

THE ROLE OF THE OCCUPATIONAL HEALTH PROVIDER IN PRE-EMPLOYMENT MEDICAL SCREENINGS AND POST WORK INJURY TREATMENT

I. Pre-Employment Medical Screenings

With the economy showing signs of recovery, it is anticipated that employers, both large and small, will begin to hire more workers over the next several years. Employers will seek to hire the best and the brightest for those positions. However, the hiring process poses significant risks to all employers by restricting medical information during the hiring stage.

The Americans with Disabilities Act (ADA) and the Maine Human Rights Act (MHRA) limit an employer's ability to make disability related inquiries both before and after hiring. The statutes, regulations and guidances published by the agencies and commissions charged with enforcement have turned a seemingly simple hiring process into one that is extremely complex and fraught with legal dangers to the unsuspecting employer.

Generally, the regulatory pattern is designed to require all employers to make an individualized assessment of an applicant's ability to do the job for which he/she is being considered. It is well known to most human resource

directors and other hiring personnel that disability related questions cannot be asked before hire. “Disability related questions” are questions likely to elicit information about a disability. Asking about prior workers’ compensation claims, current or past medication regimen, genetic information, or requesting copies of medical reports are all examples of the types of inquiry which are prohibited. Asking whether reasonable accommodations in order to perform the job functions may be needed is appropriate. Asking about the obvious, e.g. “how did you break your leg, have you been drinking today, or do you use illegal drugs” have all been deemed to be appropriate areas of inquiry. Nonetheless, it is an area that is confusing and should be afforded an abundance of caution.

Once a job has been offered, the employer is entitled to ask disability related questions and to require a medical examination. The job offer may be conditioned on passing the medical examination. The medical examination is a procedure or test that seeks information about an individual’s physical or mental impairment or health. It must be given to all who are conditionally hired for that particular job. It is important to use a health care professional to evaluate the applicant and to administer and interpret any appropriate tests. Common medical examinations include

vision and blood tests, a physical examination, and pulmonary tests. Some testing is permitted by the employer without regard to the ADA or MHRA restrictions. Examples of these tests include reading, writing, typing, physical agility or fitness testing which measures the ability to do the job tasks or measure an employee's performance of physical tasks (running, lifting) [these become medical if done in conjunction with measuring heart rate, blood pressure, etc], or psychological tests to measure personality traits such as honesty. Drug testing is only permitted in Maine when required by federal law (truckers) or when the employer has qualified under Maine's drug testing law.

If the employer requires a post hire medical examination, it becomes important for the employer to make certain that the selected health care provider knows, understands and accepts his/her role in this process. The object is to hire an employee who is physically and mentally capable of performing the essential functions of the job with or without reasonable accommodations. To that end, it becomes important for the health care professional to know the physical and exertional requirements that are essential to the job. Detailed and current job descriptions are absolutely necessary. The providers should be required to visit the job site on a

regular basis and observe the tasks being done. Once the medical examination is done, a meaningful report should be provided by the professional to the employer which explains whether the job can be done with or without accommodation and if accommodation is needed what it is. If the result is that the applicant is unable to do the job even with accommodation, the professional should explain why there is no accommodation which would permit the applicant to safely do the essential functions.

The medical examination also provides a potential litigation benefit post hire should the applicant who becomes an employee allege that he/she sustained a work related injury. This pre-employment medical examination will provide a baseline of results against which to compare post injury findings. In many instances, new claims have been determined by the Workers' Compensation Board to be old conditions based upon the pre-employment medical examination reports and claims have been denied.

II. Post Hire Work Injuries

In order to understand where we are with respect to the treatment of injured employees under Maine's workers' compensation system, it is important to know from where we came. Maine's workers' compensation system came into being in 1915. From the outset, injured employees had the right to select their physicians and surgeons without regard to the employer. This right continued until January 1, 1993.

The Legislature began to tinker with the workers' compensation system in the 1970's by increasing wage loss benefits. With the value of these cases increasing more and more lawyers began to involve themselves in the process. Changes were made legislatively, judicially and medically to expand the type of treatment made available to injured employees. By the end of the 1980's, employees could choose to be treated by chiropractors, acupuncturists, and faith healers. Physical and occupational therapy blossomed. New and novel therapy treatments were introduced into the workers' compensation system including massage therapy, prolotherapy, and cranial therapy. Medical costs within the workers' compensation system exploded. Employees, along with their lawyers, knew the doctors

to go to in order to maximize their claims. If the employee felt that his choice of doctor was not addressing his needs, the employee simply chose another doctor to administer care.

The Legislature's first attempt to change the medical selection process was included in the amendments to the Workers' Compensation Act effective on October 17, 1991. Under the amendment, the employee still chose the physician or surgeon but could not change that selection "more than once" without permission from an independent medical examiner or the employer. Obviously, this did little to control medical costs as the employee could still select the first two physicians (with help from their lawyers). In 1992 State Government shut down when most of the worker's compensation carriers left Maine due to the outrageous costs associated with this system. This shutdown led to the enactment of the Workers' Compensation Act of 1992 which became effective on January 1, 1993. This law addressed the medical selection process in a unique way.

Under the 1992 Act, the employer was authorized to select for the employee a health care provider. The selected provider had to be authorized to practice in Maine. The employee was not permitted to

change providers until after 10 days from the inception of treatment. The employee, in order to change from the employer provider, had to tell the employer that a change was going to be made and provide the name of the new provider. The employer was then free to object if sufficient grounds existed (new provider not licensed, etc). If the objection is upheld and the employee changed providers anyway, the employer was not responsible for payment of the medical expenses for the new provider. The employee was not permitted to change from the new provider to a third provider without approval from the Board or the employer. The same restriction applied to the employee if he wanted to change from a specialist referred by the employer's provider or the employee's first selection provider. Permission from the Board or the employer was required.

The theory behind the 1992 legislative changes was that if the employer controlled the initial treatment, medical and lost time costs would be lowered. Employees would not use hospital emergency rooms as often. Employers could negotiate with physicians for lower examination and treatment costs. Employees would be less likely to doctor shop. Employer doctors would be more likely to return injured workers to restricted work than those unfamiliar with the employer's business.

Most employers now, small and large, have relationships with occupational health care providers. The relationship is unique in that it requires the occupational health care provider to have dual loyalty. The provider has a contractual duty to the employer and a statutory duty to provide certain limited medical information to the employer. This duty should not be confused with that which arises between the doctor and his patient once treatment is commenced.

What should an employer expect to receive from “the 10 day doc”? In most instances the information supplied to the employer is the same as supplied to the employee, a diagnosis and treatment plan. The employer, however, should be able to expect that the occupational health provider exercise their best medical judgment to ascertain whether the claimed injury is really medically caused by the work or work incident. With knowledge of the job duties, does the history make sense? Does the mechanism of injury make sense? Are there objective findings to support an acute injury or condition? The “10 day doc” must not simply accept the employee’s story but, rather, should test that story against his medical and environmental knowledge with critical evaluation. Further, most employers have light duty or transitional work programs to assist injured employees in staying at work.

The occupational health provider must be aware of the accommodations that the employer is prepared to make and determine whether the injured employee is capable of returning immediately to the job site. For too long, the medical community first response was “take 3 days off and call me Monday”.

That response is no longer acceptable.