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Aging Gracefully? The Senior Workforce and Their Impact on Workers' Compensation

INTRODUCTION

In recent years, there have been a number of statistical analyses performed regarding the rise in age of the workforce. According to the Bureau of Labor Statistics, the employment of workers age 65 or older grew by 101% between 1997 and 2007. Employment of individuals 75 and older increased by 172%. The National Institute for Occupational Safety and Health estimates that currently, 1 in every 5 American workers is over 65. In 2008, there were 28 million workers over the age of 55. By 2016, that number is expected to be almost 40 million. This is an increase of 43%.

There are a multitude of reasons why people are working beyond the traditional retirement year of 65. Many are working longer out of financial necessity. The effects of the "Great Recession" of 2008 are still be felt by many workers. Some are simply motivated by a desire to remain productive and to continue to be active. Although they have hit "retirement age", they just aren't ready to retire.

Statistically, older workers continue to have the fewest work-related injuries. Between 1994 and 2007, workers between the ages of 45 and 64 saw substantial safety improvements and as a result, the injury rate dropped to 93 incidents per 10,000 workers from 200 incidents per 10,000 workers. Although workplace safety improvements are significantly contributing to these reductions, there is not necessarily a parallel reduction in costs for the injured older worker. The reasons for that are many. The injured older worker typically has a higher average weekly wage and therefore, higher compensation rate. Recovery times for the injured older worker also tend to be longer and more complicated. Comorbidities play a larger role in the longer treatment times seen in injured older workers. Diabetes and obesity can contribute to delay in recovery from soft tissue injury. This delay in care can have a profound impact on the costs associated with the workers' compensation claim.

During this presentation, we will discuss the medical, legal and claim challenges the workers' compensation industry faces with the senior workforce. Our hope is that we can provide strategic direction to better manage these claims medically and legally in order to reduce costs and mitigate exposure.

MEDICAL IMPACT

Effects of aging on the working individual

General physiological effects

The aging population is not homogenous and we all age differently. The elderly, as a group, have more comorbidities (e.g., diabetes, hypertension, heart disease, dementia) which, on their own, can cause undesired effects in the life and occupation of individuals. In addition, exercise and activity may delay or slow down some of the effects of aging, so that an individual's function may vary significantly from age-matched controls.

Certain generalities can be made about the effects of aging on the health of an individual, many of which affect their capacity to work, to do so safely and to recover after an injury or illness.

CARDIOVASCULAR

- Calcium deposits in heart valves
- Hypertrophy of ventricular muscles
- Decreased maximum heart rate in response to exercise
- Decrease in VO₂ max (maximum oxygen utilization)
- Orthostatic hypotension, which may lead to falls.

RESPIRATORY

- Increased effort of respiration due to chest wall stiffness and weakened muscles of respiration.

BRAIN

- Decrease in the size of the brain
- Working memory and executive function may decline with aging.
- Decreased attention span
- Problem solving, reasoning about unfamiliar things, processing and learning new information, and attending to and manipulating one's environment show a steady decline

SENSORY

Vision – even without comorbidities like diabetes, which can further deteriorate vision, aging reduces visual acuity, depth perception and light perception (the ability to see in the dark is diminished). Because of changes in the lens, glare can be bothersome, particularly when engaged in nighttime driving. Dry eye is more common due to decreased tear production.

Hearing – aging is accompanied by loss of hearing in the higher frequencies and decreased speech discrimination, making hearing more challenging. There is also a decreased ability to

localize objects by sound. Of course, cumulative effects of noise exposure can cause separate and sometimes additive hearing loss.

Balance – our ability to balance is predicated on a number of sensory inputs that may decline with aging: vision, hearing, vestibular function and proprioception.

Reaction time – decreased.

Proprioception (the ability of the body to sense its spatial position) decreases and may be responsible for more frequent falls.

Touch – sensitivity to touch, especially vibration, decreases

Taste and smell

Increased Adverse Drug Reactions

RENAL

- Renal mass, blood flow and function decrease.
- Increased adverse drug reactions, in part due to this, but other factors are involved as well (muscle mass being an important one).

MUSCULOSKELETAL

- Muscle mass decreases, resulting in lower strength (greater in lower extremities than upper). Muscles fatigue more easily. Injured muscle heals more slowly.
- Decreased bone mass (osteopenia and osteoporosis) make older bones more likely to fracture, even after minor trauma. Injured bones heal more slowly.
- Osteoarthritis, primarily of the knees, hips and spinal column, can result in reduced range of motion, mobility and pain.
- Ligaments and other connective tissues become less pliant, resulting in stiffness.

SLEEP

- Sleep patterns are altered.

URINARY

- Increased risk of urinary incontinence.

SKIN

- Thinning, loss of elasticity; more fragile and slower healing.

IMPACT ON CLAIMS MANAGEMENT & COSTS

Investigating a claim involving an older employee should in many ways be tackled in the same manner as in any other claim. Claims need to be immediately documented and investigated from all perspectives. However, additional consideration should be given to the depth and breadth of an employee's medical and employment history in the case of an older worker. They will generally have longer medical histories, pre-existing conditions or diseases, and likely more previous work injuries. Development and retention of this information can be secured even prior to a work injury given proper employer education. Depending on the jurisdiction, employers may already have pre-employment physicals and post-hire medical questionnaires. If they do not, then a claims manager can effectively educate them on utilizing those tools.

Claims managers will also be held with the task of educating an older injured worker on their claim in the event there are pre-existing conditions or diseases such as arthritis, diabetes, and previous injuries or surgeries to relevant body parts injured. These issues may effect compensability of their claims. Both employers and claims managers should also do well to educate their older injured workers on how to prevent injury or re-injury in the event they are returned to a light duty position.

Although there are a wide range of work environments, there are some general measures that all employers can take to help reduce the likelihood of work-related injuries suffered by older employees. For instance, a primary objective would be to help eliminate slip and falls which can be more common in the older worker population. Employers can do so by ensuring there is adequate lighting, even flooring, prompt cleaning of spills or slippery surfaces, and that there are no obstructions that can contribute to falls in the workplace.

Additionally, ergonomic measures can be implemented to help reduce the risk of over-exertion injuries or injuries that typically aggravate pre-existing conditions such as arthritis of the knee, degenerative changes in the rotator cuff or degenerative disc disease. Such measures would include reducing the overall physical requirements of the job for older workers, particularly for lifting, pulling, or twisting. Also, limiting the older worker to tasks performed between mid-thigh to mid-chest level and avoid above the shoulder work. Prevention and early immediate care of injuries is essential to keeping costs low.

Furthermore, Medicare considerations are typically more common concerns at the forefront when the employee is over 55 years of age. The current federal law mandates that Medicare payments not be made for any item or service to the extent that payment "has been made or can reasonably be expected to be made promptly...under a workers' compensation law or plan of the United States or a state or under an auto or liability insurance policy or plan (including a self-insured plan) or under no-fault insurance." Further, the federal law provides that if a workers' compensation settlement "stipulates that the amount paid is intended to compensate the individual for all future medical expenses required because of the work-related injury or disease, Medicare payment for such services are excluded until medical expenses related to the injury or disease equal the amount of the lump sum settlement." Additionally, if Medicare should determine it has paid for medical expenses of an individual that are related to

an on-the-job injury, the Center for Medicare & Medicaid Services (CMS) may bring direct action against an employer and insurer to recover payments made by Medicare that should have been the primary responsibility of other insurance. Additionally, attorneys may also be found liable if settlement funds are disbursed to an employee without consideration of Medicare's interests or reimbursement to Medicare for conditional payments previously made.

As such, when considering settlement of a workers' compensation claim of an older injured worker, employers and insurers must be certain Medicare's interests are protected. This is usually accomplished by obtaining a Medicare Set-Aside Allocation Agreement, which is then submitted to CMS for approval. If the individual is really of advanced age, he or she is either likely already a Medicare recipient, or has a reasonable expectation of Medicare enrollment within the foreseeable future. Of course, there are additional costs involved in enrolling the services of a company to prepare the Medicare Set-Aside Agreement and ultimately submitting the proposal to CMS for approval.

The Legal Impact on Claims of Aging Workers

The eggshell skull theory that we take our [claimant's] as we find them is a well known fiction. More often than not, an employee's pre-existing condition or disease(s), particularly with regards to degenerative changes that may have naturally caused an injury, becomes a primary issue in a workers' compensation claim. In some cases, it may be a reason to completely deny a claim. But in most, the issue will become whether and to what extent the pre-existing condition caused the injury or was aggravated by the work or a work injury. This tends to be a commonly litigated issue in cases of older workers injured on the job. The extent of the medical evidence and claims investigation performed prior to litigation can help answer these questions. Additionally, longer recovery times post injury will result in increased exposure for indemnity benefits as well as medical expenses.

Securing concise and favorable medical opinions on these issues is key to evaluating a particular claim for ongoing medical and indemnity exposure. Medical opinions are only as thorough as the information they are based on, thus providing a current treating provider with the relevant medical history and prior medical records will help the physician answer questions related to causation and/or aggravation and determine whether an aggravation has resolved.

When evaluating claims for settlement, an injured employee's age, life expectancy, and any co-morbidities need to be considered as they can substantially effect the value of future medical and indemnity exposure. If an employee is injured near his or her planned retirement date, this may change the discussion when it comes to offering a return to work, evaluating future indemnity exposure, settlement negotiations, and whether or not a Medicare Set-Aside is needed.

Employers, claims managers, and attorneys can all do their part to help mitigate these potential expenses along the way. Everything from proper education of employers, adequate record keeping and timely claims investigation, securing medical records early and providing

them to the treating doctors, obtaining medical opinions on causation and/or aggravations, and communicating early with the injured worker and/or his attorney can aid in this process.

RESOURCES

OSHA

Job Accommodation Network (JAN); a service of the Office of Disability Employment Policy, US Department of Labor.