

CREATIVITY AND FLEXIBILITY IN RETURN TO WORK EFFORTS

One's view of a light duty return to work program very often depends upon the perspective from which you start. The insurance company or third-party administrative agency looks upon the return to work to hopefully move that claim toward closure. The employer, on the other hand, looks upon a light duty return to work program with trepidation and with legitimate concern as to how this return to work will affect not only that employee's individual workers' compensation claim but also over the financial and administrative headaches occasioned by providing restricted duty. The employee's concern, on yet another hand, has elements of both the insurance company and the employer but very often from a different angle. Depending on the presentation, the employee can view the return to work effort as simply an attempt to get him off of benefits and to force him into a position where he performs menial tasks for which he will be looked down upon by his co-employees.

For these reasons, light duty return to work programs can be a mine field which, if improperly navigated, can explode into a situation worse than had the return to work effort not been made. It is our hope, through this discussion, that we can provide a guide to navigate an employee from income benefits to productive and useful employment.

For purposes of this discussion, we are assuming a compensable

injury with ongoing and legitimate restrictions. If your employee has no restrictions from the authorized treating physician, then you are not required to provide light duty employment. Instead, that employee is in the same position as every other member of the general workforce and is required to "work for his supper."

A. Reasons for Return to Work

The most optimistic reason to return an injured employee to work is the hope that doing so will foster a healthy work environment for not only the injured employee but for other employees as well. An employer's willingness to "take care of its own" can, if handled properly, produce loyal employees who do not blame the employer for an on-the-job injury. Further, this employer can be seen as protecting its employees from economic hardship occasioned by the acceptance of income benefits. While many of us sometimes view an employee as being anxious for the "free ride" of indemnity benefits, the reality is that some States provide very low-income benefit levels. For this reason, many employees can see a dramatic difference between the TTD benefits which they receive and the net pay to which they have become accustomed from full-time work. TTD is not, therefore, a great bargain for the employee. Employers should use this fact to their advantage by convincing the injured employee that productivity is beneficial not only to the employer but also to the employee whose bills and expenses do not decrease simply by the occurrence of a work-related injury.

Equally as important, but more often the selling point to employers is the dramatic cost savings which can be realized if light duty work is routinely made available. An employee who is allowed to languish out of work costs the employer both indemnity benefits and medical benefits. The employee who is allowed to "sit at home" has more time to focus on his injury thereby providing potential for the perceived need for additional treatment in order to achieve the "cure" which may not even be possible. Furthermore, the idle employee, focusing on continued pain and problems, is also concerned about financial stability and egotistical factors like the inability to adequately provide for

his family. This situation leads either to actual depression or complaints of depression, which may later require psychological/psychiatric intervention to cope with the pressures of being out of work.

Much as athletes can be injured when returning to their sports from off-season vacations, employees are more susceptible to re-injury and complaints of pain after returning to the workforce from extended periods of disability. Very often, employers and insurers dismiss an injured employee's complaints after a brief return to work period as simple whining. However, the possibility exists that the employee is simply deconditioned. The employee, in addition to dealing with the after effects of a work-related injury, is also beginning to reuse muscles not particularly exercised during extended periods with a recliner and a remote control. The best way to stop this "deconditioning" is to prevent the employee from becoming or remaining idle for extended periods of time.

Another equally legitimate reason to keep an employee from extended periods of disability is the "Oprah mentality" that sometimes arises when an injured employee is subjected to too much daytime television. In addition to the mind-numbing effects of the programming itself, the employee is exposed to numerous attorney and chiropractic commercials, which instill or reinforce the notion that the employer is not out for the employee's interests. This then translates into the employer's problem with increased indemnity, medical and settlement costs as well as possible litigation costs.

Oftentimes, the employer and not the employee provides the first impediment to an employee's return to work. We must diligently guard against the idea that workers' compensation claimants are necessarily bad employees. While this may sometimes be true, the State Board of Workers' Compensation is dubious of such claims and very often views such assertions as retaliation for filing the workers' compensation claim. Before accepting this assertion from the employer, ask: "does the personnel file support the idea that this employee was a non-productive employee with poor performance, attitude or punctuality?" An employer that constantly finds reasons to

terminate employees with workers' compensation claims may find, too late, that it has developed a reputation with the State Board of Workers' Compensation for not taking care of its employees.

For the true "problem employee," not giving a return to work option through a light duty work program gives the employee exactly what that employee wants. The employer's refusal to provide light duty work surrenders control of the claim to the employee resulting in an exponential increase in the cost of the claim.

Oftentimes, the employer views a light duty work program as an opportunity to set a bad example for other employees. Whether the bad example be from the injured employee's spreading of gossip such as "I'm going to own this company" or the injured employee getting paid the same amount for less work duties, employers often assume that the best way to prevent this bad influence from spreading is to remove the employee from the company. Once again, however, this cedes control of the claim to the employee and removes a great deal of flexibility in handling the workers' compensation claim by the employer and insurer. Furthermore, simply removing the employee from the company does not cut the employee's lifeline to his co-employees nor either does removal of the employee move the claim toward resolution.

The most common objection a light duty return to work request is the perceived lack of such work by the employer. Many times, the employer simply has not looked. Analyzing the legitimate job functions which have to be performed and determining whether any can be performed by an employee with physical restrictions very often reveals the availability of some work which can be performed by the claimant. The employer should be encouraged to look for opportunities to make a light duty job offer, not for reasons to refuse it.

B. Elements of a Return to Work Program

The most important component of any return to work is cooperation from the authorized treating physician. Medical approval of a light duty job is a necessary component to the

employee's return to work effort. Theoretically, the employer will choose physicians for inclusion on its panel that are familiar with the workers' compensation process and that show a willingness to consider a return to work as therapeutic to the employee. To maintain control of the medical treatment rendered to your employees, a panel of physicians must be properly composed, posted and utilized. The panel must also be properly posted to assure that employees have knowledge of the panel and how it is to be used in connection with work-related injuries.

Whenever an employee is sent to the authorized treating physician for medical treatment, the employer should advise the physician to consider appropriate restrictions and that the restrictions will be accommodated by the employer. Do not allow the employee the freedom to tell the authorized treating physician that the employer has no light duty work; that unrefuted point will result in a disability slip from the doctor's office.

The next essential element in the return to work program is the employer: the employer must have the proper attitude with regard to light duty work efforts. First, the employer must be patient in pursuing the medical opinion and providing the necessary documentation of the employer's actual job opportunities. The employer must also be patient with the employee and not allow the employee's bitterness, trepidation, or whining to scuttle the return to work effort.

The employer must scrupulously observe all Board rules, as technical deficiencies in the employer's filings will thwart return to work efforts. When the job description is submitted to the authorized treating physician for approval, the employer must also send a copy of the job description to the claimant or claimant's counsel. Once the job description is approved by the authorized treating physician, the employer must send a WC-240 to the employee (regardless of the date of accident) advising the employee of the specific job being tendered, the approval of that job by the authorized treating physician as well as the date, time and location on which the employee is to report for duty. The employee must be provided 10 days notice. If the employee does not successfully remain at work for 15 business days

(note: this is not 15 calendar days), then the employer must recommence income benefits regardless of whether the employee's attempt at the job was sincere. Lame attempt at return to work efforts are issues for litigation--not for hardball tactics. Patience at this juncture is essential since refusal to recommence income benefits will result in a waiver of the employer's defense that the job was, in fact, suitable.

The final link in the light duty return to work program over which the employer has any measure of control is the job itself. The employer should look to the essential functions of the employee's regular job to determine whether the employee can perform those functions with or without accommodation. If so, a return to work effort is easier to contemplate. Written job descriptions are helpful in this regard in that they quickly provide information to the authorized treating physician for approval or modification.

If, on the other hand, the employee's regular job is beyond the employee's light duty restrictions, then consideration of other positions should be made. Simply put, is there another job for which the employee is otherwise qualified which that employee could perform with reasonable accommodations? It is not necessary for the employer to create a job for the employee.

Some consideration should be given to consulting with the injured employee to determine whether there is any job available, which the employee could perform with or without accommodation. Note, if this analysis sounds similar to the ADA considerations, it is. In fact, your light duty return to work program may be your best defense against an ADA claim by establishing, through example, the employer does not discriminate against individuals based upon physical restrictions or handicaps.

An indispensable outside source of assistance for your light duty return to work program is vocational rehabilitation. Vocational rehabilitation expertise can be utilized either with or without permission from the claimant or claimant's counsel.

With permission of the claimant or the claimant's counsel, vocational rehabilitation can be an invaluable service both within and outside the

company. For return to work efforts within the company, vocational assistance can provide a detailed analysis of each distinct job function, job movement and requirement. Such information is usually very helpful in explaining to the authorized treating physician exactly what motions and duties are required in the job, which the claimant is expected to perform. For those return to work efforts outside the employ, vocational assistance can locate employment elsewhere that it is suitable for the employee's restricted capacity.

Without the consent of the claimant or the claimant's counsel, however, rehabilitation efforts are severely limited. O.C.G.A. § 34-9-200.1 and Board Rule 200.1 have been construed by the State Board of Workers' Compensation to subject rehabilitation suppliers to civil penalties for consulting with a physician about an injured employee even without contact with the injured employee.

Even without permission of the claimant or claimant's counsel, vocational rehabilitation can assist the employer in identifying light duty positions, describing light duty positions or modifying existing positions to qualify them as suitable light duty employment. That expertise can be drawn upon for the purpose of preparing a report, which the adjuster, the employer or the employer's counsel can then utilize in direct contact with the authorized treating physician. This contact (by the employer, the insurance adjuster or defense counsel) cannot be restricted by claimant's counsel and does not violate the claimant's privacy interests. Use of rehabilitation suppliers in advance of an injury to prepare job descriptions for all available jobs within the employer's business may be a good idea in that it will provide a quick reference, which the employer can provide to the authorized treating physician for consideration and approval. This alone can limit disability exposure on present and future claims. Some employers have even taken the extraordinary step of providing a notebook of all job opportunities to their panel physicians so that the physicians are aware of the job performed by the claimant and the physical requirements of that job. Furthermore, having job descriptions readily available to the authorized treating physician provides the advantage of giving a panel provider the opportunity to consider a return to work while the employee is fresh in their mind rather than relying on vague recollections prompted by cryptic notes in the employee's medical

chart.

C. Types of Return to Work Programs

Within the structure of the physical restrictions imposed upon the employee by the authorized treating physician, light duty return to work is really only limited by your imagination. A successful transition between injury and productive employment is, however, fostered by the employer's attitude in providing employment that constitutes a legitimate business necessity. In other words, if the job looks like it is "make-work," the employee has less incentive to perform that job, and the State Board of Workers' Compensation has less reason to consider the job legitimate and to force the employee to perform it.

The entire reason for considering the light duty return to work of your injured employees is to maintain control of your workers' compensation claims thereby keeping their costs down. The maximum control and flexibility, which the employer can possess, in return to work efforts is to bring the employee back to work within the employer's business. It necessarily follows, then, that return to work efforts outside the employer's business provide the least amount of control and least amount of flexibility. Each return to work option requires medical support and employer patience. Not every option is available in every circumstance nor will every option be ideal for every given case.

D. Return to Work within the Employer's Business

The thing to remember with this return to work program is that **YOU ARE IN CONTROL**. While the employer may have concerns regarding the injured employee's performance or attitude after a return to work, the employer can, through creativity and patience, prevent a bad attitude from blossoming into an unsuccessful return to work attempt.

The best option for the injured employee's return to work is to attempt a return to the employee's own job. The job cannot be then considered "make-work"; there is less down time for training and a quicker return to normalcy than under any other possible job opportunity. The employer should maintain flexibility in that return to

work effort and consider possible reductions in the job duties if certain non-essential functions are outside the employee's restrictions. If the employee's job is not immediately suitable, minor modifications may make it so. If the essential functions of the job are still beyond the employee's restrictions, the employer should consider other available work.

The return to work within the employer's own business is the least expensive alternative of all return to work options. Generally, if the employer can successfully return the employer to his regular job either with or without removal of non-essential duties, little expense is incurred.

Conclusion

The only limitation to the employer's return to work efforts is the employer's imagination and capacity for patience. The more flexible the employer can be, the more control that can be achieved. If the employer has maintained control of the workers' compensation claim, nine times out of ten, the claim is less expensive and of shorter duration.

--

