Advanced Concepts in Functional Capacity Evaluations, Job Analysis, Workers’ Compensation, and the ADA

ABVE Conference 2018

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FUNCTIONAL CAPACITY EXPERTS, LLC
Session Topics

1. How Do You Know if the Injured Worker Gave their Best Effort During a FCE?
2. The Unfortunate Misuse & Abuse of Waddell’s Signs.
4. Workers’ Compensation and the ADAAA: Must be full-duty to return to work leads to disability discrimination.
Session 1

How Do You Know if the Injured Worker Gave their Best Effort During a FCE?
Residual Functional Capacity

- What a claimant can still do despite his or her functional limitations.
- “The most you can still do despite your limitations.”
- “An assessment of an individual’s ability to do sustained work-related physical and mental activities in a work setting on a regular and continuing basis.”
  - “A regular and continuing basis means 8 hours a day, for 5 days a week, or an equivalent work schedule.”

CFR 416.945  Residual Functional Capacity.
“Most physicians are not trained in assessing the full array of human functional activities and participations that are required for comprehensive disability determinations.”

“The relationship between impairment and disability remains both complex and difficult, if not impossible, to predict.”

“The physician or treating provider may determine diagnosis and medical prognosis, but functional testing is more objective than the current use of estimates, commonly called restrictions. In an evidence-based medical model, measurements are preferable to estimates.”

In SSD claims, the medical diagnosis or medically determinable impairment may be sufficient to meet the “listing of impairments.”

You cannot reliably predict the severity of a claimant’s functional limitations based on their medical diagnosis or medically determinable impairments.

How does a physician or an ALJ reliably establish the existence or non-existence of significant functional limitations without objective evidence from functional testing performed by a qualified FCE examiner?
Both organizations essentially agree that:

- Measured evidence is more objective than speculation.
- The functional limitations caused by most medically determinable impairments can not be reliably predicted.
Medically determinable impairments combined with the results from content valid functional testing administered by a qualified FCE examiner form the basis for establishing the severity of functional limitations.

When the why is clear, the how is easy.
Definition:

A comprehensive performance-based medical assessment of an individual’s physical and cognitive abilities to safely participate in work and other major life activities.

2 types:

- **Job/Occupation Specific FCE**
- **Any Occupation FCE**
Duration:

The FCE examiner is ultimately responsible for determining the amount of time medically necessary to design, administer, and interpret the results of the FCE based on the complexity of the case.

APTA FCE Guidelines, 2011.
Duration factors:

1. Type of FCE needed.
2. Physical and/or cognitive demands of the job/occupation.
3. Chronicity and severity of the physical and/or cognitive impairments.

Longer duration

- Individual with chronic physical and/or cognitive impairments
- Individual has reached MMI and permanent work restrictions are needed
- Individual reports fatigue and delayed onset of pain aggravation following activity participation

Shorter duration

- Individual with acute to sub-acute physical and/or cognitive impairments
- Individual has not reached MMI and temporary work restrictions are needed for early return to work
- Baseline functional abilities are needed prior to participation in an advanced work rehab program
4 Essential components:

1. Medical records review and summary, especially objective diagnostics.
2. Interview with client to discuss medical hx, symptoms, work history and education.
3. Physical examination to document objective medical evidence (signs) of impairments.
4. Content valid functional testing.

APTA FCE Guidelines, 2011.
How is Effort Determined?

- Psychophysical monitoring.
- Biomechanical monitoring.
- Physiological monitoring.
- Isometric/Static Strength testing.
- Hand Grip Strength testing.
- XRTS Lever Arm testing.
Psychophysiological Monitoring?

- Rating of Perceived Exertion (RPE)
- Pain Level/Symptoms

May provide a good indication of a claimant’s safe tolerance to activities, but validity relies completely on the claimant’s subjective perceptions.


Psychophysical Monitoring?

1-5 Rating of Perceived Exertion Scale

We will be using the following 1-5 Rating of Perceived Exertion Scale to have you rate how hard it was for you to complete various activities during the evaluation.

Your responses will be compared to your performance and test behaviors as a component of the level of effort you provided during the functional testing.

<table>
<thead>
<tr>
<th>Very Easy</th>
<th>Easy</th>
<th>Somewhat Hard</th>
<th>Hard</th>
<th>Very Hard</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
</tbody>
</table>

Rating of Perceived Exertion Guidelines

1. Very Easy. Like nothing at all.
2. Easy. Light effort
3. Somewhat Hard. Moderate effort, but I can do more.
4. Hard. I can probably do a little more, but not much.
5. Very Hard. That’s all I can do.
Psychophysical Monitoring?

0-10 Functional Pain Scale

0-10 Functional Pain Scale

We will be using the following 0-10 Functional Pain Scale to have you rate your pain during the evaluation.

Please be honest and select only ONE number.

Your responses will be compared to your performance and test behaviors during the evaluation, and to objective evidence contained in your medical records as a component of your pain behavior assessment.

<table>
<thead>
<tr>
<th>No Pain</th>
<th>Mild Pain</th>
<th>Moderate Pain</th>
<th>Severe Pain</th>
<th>Extreme Pain</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>5</td>
<td>6</td>
<td>7</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td>9</td>
<td>10</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Functional Pain Score Guidelines**

0  No pain. Pain is not present at all.

1-3  Mild pain. Pain doesn’t limit me from doing my normal daily activities.

4-6  Moderate pain. Pain limits me to light activities. I need help from others with some of my normal daily activities.

7-9  Severe pain. Pain limits me significantly. I need help from others with almost all of my normal daily activities.

10  Extreme pain. Pain completely limits my ability to do anything. I am totally dependent on someone else to help me with all of my daily activities.
Muscle recruitment
Base of Support
Posture
Control & Movement patterns

Clinical observations (by trained examiners) of biomechanical signs of effort based on operationally defined criteria have shown good validity and reliability to determine safe effort levels.


## Biomechanical Monitoring?

<table>
<thead>
<tr>
<th></th>
<th>Light</th>
<th>Moderate</th>
<th>Heavy</th>
<th>Maximal</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Muscle Recruitment</strong></td>
<td>Prime movers only</td>
<td>Recruitment of accessory muscles, trunk and neck stabilizers</td>
<td>Pronounced recruitment of accessory muscles and stabilizers</td>
<td>Bulging of accessory muscles and stabilizers</td>
</tr>
<tr>
<td><strong>Base of Support</strong></td>
<td>Natural stance</td>
<td>Stable base</td>
<td>Wider base</td>
<td>Very solid base</td>
</tr>
<tr>
<td><strong>Posture</strong></td>
<td>Upright</td>
<td>Beginning of counterbalancing</td>
<td>Increasing counterbalancing</td>
<td>Marked counterbalancing</td>
</tr>
<tr>
<td><strong>Control &amp; Movement Pattern</strong></td>
<td>Easy movement patterns</td>
<td>Smooth movements</td>
<td>Begins to use momentum, difficult but not max</td>
<td>Uses momentum in a controlled manner, loss of control with added weight</td>
</tr>
</tbody>
</table>
Continuous heart rate monitoring to calculate % heart rate increase and % maximum aerobic capacity have shown to have good validity and reliability for determination of safe effort levels.


## Physiological Monitoring?

<table>
<thead>
<tr>
<th>Load (lbs)</th>
<th>Pre-Test HR</th>
<th>Peak HR</th>
<th>% HR ↑</th>
<th>% Max AC</th>
<th>PWT C&lt;30 F=30-41 O&gt;41</th>
<th>MPHFR</th>
<th>HRR</th>
<th>85% MPHFR</th>
</tr>
</thead>
<tbody>
<tr>
<td>20</td>
<td>70</td>
<td>82</td>
<td>17</td>
<td>12</td>
<td>C</td>
<td>170</td>
<td>103</td>
<td>145</td>
</tr>
<tr>
<td>30</td>
<td>----</td>
<td>90</td>
<td>29</td>
<td>20</td>
<td>C</td>
<td>----</td>
<td>----</td>
<td>----</td>
</tr>
<tr>
<td>40</td>
<td>----</td>
<td>102</td>
<td>34</td>
<td>32</td>
<td>F</td>
<td>----</td>
<td>----</td>
<td>----</td>
</tr>
<tr>
<td>50</td>
<td>----</td>
<td>116</td>
<td>66</td>
<td>46</td>
<td>O</td>
<td>----</td>
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<td>----</td>
</tr>
</tbody>
</table>

* 54 y/o male.
Isometric/Static Strength Testing?

- Static leg lift test
- Static arm lift test
- Horizontal validity lift test
- Coefficient of Variance

Isometric/static lift testing has shown no relationship to dynamic lift capacity and the use of CV to classify effort level is not scientifically reliable.


Hand Grip Strength Testing?

- Maximum Voluntary Effort (Bell-shaped curve)
- Rapid Exchange Grip
- Stokes protocol
- Coefficient of Variance

Hand grip strength testing and COV have shown to be invalid and unreliable for determination of effort level.


The lever arm has a fixed axis point of rotation. This causes a forward displacement in the body’s center of gravity as the load is raised. In contrast, a box and most other objects being lifted in the workplace do not have a fixed axis but allow for freedom of the body’s center of gravity to move the load. The biomechanics of lifting are not identical as advertised.

Recommended Methods for Determining Effort

- Psychophysical monitoring ✓
- Biomechanical monitoring ✓
- Physiological monitoring ✓

Use of all 3 methods by a qualified FCE examiner provides the most valid and reliable assessment of a claimant’s residual functional capacity.
NOT Recommended Methods for Determining Effort

- Isometric/Static Strength Testing
- Bell-Shaped Curve, Rapid Exchange Grip, Coefficient of Variance
- XRTS Lever Arm and HG Testing

CAUTION: Do NOT rely on the above testing methods or “high tech” equipment to produce a reliable, valid, or usable FCE result.
If Effort is Good and Pain Behavior is Normal.....

- FCE examiner should consider Pain/Symptom reports and RPE in final RFC determinations.

If Effort is Good and Pain Behavior is Abnormal.....

- FCE examiner should disregard reliability of self-reported Pain/Symptoms and RPE in final RFC determination.
- However, FCE examiner should consider recommendation for Psych eval and treatment if necessary to compliment Voc Rehab and improve RTW prognosis.
If Effort is Poor and Pain Behavior is Normal.....

- Work Physiology Principles – Heart Rate Response
  - % Max Aerobic Capacity?
  - Age-Gender lifting norms.
- FCE examiner should consider Pain/Symptom reports and RPE in final RFC determinations.

If Effort is Poor and Pain Behavior is Abnormal.....

- Work Physiology Principles – Heart Rate Response (see above)
- FCE examiner should disregard reliability of self-reported Pain/Symptoms and RPE in final RFC determination.
The claimant was only willing to perform activities falling within a Light work level. While it is likely they can perform work activities classified at a higher physical demand level, their current safe maximal work level could not be established due to their failure to fully cooperate during the FCE.

Since the claimant invalidated their test results, their ability to participate in work related activities could not be determined.
Instead Expect a FCE Report to provide.....

- An opinion about the claimant’s work level whether the claimant’s test performance was valid or invalid.
  - **Valid Performance**
    - Objective evidence from functional testing
    - Objective evidence from physical exam
    - Objective evidence from medical records review
    - Symptoms + or –
  - **Invalid Performance**
    - Same objective evidence as above with special emphasis on
      - Work Physiology
      - Age-gender norms for material handling activities.
FCE Report Examples

Results:

1. Effort
2. Pain Behavior
3. Work Level

C:\Users\steve.allison\Documents\FCE Example 1 - Hand Grip & Limited Work Physiology.pdf

C:\Users\steve.allison\Documents\FCE Example 2 - XRTS - Work Phys-Waddell's.pdf

C:\Users\steve.allison\Documents\FCE Example 4 - FCE Summary.pdf

C:\Users\steve.allison\Documents\FCE Example 4 - HPE.pdf

C:\Users\steve.allison\Documents\FCE Example 4 - FT.pdf
Brief Stand & Stretch Break
Session 2

The Unfortunate Misuse & Abuse of Waddell’s Signs
Large number of commercial FCE systems that purport to be able to objectively identify individuals who provide INSINCERE or UNRELIABLE effort during FCEs and who also demonstrate NON-ORGANIC PHYSICAL SIGNS often referred to as Waddell’s signs consistent with SYMPTOM EXAGGERATION.

Gordon Waddell, et. al. *Nonorganic physical signs in low back pain.*

- Proposed non-organic physical signs were distinguishable from “standard” clinical signs of physical pathology and correlated with other psychological data.

- Suggested that non-organic signs be used as a simple clinical screen to help identify patients who may require a more detailed psychological assessment.
A Look at Waddell’s Signs

Waddell's Signs - Nonorganic Lumbar Physical Signs Screening Test – YouTube
The use of Waddell’s signs in workers’ comp and personal injury claims grew prolifically.

Many medical providers had little or no background in the original development or proper interpretation of Waddell’s signs.

Many FCE examiners and physicians learned about Waddell’s signs in a very short story format while attending continuing medical education courses or from other peers.

Unfortunately, many of those individuals with legitimate injury claims were mislabeled as symptom exaggerators or malingeringers based in large part on the inappropriate use and interpretation of Waddell’s signs.
Waddell, et. al. *Behavioral responses to examination: a reappraisal of the interpretation of non-organic physical signs.*

In this study, the authors noted the signs had been misinterpreted and misused both clinically and medicolegally.

Further noted that the behavioral signs on their own were not a test of credibility or faking, and the signs offered only a psychological “yellow flag” to those patients who may require both management of their physical pathologies and more careful management of the psychosocial and behavior aspects of their illnesses.
Fishbain, et. al. *A structured evidence-based review on the meaning of non-organic physical signs: Waddell signs.*

Review of 61 studies and case reports related to Waddell’s signs. From this literature review, the authors reached the following conclusions about Waddell’s signs:

1. Do not correlate with psychological distress.
2. Do not discriminate organic from non-organic problems.
3. May represent an organic phenomenon.
4. Are associated with poorer treatment outcomes.
5. Are associated with greater pain levels.
6. Are not associated with secondary gain.
7. Are some methodological problems with Waddell’s signs studied as a group.
Fishbain, et. al. *Is there a relationship between non-organic physical findings (Waddell’s signs) and secondary gain/malingering?*

Review of 16 studies and case reports related to Waddell’s signs and secondary gain or malingering. From this literature review, the authors concluded that:

The preponderance of evidence pointed to **no association** between Waddell’s signs and secondary gain or malingering.
Ranney. A proposed neuroanatomical basis of Waddell’s non-organic signs.

Ranney noted the use of the term “non-organic signs” suggested a non-physical cause, such as psychological or sociological factors.

Provided a valid neuroanatomical basis to explain physical causes for 6 of the 8 original non-organic physical signs. The 2 signs not explained were regional weakness and over-reaction.
1. Superficial tenderness – skin discomfort on light palpation.

• CNS sensitization due to prolonged pain stimulation resulting in physical changes in the anatomical pain pathways at the spinal cord level.
2. **Nonanatomical tenderness** – unrelated to anatomical patterns.

   • Pathological changes in pain pathways at the spinal cord level.
Neuroanatomical Basis

3. Pain on axial loading: back pain with downward pressure on the head.

• Pain in the neck with axial loading frequently occurs with whiplash injuries. If an individual is hypersensitive to pain and apprehensive, anxiety may cause back muscle spasm and back pain.
4. **Pain on simulated rotation: rotating shoulders and pelvis together.**

- **Tricky maneuver.** If sacroilitis is present in an anxious person, pain can result due to fear of movement based on bad experiences with doctors.
- **Stress on SI joint structures.**
Neuroanatomical Basis

5. Distracted straight leg raise: pain when tested supine, but not (or less so) when seated.

- One or both of these signs may represent apprehension which potentiates pain.
- Lumbar spine posture is different in sitting versus supine resulting in stress in different structures (facets, disks, etc.) depending on the posture.
6. Regional sensory changes: stocking like sensory loss or sensory loss in an entire extremity or side of the body.

- May be the result of changes in how pain signals are processed.
- Scant research to support a basis for regional sensory changes.
Psychophysical Signs of Possible Abnormal Pain Behavior

3 Major Psychophysical Signs on Physical Exam:

1. Cogwheel or catchy weakness
2. Widespread numbness/tingling
3. Inconsistent movement patterns

Abnormal Pain Behavior = Pain behavior that is not consistent with objective medical evidence. Sometimes, but not always associated with psychological conditions including depression, anxiety, somatization, and less often malingering.
Official Break

“Was it a work-related injury? I'm not sure. He fell over in his chair while snoozing.”
Session 3

Job Descriptions as a Legal Basis for Employment Decisions
Job Descriptions as a Legal Basis for Employment Decisions

Why have a job description?

- ADA requires all employers with 15 or more employees to have a “listing” of job duties, skills, and requirements for each position.
- Set minimum “cognitive” and physical qualification standards.
- Proper job placement
  - New hires.
  - Existing employees.
  - Return to work......
Focus on Physical Demands

How much is enough?

• Medium work.
• Must be able to lift 50 pounds.
• Must be able to stoop, squat, kneel, and climb.
• Must be able to use hands for manipulating objects.

Is this information helpful?

What can be done to improve the specificity of the job demands so they can be more useful?
Focus on Physical Demands

Basic rules of construction:

- Define **activity duration** or **# reps**.
  - Occasional (1-33%, 1-100 reps).
  - Frequent (34-66%, 101-500 reps).
  - Constant (67-100%, 501+ reps).

- Define **vertical** and **horizontal** distances.
  - Lifting, carrying, pushing, pulling.

- If activity is **uninterrupted**, define time.
  - Standing at a work station for up to 1 hour and 20 minutes with no interruptions to walk or change postures.

- Delineate **essential** from **marginal** job functions.
Focus on Physical Demands

On-site Job Analysis

• The most objective method for quantifying the physical demands of a job.
  • Time, distance, reps, force measurements.
  • Pictures and/or videos.

• Relies on direct observation and interviews with employees who perform the job, their supervisors, safety, and human resources.

• Employees are considered the subject matter experts. Their input is crucial for legal defensibility.
Focus on Physical Demands

Do NOT rely on:

• Phone interviews with supervisors, HR, etc.
• Check off forms completed by supervisors, HR, etc.
• Outdated job descriptions.
• Generic job descriptions.
Essential versus Marginal Job Functions

Essential job functions
The basic job duties that an employee must be able to perform, with or without reasonable accommodation.

Marginal job functions
Extra or incidental duties
The EEOC recommends that employers carefully examine each job to determine which functions are essential to performance. This is especially important prior to taking employment actions such as return to work, job transfer, or termination.
Essential versus Marginal Job Functions

Key factors to consider in determining if a job function is essential:

• Does the position exist to perform the function?
• What are the consequences of not performing the function?
• How much time is spent performing the function?
• Are special skills or training required to perform the function?
Dictionary of Occupational Titles

• Occupation specific as opposed to job specific.
• Good basic starting point for general job functions and as a basis for typical physical demands.
Dictionary of Occupational Titles

Sedentary 11% of occupations
Light 49.6% of occupations
Medium 29.6% of occupations
Heavy 9.1% of occupations
Very Heavy 0.7% of occupations
Climbing: 18% of all occupations
Balancing: 8% of all occupations
Stooping: 36% of all occupations
Kneeling: 16% of all occupations
Squatting: 23% of all occupations
Crawling: 5% of all occupations
Reaching: 99% of all occupations
Handling: 99% of all occupations
Fingering: 85% of all occupations
## Job Browser Pro & Occubrowse

<table>
<thead>
<tr>
<th>Activity</th>
<th>Light</th>
<th>Medium</th>
<th>Heavy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Climbing</td>
<td>10%</td>
<td>7%</td>
<td>30%</td>
</tr>
<tr>
<td>Balancing</td>
<td>5%</td>
<td>12%</td>
<td>19%</td>
</tr>
<tr>
<td>Stooping</td>
<td>25%</td>
<td>56%</td>
<td>71%</td>
</tr>
<tr>
<td>Kneeling</td>
<td>32%</td>
<td>24%</td>
<td>32%</td>
</tr>
<tr>
<td>Squatting</td>
<td>3%</td>
<td>36%</td>
<td>49%</td>
</tr>
<tr>
<td>Crawling</td>
<td>2%</td>
<td>5%</td>
<td>7%</td>
</tr>
<tr>
<td>Reaching</td>
<td>99%</td>
<td>100%</td>
<td>100%</td>
</tr>
<tr>
<td>Handling</td>
<td>99%</td>
<td>100%</td>
<td>100%</td>
</tr>
<tr>
<td>Fingering</td>
<td>86%</td>
<td>91%</td>
<td>76%</td>
</tr>
</tbody>
</table>
Sample Physical Demands Listing

1. Identify job functions.
2. Determine physical demands required for each job function.
3. Classify each job function as essential or marginal.

Physical Demands Of Job

Employee’s Physical Capacity
Brief Stand & Stretch Break

Refuse to lower your standards to accommodate those who refuse to raise theirs.

Quotes & Thoughts
Session 4

Workers’ Compensation and the ADAAA: Must be full duty to return to work leads to disability discrimination
ADAAA

• Jan 1, 2009, the ADA Amendments Act (ADAAA) became law.

• Broadened the definition of “disability” making it easier for individuals to qualify for protections under the ADA.
EEOC Cases

1997-2016 EEOC Disability Discrimination Claim Trends

https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm
EEOC Cases

1997-2016 EEOC Disability Discrimination Claim Trends

https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm
EEOC Cases

- 1997-2008
  - Avg monetary benefits: $50.1 million
  - Range monetary benefits: $41.3 (1997) to $57.2 (2008) million

- 2009-2016
  - Avg monetary benefits: $101.9 million
  - Range monetary benefits: $67.8 (2009) to $131.0 (2016) million

- 2017
  - UPS - 2 million

[Source: https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm]
Disability under the ADAAA

1. A physical or mental impairment that substantially limits one or more major life activities.
2. A record (or past history) of such an impairment.
3. Being regarded as having a disability.
Substantially Limits?

- **ADA**: The impairment prevents a person from performing a major life activity or significantly restricts the person’s ability to perform the activity as compared to the average person in the general population.

- **ADAAA**: Requires a lower degree of functional limitation than the previous standard.
  - Is to be construed broadly in favor of expansive coverage, to the maximum extent permitted by the term of the ADA.
  - Requires an individualized assessment.
  - Without regard to functional improvements from the use of mitigating measures such as medications or hearing aids.
  - Impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

https://www1.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm?rendorprint=1
Substantially Limited in Work?

Substantially limited in work means that the impairment interferes with the individual’s ability to perform either a “class or broad range of jobs in various classes” rather than a type of work.

A class of work may be determined by reference to the nature of the work (commercial truck driving) or by reference to job-related requirements that an individual is limited in meeting (prolonged standing, repetitive use of hands).

An individual need only be substantially limited, or have a record of a substantial limitation, in one major life activity to be covered under the first or second prong of the definition of “disability.”

https://www1.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm?renderorprint=1
Major Life Activities?

1. Caring for oneself.
4. Hearing.
5. Eating.
7. Walking.
8. Standing.
9. Lifting.
12. Etc......

https://www.eeoc.gov/laws/statutes/adaaa.cfm
Regarded As?

- If the individual was subjected to an action prohibited under the ADA because of an actual or perceived physical or mental impairment whether or not the impairment limited or was perceived to limit a major life activity.

- Does not apply to impairments that are transitory and minor.
  > Actual or expected duration of 6 months or less.

https://www.eeoc.gov/laws/statutes/adaaa.cfm
Under the ADAAA, the focus for establishing coverage is how a person was treated because of a physical or mental impairment (that is not transitory or minor) rather than on what an employer may have believed about the nature of the person’s impairment.

https://www1.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm?renderforprint=1
An employee has a work-related injury that has resulted in a temporary back impairment that does not substantially limit a major life activity. However, the employer views him as not being able to lift more than light weight and refuses to return him to his position. The employer regards him as having an impairment that substantially limits the major life activity of lifting. The employee has a disability as defined by the ADA.

https://www.eeoc.gov/policy/docs/workcomp.html
An employer refuses to allow an employee to return to his position because of a facial scar that resulted from a work-related accident. The employer fears negative reactions by co-workers or customers. The employer regards him as having an impairment that substantially limits the major life activities of interacting with others and working. The employee has a disability as defined by the ADA.

https://www.eeoc.gov/policy/docs/workcomp.htm
Reasonable Accommodation?

The duty to provide reasonable accommodation is a fundamental statutory requirement because of the nature of discrimination faced by individuals with disabilities.

- Making existing facilities accessible.
- Job restructuring.
- Part-time or modified work schedules.
- Acquiring or modifying equipment.
- Changing tests, training materials, or policies.
- Providing qualified readers or interpreters.
- Reassignment to a vacant position.

https://www.eeoc.gov/policy/docs/accommodation.html#general
Employers are required by the ADA to provide reasonable accommodation not only for job applicants with disabilities but also for existing workers with disabilities (including injured workers’ receiving workers’ compensation benefits) unless it can be factually shown that doing so would cause an undue hardship for the employer.

https://www.eeoc.gov/policy/docs/accommodation.html#general
Does the ADA apply to Workers’ Compensation?

YES, much more often than not.

1. EEOC Enforcement Guidance: Workers’ Compensation and the ADA

2. Employers Must Begin Interactive Process for Return to Work Sooner Than Thought
Does a worker with an occupational injury have a disability within the meaning of the ADA?

The passage of the ADAAA in 2009 broadened the definition for disability making it easier for individuals to qualify for disability protections.

Yes, if:

The work injury is severe enough to result in a substantial limitation with a major life activity.

• Permanent work restrictions.
Workers’ comp injury covered under the ADA? (continued)...

Any condition serious enough to require medical restrictions/limitations for more than a few days or weeks are likely to meet the definition of an ADA disability.
May an employer require that an employee with a disability-related occupational injury be able to return to “full duty” before allowing the employee to return to work?

No.....

The term “full duty” may include marginal as well as essential job functions or may mean performing job functions without any accommodation.
Must be full-duty to return to work? (continued)...

An employer may NOT require an employee with a disability to return to work full duty to:

• Perform marginal functions of the position, or
• Perform essential functions without consideration for reasonable accommodation.
Does the ADA require an employer to provide reasonable accommodation for an employee with an occupational injury who has a disability as defined by the ADA?

Yes...

An employer must provide the employee with reasonable accommodation as long as it does not impose an undue hardship.
When does an employer’s obligations to consider reasonable accommodation begin?

As soon as the employer is informed that a worker has medical restrictions/limitations due to a work-relate condition.

The employer should immediately engage the worker in an interactive process to look for a reasonable accommodation under the ADA.
When does an employer’s obligations to consider reasonable accommodation begin?

- As soon as the employer is informed that a worker has medical restrictions/limitations due to a work-related condition.

- The employer should immediately engage the worker in an interactive process to look for a reasonable accommodation under the ADA.

When does an employer’s obligations to consider reasonable accommodation begin?

Whether or not the worker’s condition is stable and has reached maximum medical improvement (MMI) has no relevance either to:

1. The time when the employer’s obligation to engage in the interactive process begins, or...
2. The time when a worker should be considered a qualified individual with a disability under the ADA.
Kowitz vs Trinity Health Corp.

- Following neck surgery for cervical spinal stenosis, a respiratory therapist had returned to work with the restriction of a reduced work schedule. She notified her employer (Trinity Health) that she would not be able to complete the physical portion of her CPR certification by the mandated deadline because she had not obtained medical clearance from her treating orthopedist who had ordered 4 additional months of physical therapy.
- Trinity Health subsequently terminated Kowitz for her inability to perform basis life support which was an essential job function.

https://www.eeoc.gov/eeoc/newsroom/release/12-20-12.cfm
Federal appeals court issued a reminder to all employers regarding disabled employees’ requests for reasonable accommodation.

- An employee does not have to specifically request that an employer provide an accommodation.
- An “implied” request “work restrictions” is sufficient to trigger an employer’s obligation to engage in the interactive process with the employee.
Camp vs. Bio, LLC

- 38 year veteran employee working as stock clerk for a grocery store. History of scoliosis since a teenager, but had worked with this “bad back” without incident. On one occasion, Camp’s 3 person team didn’t finish putting out all the stock. The store director found out from one of the team members about Mr. Camp’s bad back which had slowed the team down.

Camp vs. Bio, LLC

- HR Director gave Mr. Camp the stock clerk job description and a “physical capabilities testing sheet” for it to be completed by a physician.
- Job description had been created 5 years prior to the incident and more than 30 years after Camp’s employment.
- Job description listed requirements of lifting 20 pounds constantly and 20 to 60 pounds frequently.

Camp vs Bio

Camp vs. Bio, LLC

- Doctor concluded Camp could lift 20 pounds frequently and 10 pounds constantly, with a maximum lift of up to 35 pounds.
- Bi-Lo forced Camp to take a leave of absence.
- Camp attempted to RTW, but Bi-Lo would not allow him to RTW until he had been medically cleared to lift 60 pounds as required by the job description.

Camp vs. Bio, LLC

- Camp subsequently requested an accommodation that would allow him to return to work under the same arrangement as before where his two coworkers lifted the heaviest stock.
- Bi-Lo denied Camp’s request for accommodation.
- Appeals Court found for Camp.

Camp vs. Bio, LLC

- Bi-Lo made 3 critical mistakes:
  - Relied on a vague and invalid job description.
  - Relied on guesstimated vs actual work abilities.
  - Failed to consider reasonable accommodation.

Best Practices for Preventing Disability Discrimination at Work

- Consider every WC claim a potential ADA claim.
- Validate Job descriptions.
  - Listing of physical demands linked to essential job functions.
    - Review and update annually.
Best Practices for Preventing Disability Discrimination at Work

- Engage the injured worker in an interactive process for safe return to work options.
- Don’t take the position of “must be full-duty to return to work.”
- Don’t accept “no work” from the treating doctor.
Best Practices for Preventing Disability Discrimination at Work

- A restricted-duty policy that provides for an individualized assessment of the injured worker’s unique circumstances is more appropriate than a one-size fits all blanket policy for a time limit to return to work.

- Content valid functional testing provides critical evidence regarding an injured worker’s ability to safely perform the physical demands of the essential functions with or without reasonable accommodation.
Q & A

"We are what we repeatedly do; excellence, then, is not an act but a habit."
~ Aristotle
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