Post-Hire Medical Questionnaire

- The ADA and the 3 stages of the hiring process
  - What can you ask and when can you ask it?
- What is a post-hire medical questionnaire and why would you want to have one?
  - Rycroft defense
- Best practices for creating post-hire medical questionnaires
- ADA accommodation
  - What is “reasonable”?
- Using post-hire medical questionnaires effectively
Hiring Process - 3 Stages

• Under the Americans with Disabilities Act of 1990 (“ADA”), there are three distinct stages of the hiring process, each with particular restrictions on the ability of a potential employer to obtain information regarding an applicant’s medical history. 42 U.S.C.A. §12112(d).

1st Stage: Pre-employment/Interview

• At the pre-employment stage, which is the timeframe before an offer of employment has been made, an employer can only make inquiries into the ability of an applicant to perform job-related functions. 42 U.S.C.A. § 12112(d)(2). At this point, any inquiries into an applicant’s medical history or any request or requirement regarding a medical examination is prohibited. Id.
1st Stage: Pre-employment/Interview

- Focus on ability to perform specific job functions
  - Example: Can you lift 50 lbs.?
- Can ask about attendance (how many days absent from last job), but not the reason for the absences
- Consistency is key – must ask the same questions of every applicant
  - Include these questions on the written application to ensure uniformity

2nd Stage: Post-Offer

- Once an offer of employment has been extended, but prior to the applicant starting to perform work duties, an employer may require a medical examination and can even condition the offer of employment based on the results of the examination. 42 U.S.C.A. §12112(d)(3).
  - Hire may also be contingent on passing a drug test
- This is the stage during which a post-hire medical questionnaire should be given to the employee
2nd Stage: Post-Offer

• However, if an employer requires medical examinations or post-hire medical questionnaires, *all* entering employees should be subjected to the examination and/or given the same questionnaire. 42 U.S.C.A. § 12112(d)(3)(A) (emphasis added).

• Again, consistency is key

2nd Stage: Post-Offer

• Additionally, any information obtained through the examination or questionnaire regarding the applicant’s medical condition or history must be maintained on separate forms and in separate medical files. 42 U.S.C.A. § 12112(d)(3)(B).

• This information must be treated in the same manner as a medical record.
3rd Stage: Employee Starts Work

• Once an applicant has started working, an employer is allowed to conduct voluntary medical examinations, including inquiries regarding medical history, as long as it is conducted as part of an employee health program available at that work site. 42 U.S.C.A. § 12112(d)(4)(B).

• Additionally, an employer may make inquiries into the ability of an employee to perform job-related functions. Id. Any information received at this point must also be kept confidential and in a file separate from the employee’s personnel file.

What is a PHMQ?

• What is a post-hire medical questionnaire?
  – Document used to gather information as to a new employee’s medical history
  – Can be industry specific – focus on prior injuries/illnesses that tend to arise in the particular employer’s line of work
  – Permitted to ask about prior WC claims, but risky
  – better to focus on prior injuries
Why use a PHMQ?

- If the employee misrepresents his/her physical condition or medical history, employers may have a defense to an otherwise compensable workers’ compensation claim
- *Rycroft* defense

*Rycroft* Defense

- *Rycroft* defense can be challenging and requires more than an employee “lying” about a previous injury
  - Strict application because it acts as a complete bar to an otherwise compensable claim
- To establish a *Rycroft* defense, the employer/insurer has the burden of proof and must establish all three of the following:
Rycroft Defense: 3 Elements

1. The employee knowingly and willingly made a false representation as to his/her physical condition or medical history
2. The employer relied upon the false representation and this reliance was a substantial factor in the hiring decision
3. There is a causal connection between the employee’s false representation and the alleged work injury

Knowing and Willful

• The misrepresentation must be “knowing” and “willful”
  – The employee must have known the truth and decided to withhold it
  – What if the employee simply forgot?
  – May depend on how the question is asked
Knowing and Willful

- *Saunders v. Bailey*
  - Claimant had a severe prior work injury that required surgery for two ruptured discs in her back
  - She was asked by new employer if she had “any health problems that would keep her from doing the type of work described to her”
  - The employee responded her health would “not be a problem”
  - She reinjured her back 6 weeks after starting new job, but the State Board found her response - her health would allow her to perform the job - was a “good faith” response and not a knowing misrepresentation. *Saunders v. Bailey*, 205 Ga. App. 808 (1992).

Reliance by Employer

- “The Employer must have relied upon the false misrepresentation and this reliance must have been a substantial factor in the hiring.”
What is Reliance?

• What is “reliance?”
  – Testimony from employer representative it would not have hired the employee at all if he/she had answered the questions truthfully. From Georgia Elec. Co. v. Rycroft, 259 Ga. 155 (1989).
  – Americans with Disabilities Act was passed in 1990.
  – Or, if the claimant had told the truth, the employer would have investigated further and obtained a medical examination. Fort Howard Corp. v. Devoe, 212 Ga. App. 602 (1994).

Substantial Factor in the Hiring

• “...and this reliance must have been a substantial factor in the hiring.” Georgia Elec. Co. v. Rycroft, 259 Ga. 155 (1989).
  – Employer does not have to assert a truthful response would have led to an immediate termination.
  – In fact, in Devoe, the personnel director admitted she did not rely upon the medical questionnaire for the “actual hiring decision.” Fort Howard Corp. v. Devoe, 212 Ga. App. 602, 604 (1994).
  – Instead, the personnel director indicated she would have investigated the matter further and sent the employee for a medical examination and may have “sent him home” if the investigation revealed a history of back problems. Id.
Substantial Factor in the Hiring

• In Shepherd Ctr. v. Williams, the employer testified that, in compliance with the ADA, if the claimant had been truthful, the employer would have had the employee undergo an additional medical evaluation, then it would have tried to make reasonable accommodation to his restrictions by attempting to find him some other position within his capabilities, and it would have withdrawn the offer of employment had it found itself unable to make reasonable accommodation. Shepherd Ctr. v. Williams, 251 Ga. App. 560 (2001).

• The Court of Appeals found this testimony to be sufficient proof the employer “relied” on the false representation and this reliance was a “substantial factor” in the hiring

• The employer does not have to prove that the employee would not have been hired after admitting to a prior injury, only that there would have been further medical inquiries and/or evaluations

Causal Connection

• There must be a “causal connection between the false representation and the injury”
  – An employer does not have to show the employee’s preexisting condition caused his subsequent on-the-job injury
    o For instance, in Gordon County Farm v. Cope, the claimant’s preexisting back condition did not cause her subsequent fall. Gordon County Farm v. Cope, 212 Ga. App. 812 (1994).
    o However, the medical evidence indicated the injury resulting from the on-the-job accident was considerably worse than it would have been had the preexisting condition not been present. Id.
Causal Connection

- So, the “causal connection” need only be between the preexisting condition, which the employee misrepresented, and the subsequent injury for which he/she seeks workers’ compensation benefits
  - Degrees of Causation?
  - How remote?
    - For instance, same exact location? Same spinal level or adjacent?
  - May need expert testimony

Other Reasons to Use a PHMQ

- Other reasons to use a post-hire medical questionnaire
  - In the workers’ compensation context, to impeach a claimant’s credibility at trial
  - You may not be able to meet all three prongs of the Rycroft defense, but you can show that the claimant was not truthful at the time of hire
PHMQ: What Questions to Ask

• “Have you ever been treated for any of the following conditions or diseases?”
  Herniated Disc
  Surgical Removal of a Disc or Spinal Fusion
  Chest Pain
  Arthritis or Rheumatism
  Knee Injury
  Back Injury
  Neck Injury
  Shoulder Injury

If you answered “Yes” to any of the above questions, please explain:

PHMQ: What Questions to Ask

• Have you ever had any injury, operation or any disability not covered by the above questions? If yes, please explain. If not, state “None.”

• Can you lift 50 pounds comfortably?

• Would you like to discuss a reasonable accommodation to perform your job?
Employee Affirmation

• Employee Affirmation
  – At the end of the post-hire questionnaire, have the employee sign a statement affirming he/she understood the questions and answered them truthfully
  – And that the employee understands his/her completed questionnaire will be kept in a separate medical file, apart from his/her personnel file

Other Considerations

• To assert a *Rycroft* Defense, the misrepresentation does not have to be written. It can be verbal.
• However, written statements by the employee, with his/her affirmation, tend to be more compelling evidence in court than an employer’s recollection of what an employee may have said months/years prior
• Include a disclaimer stating all new hires must complete the questionnaire and the job offer is conditioned on the responses, any required medical examination and job availability
ADA Accommodations

• If the employee’s responses on the PHMQ warrant investigation, the ADA requires the employer to “engage in the interactive process”
  – Sit down with the employee, discuss the situation and send for medical clearance
• Request medical documentation of restrictions
  – Provide a job description to the treating physician so there is no ambiguity as to what the job requires

ADA Accommodations

• The employer is not required to create a job for the employee
  – If the employee cannot be “reasonably accommodated,” they can be terminated
• What does “reasonable accommodation” mean?
  – A modification is reasonable if it is feasible or plausible; must not cause an “undue hardship” to the employer
  – Employers are not required to eliminate essential job functions or fundamental duties of the position
Adjusters – Effective Use of a PHMQ

• Once a claim has been reported:
  – Ask if there is a PHMQ
  – ISO claim search and/or medical canvas
  – Get a WC-207 as quickly as possible

• Time limitations:
  – Only have 60 days from date of employer knowledge of the accident to assert Rycroft
  – Essential to identify a PHMQ early and determine if Rycroft may be available

Takeaways

• Use a PHMQ to gather information about an employee’s medical history/prior injuries after an offer of employment has been made
  – Make sure to ask the same questions of every new hire and use a questionnaire that will cover conditions of particular concern to your industry

• If an employee fails to disclose relevant prior injuries, may be able to establish a Rycroft defense to any subsequent WC claims
Thank You!

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