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Five Steps Toward Cost Containment in Workers' Compensation

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Public employers are under increasing financial constraints even as costs in workers' compensation continue to rise. Here are five steps employers can take to help reduce ever increasing workers' compensation costs.

Post-Offer Medical Exams

Employers may not consider the decision whether or not to require a post-offer medical examination as a workers' compensation cost containment decision, yet there is nothing more important to a workers' compensation program than making sure that applicants for physically demanding jobs are fit to perform the essential job functions. Because workers' compensation laws require employers to take employees as they find them, an injury resulting from aggravation of a prior condition is treated the same for compensability purposes as a new injury.

In a post-offer medical examination, an employer can ask critical questions of applicants in order to determine fitness for duty. The EEOC does not restrict the range or number of questions that may be asked, but decisions on whether to revoke a job offer must be job related and consistent with business necessity. Certainly it is important to consider whether the applicant for a physical job has a history of prior spinal problems, prior chiropractic treatment, prior surgery to major joints and any present medical conditions that interfere with the ability to perform the essential functions.

If an employer utilizes post-offer medical examinations, the employer must require a post-offer examination of all those in the same job category. A functional job description must be provided to the health care practitioner who performs the post-offer medical examination. Sometimes a functional capacity examination can be helpful in assessing abilities of the applicant in connection with the essential job functions. If an applicant fails the post-offer medical examination and there is no way to accommodate the restriction, then the employer can withdraw the job offer.

Interviewing and Selecting Your Treating and Evaluating Doctors

All too often authorized medical providers are chosen for the wrong reasons. There are really two categories of doctors involved in workers' compensation: the initial occupational medical facility and specialists which may be needed. Workers' compensation treatment involves an understanding of the medical/legal precepts, namely whether a medical condition arises from work and not from a personal cause or condition unconnected to work. In the case of occupational disease claims, physicians need to understand whether a medical condition is produced by work conditions that are characteristic of or peculiar to the occupation in a material degree and not common generally. For example, work stress is common to all places of employment and therefore feeling stressed about being overworked is generally not compensable. Unfortunately, many doctors involved in workers' compensation treatment do not know these basic standards.

Employers also should not select initial treating doctors who are unfamiliar with the job duties. Not knowing how jobs are performed makes it impossible for a physician to opine on causal relationship and fitness of duty. Ideally, those who are responsible for workers' compensation

programs should meet with the treating doctors who are working with the municipality to discuss communication issues, light duty programs, and fitness for duty requirements.

Most importantly, when an occupational facility or a treating doctor is retained, it is important to examine the history form that is being used by the medical facility. If the authorized treating doctor is using a generic health history form and is not asking about prior chiropractic treatment, prior car accidents, prior family doctor information, second jobs, and recreational hobbies, then the municipality is likely to end up paying for claims that do not really arise from work.

Fitness-for-Duty Examinations

Earlier we discussed post-offer medical examinations of job applicants to whom a job offer has been made. In contrast, fitness-for-duty medical examinations are focused on existing employees. If an existing employee is having difficulties on the job, for example, limping or struggling to walk, the employer is within its rights to compel the employee to attend a fitness examination. The standard is “business necessity” and the focus of the medical examination is on the specific medical condition at issue. For example, if the employee is complaining about left knee pain while working and is sent for a fitness examination, the physician should not do a total body examination but should address the left knee condition.

When an employee has been out of work for a long period of time with serious physical injuries or when an employee has exhausted the time allowed for light duty, a fitness examination should be arranged to address two central questions: 1) can the employee perform the essential job functions with or without accommodation? and 2) if the employee performs the essential functions, does he or she pose a direct threat of harm to himself or others?

If a public employee can no longer perform the essential job functions because of medical reasons, it may be possible for the employee to obtain an ordinary disability pension or even an accidental disability pension, depending on the nature of the injury. The biggest mistake employers make is returning injured workers to jobs that they clearly cannot do safely, thereby putting the employees at great risk of re-injury. Determining whether an employee is fit for duty on a permanent basis is an employment issue and not a workers’ compensation issue. Therefore employers should not expect the workers’ compensation third party administrator to make decisions on whether the employee is fit for duty or should be reinstated. This process falls within the purview of employment lawyers and municipal managers.

Establishing Sound Absence Management Programs

There are several features of an absence management program. Municipalities need to understand that being out of work on a workers’ compensation injury or illness does not provide indefinite job protection. The workers’ compensation law in New Jersey is not an employment law: it provides monetary and medical benefits to injured workers. Workers’ compensation judges do not deal with employment issues such as job reinstatement. Just as in the private sector, job action is often needed when an employee is out of work for a very long period of time or cannot perform the essential job duties any longer and no accommodation can be made.

The features that a public entity must focus on include an understanding of the Family and Medical Leave Act, a clear light duty policy with end limits, an interactive process when there are legitimate fitness-for-duty issues, and an appreciation of ordinary and accidental disability laws.

The FMLA protects an employee on leave for up to 12 weeks and anyone on FMLA has job reinstatement rights during that 12-week period. Absences under workers’ compensation run

concurrently with FMLA time. In other words, if an employee goes out of work from January 10th to April 1st, that time may be counted against the employee's FMLA entitlement.

Light duty policies make good sense and save money for public and private employers. On the other hand, indefinite light duty is problematic. The basic rule is that light duty should have an end point. Some municipalities put a specific time frame on the end of light duty; others terminate light duty at maximal medical improvement, and still other employers blend the two concepts (ex: light duty till maximal medical improvement but no longer than one year). After a lengthy period of light duty, if an employee still cannot return to work, the employer may have to make employment decisions.

When a physician indicates that an employee can no longer safely perform the essential job functions following an injury or illness, the employer should engage in an interactive process to determine whether there are other possible accommodations, such as reassignment to vacant jobs for which the employee may be qualified. Other options should be discussed as well, such as potential for an ordinary or accidental disability pension.

Developing History Forms and Witness Reports

When an employee claims a work injury, the municipality or the third party administrator must obtain from the employee sufficient information to decide whether the complaints are preexisting and not work related or whether work caused or contributed to the medical condition. The past history form and the details of the accident need to be well defined. Employers and third party administrators should find out about past medical treatment, past chiropractic treatment, past car accidents, and treatment with family doctors in order to make informed decisions on whether to accept or deny a claim. Misrepresenting past medical history is considered fraud under the New Jersey Fraud Act set forth at *N.J.S.A*. 34:15-57.4. The best way to elicit such crucial information is to have the employee fill out and sign a detailed history form at the very outset of the case.

The municipality and third party administrator also need to interview potential witnesses and supervisors right away because memories dull over time. This is especially important when un-witnessed accidents take place or when dealing with that segment of employees who have repeat and multiple injuries.

If a municipality follows these five steps, workers' compensation costs can be contained.