2018 CLM Business Insurance & Workers' Compensation Conference
May 22-24, 2018
Chicago, Illinois

"Return to Work Policies and Pitfalls"

I. Return to Work Issues

Whenever possible, it is of great benefit for both the employee and the employer when an injured employee returns to work. Bringing an employee back to work, even light duty work, can reduce exposure for the employer, and also benefit the morale and self esteem of the injured employee. Injured Workers Returning to Work on Light Duty Can Help Employers Bottom Lines, Improve Morale, 18 No. 9 ADA Compliance Guide Newsl. 7 (September, 2007).

Generally, even though it is more desirable to return an injured worker to work rather than let him stay off and collect workers' compensation, the mechanics of returning an injured employee with physical restrictions back to work is a challenge for employers. The employer must find work for the employee within their restrictions, which also helps the employer to run day to day operations. Further, the employer has to consider coverage of the employee's regular job during the time he or she is unable to perform the essential duties of the regular job.

Benefits to Employee and Employer

Often, the modified duty job will help get the employee back into a routine and make them more eager to return to their full duty job. Return to work allows employees further job security, increased morale, and retention of on the job knowledge.

Returning an employee to work can also help the employer in many ways. In day to day operations, it helps the employer avoid a lack of productivity, reduce turnover, maintain experienced workers, improve employee relations, reduce costs, and lessen their exposure under employee benefit programs.

Studies have shown that the longer an injured employee is out of the workforce, the higher the chances that they will not be able to return to work at all. Return to Work Efforts: Key Factor in Managing WC Costs in Coming Decades, Michael Lewis, 20 No. 6 Quinlan, Workers' Comp Bottom Line, June 2011. As such, it is wise for employers to provide accommodations and restricted/light duty work to get employees back to work sooner and reduce costs. A study by the Workers' Compensation Research Institute also confirmed that return to work issues will be an increasing concern for employers as the baby boomer generation ages. The Institute indicated that return to work and modified duty programs are a good way for employers to keep workers' compensation costs in check. *Id.*

Light/Modified Duty Work

An employer may create a light or modified duty position for an employee when he or she is been injured while performing work for the employer and, as a consequence, is unable to perform his or her regular job duties. Light or modified duty assignments are usually a win-win for everybody as they cut down on potential workers' compensation costs and help the employee gradually return to work as they heal. If the employer is unable to accommodate an employee within his or her restrictions, not only can it add additional disability benefits under workers' compensation laws, but it could also turn the case from a simple permanent partial disability case into a permanent total disability case, resulting in much greater exposure for the employer. Such benefits could make the employer liable for weekly benefits to the employee for life under some workers' compensation laws.

If an injured worker voluntarily fails to return to work when released or refuses a suitable accommodation within his or her restrictions, and the employer testifies that employment within the worker's restrictions were available, no indemnity benefits are due or owing. The injured worker must carry his or her end of the bargain. Therefore, indemnity benefits may be cut sooner if a restricted duty job offer is made.

Often, a dispute arises over whether an injured worker is entitled to indemnity or wage loss benefits. However, in instances where the injured worker is clearly off work or on restrictions, and the employer cannot accommodate those restrictions, in addition to penalties for late payments, interest may also be due on late payments or on underpayments, which creates exposure for the carrier and an incentive to get the claimant back to work.

II. Legal Issues

Workers' Compensation

Returning an employee to work greatly reduces workers' compensation costs for the employer. While the employee is off work, they are eligible to receive workers' compensation benefits, which must be paid by the employer, which also must pay for the employee's job to be covered during the time off.

Return to work can also greatly reduce workers' compensation exposure, as it gets the employee back to their regular salary and lowers the risk of a costly workers' compensation case.

Interplay with ADA

The Americans with Disabilities Act, or ADA, provides that no employer "shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to … the hiring, advancement or discharge of employees…." *Hutchinson v. United Parcel Service, Inc.,* 883 F.Supp. 378, 387 (U.S.Dist.Ct. N.D. Iowa (1995), *citing* 42 U.S.C. §12112.

Under the ADA, the employer must engage with the injured employee in an "interactive process" to determine "reasonable accommodation." The Americans with Disabilities Act, as amended in 2009, provides a very broad definition of "reasonable accommodation". Under the ADA "[t]he term "reasonable accommodation may include job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustments or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." 42 USC section 12111 (9) (B). Providing a light or modified duty job to an employee with activity restrictions because of a work-related injury is one type of "reasonable accommodation." The employer, under ADA's provisions, must sit down with the employee and conduct an "interactive process" to discuss options to return the injured employee to work.

The ADA does not require employers to create light duty positions as a form of reasonable accommodation. *Watson v. Lithonia Lighting,* 304 F. 3d 749 (7th Cir. 2002). But an employer must provide other forms of reasonable accommodation required under the ADA. For example, subject to undue hardship, the employer must: (1) restructure the position by redistributing marginal functions which an individual cannot perform because

of a disability; (2) provide modified scheduling (including part-time work), or (3) reassign an occupationally injured employee with a disability to an equivalent existing vacancy for which he or she is qualified.

In addition, there are many federal cases which examine light duty policies as applied to injured employees who have requested that their employer accommodate their activity restrictions. For example, an employee cannot make his employer provide a specific accommodation if another reasonable accommodation is instead provided. *Lloyd v. Washington and Jefferson College*, 2007 WL 1575448 (W.D. PA. 2007)(May 30, 2007)(Not reported in F. Supp. 2d). An employer is not required, under the ADA, to provide an employee only the accommodation which the employee specifically requests or prefers. Instead, the employer need only provide some reasonable accommodation. *EEOC v. Yellow Freight System, Inc.*, 253 F.3d 943, 951 (7th Cir. 2001)(A request for unlimited sick days as an accommodation is not reasonable as a matter of law.)

As stated above, the employer cannot refuse to return an employee to work due to the fear of re-injury unless the employer can show that employment of the person in the position poses a "direct threat." 42 USC section 12111 (3). The ADA defines "direct threat" as "means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *Id.* Where an employer refuses to return an employee to work because it assumes, correctly or incorrectly, that his or her disability-related occupational injury crates merely some increased risk of further occupational injury, it discriminates on the basis of disability. The employer may not refuse to return to work an employee who is able to perform the essential functions of the job with or without a reasonable accommodation, unless it can show the returning the person to the position poses a "direct threat" to the health and safety of other individuals in the workplace.

To determine whether an employee poses a "direct threat," courts consider factors including: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that potential harm will occur; and (4) the imminence of potential harm. *Emerson v. Northern States Power Co.,* 256 F.3d 506, 514, (7th Cir. 2001).

If the employer cannot accommodate an employee's restrictions, the employer must show that no accommodation could be made after engaging in an interactive process with the employee to evaluate the condition. *Spurling v. C&M Fine Pack, Inc.,* 739 F.3d 1055, 21 Wage and Hour Cas.2d(BNA)1315 (7th Cir. 2014). In *Spurling*, a claimant suffered from a condition which caused her to lose consciousness occasionally. The claimant filed an ADA suit against her employer when they terminated her employment, alleging that they failed to reasonably accommodate her condition. The Seventh Circuit held in favor of the claimant, finding that the employer failed to show that they could not

make any reasonable accommodation to enable the claimant to carry out her job.

Union Issues

Employers must be cognizant of union issues and contracts. Collective bargaining agreements may call for certain procedures or standards to be met in evaluating return to work and disability.

State Issues

In many states, including Missouri, the employee only needs to be gainfully employed, they don't need to actually return to the same job they had originally. For example, if they are terminated for cause and they are released to light duty, the employer can end benefits indicating that had they maintained employment, a job would be available to them. This is often seen when there is a negligent safety violation termination.

Some states, such as Illinois, require that when an employee who is entitled to receive indemnity benefits as a result of a work-related injury is later terminated for cause (unrelated to the work injury), the employer's obligation to pay TTD workers' compensation benefits continues until the employee's medical condition has stabilized and he has reached maximum medical improvement. Interstate Scaffolding, Inc. v. Illinois Workers' Comp. Comm'n, 236 Ill. 2d 132, 923 N.E.2d 266 (2010).

States such as Florida do allow indemnity benefits to cease when an injured worker is terminated for misconduct. However, it is important to note that it is very hard to prove that the injured worker's reason for termination rose to the level of "misconduct." For example, an injured worker stating she wished to punch a co-worker in the face was not misconduct, and the carrier is nevertheless responsible for payment of indemnity benefits following the claimant's termination. Further, while a violation of an employer's policy may constitute misconduct, repeated violations of explicit policies, after several warnings, are required. An isolated act of negligence is not misconduct.

It is particularly important for employers to be aware of the rules in their state that specify when indemnity may be terminated. When the standard is as stringent as Illinois- that the employee must be at MMI- the employer is greatly benefited by accommodating any restrictions to get the employee back to work and reduce indemnity exposure.

Some state legislatures have also taken action. While return to work programs are not required in Illinois, a recent house bill proposed that any employer who developed and submitted a workers' compensation return to work program would receive reduced workers' compensation operations fund fees or premiums. Illinois House Bill 2525. The bill was vetoed by Illinois' governor, but shows that the legislature is contemplating the benefits of return to work programs to reduce workers' compensation costs.

Florida practitioners also have to be aware of the affect of attorney's fees on costs. In light of recent case law from Florida's First DCA regarding attorney fees, there is an increasing motivation to return injured workers to the workforce in order to avoid exposure to workers' compensation benefits. This is because attorneys for injured workers are not only collecting guideline or statutory fees on claims, but they are also earning hourly fees on securing benefits. Depending on the venue (attorneys get more costly as you move South), if they are successful in obtaining the benefits for their client when there is a dispute over payment, injured worker attorneys in Florida are earning up to $350.00 per hour on their time for securing late or unpaid indemnity benefits.

III. Best Practices

It's important for the employer to have an established light duty/modified job available and ready to go. This sedentary position can be as simple as simple data entry or file organization. It can even be something unrelated to their regular job. One example is an employer who had light duty employees repaint hand rails around their property.

Providing the claims team with up to date job descriptions is crucial to mitigating lost day exposure. The claims team provides these job descriptions to the medical providers at the onset of the claim, so the doctor is knowledgeable of the details of job requirements. It is recommended that the claims team have access to the job description library and given updates any time there are changes. Where there is union involvement, employers often will ensure the union signs off on the descriptions as well.

Ultimately, the goal, for both employer and employee, is to return the employee to work, performing the essential functions of his job with or without a reasonable accommodation.

Having a light duty work program in place helps the employer to be proactive and have a realistic template for how to return employees back to their full capacity in the quickest amount of time. Such programs allow the employer to anticipate potential issues that may arise and streamline the return to work process.

Return to Work Policy

Return to work policies are of great benefit, as they outline specific procedures and actions that must be taken by an employer in an effort to return an employee to work. Such a policy, on its face, does not treat an individual with a disability less favorably than an individual without a disability; nor does it screen out an individual on the basis of the disability. Return to work policies and programs also provide clarity to the employer and the employee about the process and expectations.

Any return to work policy must include only light or modified duty accommodations. While some employers have tried to avoid having to accommodate employees by instating "100% healed" or "no restrictions" policies that provide that disabled employees may not return to work until they are 100% healed, these policies are a violation of the ADA. Such a policy calls for no accommodations to be made as employees are not allowed to return to work until they have no restrictions. Since 100% healed policies prevent the individualized assessment of the employee's qualifications as required by the ADA, it thus excludes disabled people who are qualified to work. The Seventh Circuit has consistently held that because of this exclusion, 100% healed policies constitute a *per se* violation of the ADA. *Steffen v. Donahoe,* 680 F.3d 738, 748 (7th Cir. 2012), *citing Powers v. USF Holland, Inc.,* 667 F.3d 815, 819 (7th Cir. 2011).

It is important to note though, that it will not be considered a 100% healed policy where an employer is unable to accommodate any restrictions that the disabled employee may have, so long as an individualized assessment of the employee's capabilities has been made.