Returning an injured employee to the workforce can be a slow and sometimes costly process. Employers need to manage their obligation to provide all employees with a safe place to work with the need to ensure work commitments can be met without too much interruption from the returning employee. Ensuring that you have the right information to manage this process, and manage your competing obligations is imperative.

As the workforce becomes more mobile and businesses need to ensure flexibility both in the services they offer and the functions their employees perform, administration associated with job roles and functions can fall by the wayside. A failure to periodically review the requirements of roles and update position descriptions and functions can have adverse consequences when managing employee issues, including when returning an employee to work after an injury.

Determining the Inherent Requirements of a Role

When returning an employee to work following an injury, it is necessary to consider the employee’s capacity to perform the inherent requirements of their job. Determining what these are requires consideration, not just of the work performed by the employee but also the terms on which the person is employed and relevant surrounding circumstances, such as handbooks and policies about safety assessments and processes.

Often, when assisting an employee to return to work from injury, employers will have the employee assessed by an independent medical practitioner. This is to confirm the employee is fit for work, and to determine whether any adjustments need to be made to assist the employee’s return. For the practitioner to make an informed assessment, a detailed job description and important requirements of the job need to be provided. If this is incomplete or inaccurate, the assessment may not be able to be relied upon. There is no need to provide information on prior injuries that an employee has recovered from. We often see employer's relying only on the job description to identify the inherent requirements of a particular role. This is a good starting place, as long as the job description is up to date and reflective of the actual functions performed and not missing any significant tasks. However, it is important to include an objective assessment of what the employee is reasonably expected to do on a day to day basis.

What Does the Fair Work Commission Think?

The Fair Work Commission agrees. In a recent decision ([2017] FWC 440), the Commission confirmed not only the importance of considering how the work is actually performed (i.e. what is reasonably expected of the person fulfilling the role) but also the necessity to consider how relevant policies and practices may impact on the performance of a role.

In this case, when managing the return to work of an injured employee, the employer relied on the core physical demands it had identified for front line operational roles. In particular the employer

1 Martin v TNT Australia Pty Ltd [2017] FWC 440
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relied on the requirement that its delivery drivers be able to lift 40kg from floor to waist/waist to floor. However the employer did not consider other relevant factors such as whether or not other employees who perform similar tasks were doing so unaided, the nature of the job, the manual handling procedures and practices and access to reasonable alternatives such as the use of lifting aids. Furthermore the employer did not consider its own practice of relying on employees to make their own assessment of the risk of picking up an item, and the modifications they should make when items are identified as being too heavy.

The Commission undertook its own assessment taking into account those processes set out by the employer to assist employees manage their manual handling. Importantly, the Commission concluded that the ability to lift weights of over 40kg unaided was not a vital requirement of a position of Delivery Driver, due to the fact that the employer placed reliance on the judgement of drivers to take responsibility for their own safety, for assessing the lifting of freight and had support mechanisms in place (such as forklifts) if they could not safely lift goods above certain weights.

The employer's decision not to consider its own processes and the reliance it placed on its drivers resulted in an unfair medical assessment and the decision of the employer not to return the driver to work to be overturned.

What About Psychological Requirements?

In many industries, including front line services (think health providers, police, firefighters, aged care, childcare and Fly-in, Fly-Out operations), the job inherently requires much more than the physical elements of the role to be articulated. Yet this is not always clearly expressed in a job description or organisational policy. Identifying whether there is an inherent psychological requirement to a role and documenting what it is and why it is necessary is important, particularly if an employer is to rely on that 'inherent' requirement when assessing an injured employee. It is also necessary that any assessment of an employee's ability to meet the psychological requirements of a role be carried out by an appropriately qualified practitioner. An occupational physician assessing an employee's physical capabilities is not going to be suitably qualified to provide an assessment of the employee's psychological capacity.

What Should Employers do?

There are some simple, yet fundamental steps to take to identify the inherent requirements of a particular role. As a start, you need to:

- review the relevant job description to clarify what it is the employee does on a day to day basis – update if necessary and ensure there is a process in place to regularly review and update job descriptions
- consider whether there are any policies or practices which impact the way the employee performs the work. Are there safety policies which require the work to be performed in a particular way, or require a certain process to be followed? If so, consider how these impact on the day to day functioning of the role
- ensure the independent medical examiner has all relevant information needed to properly assess the worker’s capacity.

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