accommodation.

How then do employers decide whether an employee who has been out of work with a serious injury is fit for duty?

Medical and legal guidance is crucial. From a medical vantage point, employers can reach out to treating doctors, occupational physicians or physiatrists for advice on fitness for duty. As mentioned above, FCEs are a wonderful tool that provide objective and scientific information about ability to perform essential functions. For this reason, treating doctors routinely ask for FCEs before giving opinions on restrictions and ability to perform job duties. From a legal standpoint, it is important to consider the application of disability and leave laws that may apply.
Here are some common traps that employers fall into in fitness assessments:

* The Ambivalent Treating Doctor Syndrome

Quite often the treating doctor imposes serious job restrictions that carry on for many months. There may be severe restrictions against lifting, bending, reaching and performing other physical functions. Light duty may be offered. After maximal medical improvement is reached and compensation benefits end, the employee will often contact the employer to return to work. When the employer expresses concerns about the medical restrictions, a short note may suddenly appear from the treating doctor removing all restrictions. This stunning turn of events leaves employers shaking their heads.

* The “Wing It” Return-To-Work Note

New Jersey is blessed with highly skilled surgeons in the workers’ compensation arena. However, surgeons are not always the best choice when it comes to deciding whether the employee can do a particularly difficult job. A good fitness-for-duty examination requires time, information and medical expertise. The job description must be read and considered, and the physician must speak with the employee about job duties. In addition, FCEs should be analyzed to see that the testing reflects the actual job duties to be performed. Cryptic medical notes following a serious surgery stating, “Bill may return to work full duty” without analysis or any indication that job description has been analyzed are more often than not “wing-it” notes. There are risks to the employee who is returned to a job that he or she cannot safely perform, and a well-intentioned “wing-it” note can do more harm than good.

* Reflexively Turning to Treating Doctors

When it comes to assessing fitness for duty, the best choice is generally an occupational physician or physiatrist who specializes in this area of medicine and has an understanding of reasonable accommodation requirements. These experts often have training in biomechanics and are willing to expend the time it takes to fully appreciate the job duties and consider possible accommodations. There is simply no substitute for thorough analysis. The idea that fitness assessment is as simple as scribbling on a note pad could not be further from the truth. Yet all practitioners continue to see treating doctors hurriedly write “full duty” without any analysis at all of the job requirements or previous restrictions.

* Asking the Comp Adjuster Whether the Employer Must Reinstate

This is also a very common mistake that employers make in New Jersey. The reason this happens is that many employers erroneously think that return-to-work issues are decided in comp court. Almost every adjuster has been asked more than once for advice from an employer on whether the employer can terminate or must reinstate. This is a complex medical/legal inquiry with significant labor law implications that should be put to house counsel or outside counsel for guidance.

Developing a return-to-work team is the best solution. There is an important role on this team for counsel, HR managers, claims professionals, supervisors, nurse case managers, and medical experts. It is a fact of life that many employees post-injury cannot return to their former job while many others can and should be reinstated. The process is complex but can be handled effectively with a consistent and comprehensive approach.
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