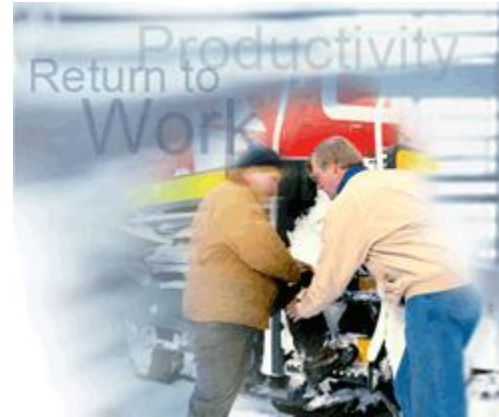




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Concepts that work. Solutions that last.



Work Solutions Insight

Your work injury management newsletter October 2007

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DSI NATIONAL CONFERENCE FOR EMPLOYERS AND PROVIDERS CHICAGO, OCT 26-27

The Newest Concepts in Work Injury Management and Prevention: Functional Fitness for Duty II

An outstanding roster of speakers will gather at Indian Hills Resort in Chicago on October 26-27. A combination of employers, physicians, therapists, case managers and other occupational health specialists will meet to discuss newest research and methods to improve health and return to work of workers. The multidisciplinary conference is designed to bring the main players together to discuss how all can work together to keep workers safe and health and also to vastly improve return to work through job function matching. Research and outcomes to give insights into the issues are also slated.

Speakers include:

- William Shaw PhD: Liberty Mutual Research Center
- Barbara Toepen-Sprigg MD: Occupational Medicine
- Bruce Sherman MD: Goodyear Corporate Medical Director
- Manny Kiesser, Director of Cast Health, Disneyland Resort
- Leonard Matheson PhD: Psychologist
- The WeatherShield Team
- Scott Ege, Libby McCoy, Ginnie Halling, Curt DeWeese, occupational rehabilitation specialists
- Dennis and Susan Isernhagen
- Panelists of case managers, physicians, therapists, ergonomists

For full information on speakers and topics, go to www.dsiworksolutions.com and click on the conference brochure. Or, call DSI at 218-625-1051.

Post-offer Screenings: What is Legal, What is Not By Gwen Simons, Esq., PT, OCS, FAAOMPT

History of Post-offer Screenings

There has been marked focus on the legal compliance of post offer testing since the Americans' with Disabilities Act (ADA) was passed. The Equal Employment Opportunity Commission (EEOC) regulations help employers comply with the Americans with Disabilities Act. However, long before the ADA, the EEOC had developed Guidelines for Selection Procedures to help employers comply with anti-discrimination policies set forth in the Civil Rights Act. The anti-discrimination policies in both Acts are essentially the same: to determine whether an applicant is qualified for a job, the selection criteria (or post-offer screen under the ADA) must be job-related and consistent with business necessity. But how is job-relatedness determined and how do we know what is consistent with business necessity? More importantly, who makes those decisions and what liability does that person/entity have if claims of discrimination are made?

Health care providers, including therapists, frequently design employment screenings to determine whether a worker can perform the essential functions of a job, often using a job description. Whether the job description is accurate and valid is another story. Although the therapist should not provide legal advice to their client companies, if the therapist is not knowledgeable of EEOC regulations, they could get caught in legal issues if the employment screening turns out to be discriminate against a protected class of people based on race, sex, color, religion, national origin or disability. Even though the employer must answer to employment discrimination claims and is

ultimately responsible if discrimination occurred, the employer frequently assumes that liability for non-compliance belongs to the provider that performed the screening exam.

High Stakes for Improper Screening Exams: The Dial Case

When a screening exam is not properly designed, the stakes can be quite high for the company. Last November, a federal appeals court upheld a decision that Dial Corporation had discriminated against women by not offering jobs to female applicants who failed a "strength" test. The company was hit with a judgment of \$3.2 million, to be paid to 52 rejected female job applicants. The screening exam designed and used by health care professionals at Dial was not unlike exams typically performed at a wide range of companies across the country. Therefore, it is important to understand what went wrong at Dial so that more compliant post offer tests can be designed.

In 2000, Dial began requiring employees to pass a work tolerance screen (WTS) in an effort to reduce workplace injuries. This test consisted of lifting and carrying a 35-pound bar and placing it between two frames at 30 inches and 60 inches off the floor, to simulate the essential job function of lifting and carrying 35 pounds of sausage. During a normal work shift, an employee would lift and carry approximately 18,000 pounds and walk the equivalent of 4 miles.

The company's attempt to design a valid job-related test failed, however, because applicants worked faster during the screening test than they were required to work on the actual job. Workers on the job performed only 1.25 lifts per minute, with rests between lifts. Although applicants were told to go at their own pace during the test, they still performed six lifts per minute without breaks on the WTS.

The court determined that the screening exam did not have construct validity because the frequency of lifting on the WTS did not match the job requirements. In addition, it appeared that the pass/fail criteria were subjective and inconsistently applied, exposing Dial to suspicion about their motives.

EEOC Compliance

Jobs that have heavy work demands require higher levels of physical fitness, therefore women or disabled people who have less physical strength will have more difficulty meeting the job qualifications. This does not mean that employers cannot screen applicants where there with a screening tool that has a "disparate impact." On the contrary, the more physically demanding the job, the more important it is to screen the applicants to determine whether they meet the job qualifications. It just means that the screening procedure will be exposed to higher levels of legal scrutiny. For employers, this means that extra care should be taken to choose the right consultant to analyze jobs, determine essential job functions, and design valid screenings.

The EEOC requires employment selection criteria to have content, criterion, or construct validity if it disproportionately impacts protected classes of people. Construct validity is more difficult to prove and is less frequently used.

Content Validity

Content validity is established when a selection procedure accurately simulates essential job functions. However, as the court case above demonstrates, the EEOC expects every aspect of the essential function to be replicated, including speed and work-rest ratios. Content validity cannot be established from job descriptions that are old, inaccurate or have not been validated either by incumbent workers or objective physical measurements. Therefore, it is important for the employer to develop valid job descriptions or use qualified consultants to identify essential job functions through an on-site job analysis. Providers should make sure that job descriptions have been validated before they develop employment screenings from them. A screening exam that is based on old, out-dated or inaccurate job analyses will not have content validity. Likewise, a job description that comes from another employer or another site, even though it is the same job title, cannot have content validity until the accuracy of the job analysis is confirmed.

Criterion Validity

Some screening tools do not attempt to mimic the job (content validity), but claim to still test important job-related functions. These screening tools must have criterion validity to comply with the EEOC guidelines. However, criterion validity can be difficult and expensive to prove. An example of a screening tool that claims to have criterion validity is isokinetic testing. While clinicians may agree in general that it is important to have good muscle strength for heavy lifting jobs, it is more difficult to determine at what level the strength (or strength deficit) crosses the line from being a "potential risk" for injury (which cannot be used to deny employment), to a direct threat to the health and safety of the employee or others (which can be used to deny employment). More importantly, it is difficult to show the link between a test done on a machine and the actual job functions because there are too many variables. The test is usually performed in a different position, at a different speed, and in an artificial environment.

Many screening tests attempt to borrow criterion validity from published or non-published studies performed by others. However, the EEOC makes it clear that such borrowed studies can only be used to prove the validity of the employer's test under three conditions: (1) when the population tested in the validity study has the same work

demands as employees being screened; (2) when the validity study includes a study of test fairness for each race, sex and ethnic group relevant to a labor market; and (3) when there are no validity variables between the borrowed validity study and the employer's jobs. If variables are present, each employer must complete an internal validity study, which can be costly and time consuming.

If validity is proven, the employer must prove that there was no suitable selection criteria that was less discriminatory as an alternative. This requirement can be satisfied by choosing appropriate cutoff scores or "exclusion criteria" at the level where the applicant poses a direct threat to the health and safety of themselves or others. A direct threat is defined as a "significant" and "imminent" threat, not a speculative or potential risk.

Summary: Best Option for Legally Defensible Screenings

The risk of civil liability or EEOC fines is significant and real for employers who do not comply with EEOC regulations. Employers rely on consultants to design compliant screening exams but cannot delegate liability for compliance. Therefore, it is important to carefully choose qualified consultants who know how to design content valid screenings. Selection criteria must be job-related and based on a valid job description. The initial costs to set up a compliant screening process is worth the reduction in liability exposure.

See Code of Federal Regulations (Title 29, Part 1607). Accessed at www.gpoaccess.gov/cfr/index.html

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THE AGING WORKER; MAXIMIZING VALUE AND EXPERIENCE

By Susan Isernhagen PT

Safe and productive workability is an important topic both for workers and employers. New information is available on effective ways that employers can design work and worksites and also methods for workers to maintain their abilities long into their active lives. The average age of workers is getting older. Workers work longer and plan to work longer yet due to financial constraints. Older workers have positive work attributes. Yes, employers are aware that they need to implement programs and processes that will keep their workers productive and healthy, but that there may be some perceived challenges for the older worker.

Do you know:

1. **It is possible to design too much physical activity out of a job:** this can lead to problems of too much mental stress (when light jobs are combined and a worker has to watch too many processes or machines). It can also lead to unintended deconditioning. With a low level of physical work activity, the normal aging changes of weakness or decreased aerobic capacity are hastened. All job changes should be evaluated for potential problems before they are implemented.
2. **Strength decreases with age.** This is a fact. Exercise is the only counter. A resistance training exercise program for healthy adults over age 65 was found to **reverse aging** at the cellular level. This was demonstrated in a study just published by McMaster University in Hamilton, Ontario, Canada; the [Buck Institute for Age Research](#), based in Novato, California; and the Center for Genetics, Children's Hospital Oakland Research Institute, Oakland, California. Exercise also increases endurance, balance, coordination and heart/lung function.
3. **Learning doesn't stop.** With proper time in training, workers at all ages can learn new tasks and skills. But the bottom line is..."with proper time in training". Too many supervisors believe older workers either cannot learn new tasks or do not want to learn new tasks. This is not true. But, when approaching experienced or older workers positive management styles make all the difference. Explain what the new ideas or tasks are. Ask for comments and ideas. Allow questions to be asked. Get the "buy-in" necessary for all new idea implementation. And, give enough training and opportunity to practice the new skills that they are learned without pressure or frustration. Those management styles work for all ages, but are particularly important here.
4. **Balance loss leads to more falls and injuries:** This is a multifaceted problem. First, many subtle balance assists decline with age (decreased muscle reaction time, nerve conduction time, joint receptor sensitivity, and reflex time combined with increased postural sway). Injuries can also be more severe in a fall of a person over 50 compared with one younger. There may be some early osteoporosis of the bone and stiffness in the tendons and muscles which lead to breaks or tears. Also healing time is longer with age. Thus, the attention to slips and falls is paramount. Good lighting is important (as more light is needed with age). Walking surface issues should be noted: highlight steps, cracks, grades or obstacles. Non-slip surfaces and footwear are important. Also, with exercise, balance is assisted in dancing, slow reaction sports, and low impact aerobics.
5. **Analysis of an employer's aging/cumulative/work related problems** can lead to answers to workers compensation injuries, Non-work related injuries, STD, LTD and absenteeism. Remember that days lost are costly for the worker and the employer both. Taking care of injuries or problems is much more expensive than preventing them in the first place. Smart employers are putting time and effort into identifying the issues that may surround aging in a proactive way. Analysis, education, exercise, job rotation and ergonomics can be applied

proactively, but evaluation of the issues will prevent money just thrown at the issue. Loyalty increases...injuries decrease with proactive inclusive answers.

For more information on aging worker issues contact Sue Isernhagen
sisernhagen@dsiworksolutions.com or 218-625-1051

SSA approves report on Social Security Disability use of functional and vocational expertise

Early in 2006, the Social Security Administration commissioned a project to obtain advice from an expert multidisciplinary panel on use of functional and vocational experts to provide guidance in

- Determine how to provide needed vocational and occupational medicine expertise at all levels of the disability determination process to improve the quality of case adjudication
- Determine how the need expertise should be provided—should SSA create a national or regional cadre which would be available to all disability adjudicators
- Determine what qualifications candidates should have to provide vocational and occupational medical expertise

SSA, in collaboration with Webility Corporation, conducted the project with Jennifer Christian as the project director. A two day meeting was held in July 2006 with the other panelists, Nathan Cope MD, Robert Drake MD PhD, Melanie Ellexson MBA OTR, Tom Floren DDS Administrator, Richard Fox JD, Elizabeth Genovese MD MBA, Stephen Hubbard MD MBA, Susan Isernhagen PT, Rosalind Joffe Med, Vicki Johnson DDS Administrator, Leonard Matheson PhD, Thomas McCallum FMLI, Patricia McCollom MS RN, Kenneth Mitchell PhD, William Molmen JD, Robert Silverstein JD, Timothy Tunner, MSW PhD.

The recommendations fell into 5 areas

1. Broaden the range of professions involved and maintain a qualified pool of experts adequate for SSA's needs
2. Utilize appropriate medical-functional-vocational (mFV) providers and approaches on each case
3. Build a more complete and informative picture of work ability before making decisions
4. Help people return to work, cope better
5. Provide more individualized determinations

If you wish to read the full report, please contact Susan Isernhagen at sisernhagen@dsiworksolutions.com and ask for the SSA report.

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