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Workers' Compensation and Preexisting Conditions – The Real Truth

By Debbie Hammer, *Senior Claim Consultant*

Picture this scenario: a newly hired employee has been on the job for only a few hours when he bends over to pick up a piece of paper and winces in pain indicating he has hurt his back. It is known that the employee has previously suffered a back injury from an automobile accident that took place a few months prior to his hire date. Further, the employee has undergone back surgery one month prior to commencing employment. The employer is aware of this situation and has been adjusting work duties to accommodate his medical restrictions. Is this incident covered under workers' compensation?

In a separate scenario, an employee is injured at work when he falls off a 20-foot ladder and has to be taken to the hospital in an ambulance. He too had a previous back injury, but it took place ten years ago, requiring only a one-time doctors visit and no time-off from work. Should this claim be covered?

Most States place minimal standards on the threshold for work compensability, requiring only that work be a contributing factor, not the *sole or exclusive* cause of injury. Therefore, a preexisting condition that is aggravated by work is often considered to be a work-related injury. Does this mean that all such cases are considered work-related? Not necessarily, each situation is evaluated on a case-by-case basis. The outcome of the case will be dependant on the unique circumstances of the incident and the details surrounding it.

How is the determination made about which injuries should be covered in situations involving preexisting conditions? First, how long the employee worked for an employer is irrelevant, unless the employee is claiming a cumulative trauma injury. Timing and severity of the preexisting injury or condition relative to the work-related incident are key considerations as are the employee's statement and medical records. In the first example, the prior back injury was recent and severe, requiring back surgery prior to the commencement of employment,

relative to the work incident which was minor (picking up a piece of paper). In the second scenario, the previous back injury was several years ago and minor compared to the more serious work incident of falling off a ladder.

An important question to ask when dealing with these matters is "absent the work, would the preexisting condition have flared up and led to the same need for treatment and work disability?" If the answer is yes, the employee would not be entitled to workers' compensation. Another issue is whether the work incident *accelerated* the need for treatment that a prior injury would have ultimately required. If the answer is yes, the employee will be entitled to workers' compensation. Finally, a distinction can be made as to whether the work incident was either a *temporary exacerbation* or an *aggravation* of a preexisting condition. If the former applies, the employee might either be barred from receiving any workers' compensation benefits, or entitled to abbreviated benefits to get him back to his baseline pre-injury status. In the latter case, an aggravation is viewed as a new injury, so the employee would be eligible for full benefits less any existing disability prior to the aggravation.

It is not the claims adjuster's role to answer these questions and/or to determine their compensability. Rather, either the primary treating doctor or a medical legal expert should be asked to address these issues.

Also, an employee's statement about prior medical history should be consistent with information in his/her medical records. If a witness indicates that an employee told him/her about a preexisting history, but the employee denies it, and there are no hard facts or medical records to refute the employee, it will not be possible to maintain a denial of workers' compensation benefits short of a deposition taken to confirm the facts under oath. One employee's word over another is not considered substantial evidence. It is also important to point out that sometimes there are difficulties with obtaining past medical records. The records may have

been destroyed, the medical provider may not have kept good records or they may no longer be in business.

The bottom line: to overcome the burden of proof and strong liberal sentiment at the Workers' Compensation Appeals Board, you must make a diligent effort to conduct early and effective discovery pertaining to an injured workers' past medical history and current accident details. A physician will still need to support his opinions with medical evidence. In California, if there is a prior Award of permanent disability to the same body part, the labor code now states that the percentage of permanent disability is conclusively presumed to exist at the time of the subsequent industrial injury. In effect, any previous Awards follow the injured worker to his subsequent employers, i.e. apportionment of the preexisting disability.

What you can do to mitigate your risk:

1. Implement a pre-hire fit for duty testing policy. Although this cannot eliminate the risk of workers' compensation incidents, it will at minimum assist with the verification that an employee is able to perform the physical functions of his/her job.
2. Perform thorough accident investigations. Take statements from the injured worker and witnesses.
3. Report claims in a timely manner and communicate red flags to the insurance adjuster. A medical release and past medical records should be obtained by the adjuster for review and comment from a medical professional.

For more information on workers' compensation and preexisting conditions issues please contact your Woodruff-Sawyer Account Executive or Debbie Hammer at 415.878.2476.

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