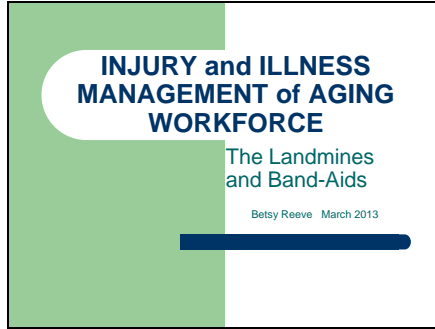
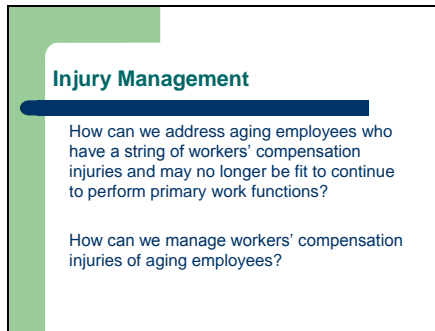


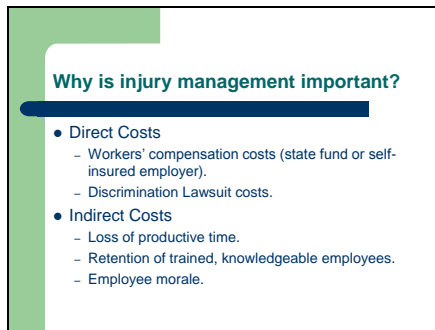
Slide 1



Slide 2



Slide 3



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STAGES of INJURY MANAGEMENT

1. Preventative Steps
 1. Hiring Practices;
 2. Personnel Policies;
 3. Safety & Injury prevention.
2. After the Injury: early & effective return to work.
3. Termination of Employment Relationship.

Slide 5

THE LANDMINES

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AGE DISCRIMINATION

An employer cannot discriminate against any applicant or employee because of his/her age.
Applies to everyone 40 or older.

- Unless bona fide occupational qualification.
- EEOC reports a 30% increase in age discrimination cases filed SINCE 2007. Age discrimination cases account for 26% of all discrimination cases.

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Disability Discrimination

Law prohibits discrimination against disabled applicants or employees.

A disability is a sensory, mental or physical impairment that is:

- Medically cognizable or diagnosable
- Exists as a record or history; or
- Is perceived to exist whether or not it does

It can be temporary or permanent

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Americans with Disabilities Act (ADA)

Requires employers to engage in an **interactive process** to determine whether disabled employees who are qualified for specific jobs require one or more "**reasonable accommodations**" to perform the essential functions of their job

Slide 9

FMLA

Allows up to 12 weeks of leave taken either intermittently or consecutively over a 1 year period for employees who suffer from a "serious health condition" and restores the employee to his or her regular position if he returns within 12 weeks (with certain exceptions)

- Intermittent FMLA leaves problematic for chronic conditions.

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Workers' Compensation Costs

- Medical treatment benefits;
- Time loss Compensation if temporarily unable to work.
- Permanent partial impairment; and/or
- Permanent total disability, i.e. pension.

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Workers' Compensation Costs

- Washington ranks third in country in amount of benefits provided to injured workers for each \$100 of payroll (2007 figures)

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Workers' Compensation Costs

- In an example given by Dept for a state fund employer, for a worker earning \$20/hour who missed 5 days of work, the increased premium was \$3,200 for three consecutive years.
 - Almost \$10,000 increase in premium for claim involving only 5 days of missed work.

Option: Keep injured worker on salary so no time loss compensation paid. Limits impact on workers' compensation premiums for particularly state fund employers.

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Prevention -Reality

- Older workers (55 -64) may be less likely to be involved in work-related injuries.
 - 20-24: 2670
 - 25-34: 6620
 - 35-44: 6610
 - 45-54: 7680 (26.7% of all claims)
 - 55-64: 3590 (12.5%)
 - 65+: 770 (2.6%)

But occupational claims of older workers are often more serious.

Dept. of Labor, Bureau of Labor Statistics (2010) for Washington

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- More median days off in older age groups:
 - 16-19: 3
 - 20-24: 4
 - 25-34: 5
 - 35-44: 10
 - 45-54: 10
 - 55-64: 14

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Health Care Injuries

In Washington, the source of the injury was a health care patient in 4.8% of all claims in 2010.

In all musculoskeletal claims in Washington, a health care patient was the source of the injury in 9.7% of musculoskeletal claims.

Dept. of Labor, Bureau of Labor Statistics (2010)

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Workers' Compensation Costs

- 5.25% of time loss claims become pensions.
- 2-3% of all claims stay open for 3 years and they have a 50% chance of resulting in pension.

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Increase in Washington Pensions

- "One of every 19 time-loss claims becomes a lifetime pension — a rate that has doubled in the past 10 years. And lifetime pension claims comprise half of all workers compensation costs."
 - Statement by Dept in 1/11 when governor was pushing for workers' compensation reform.

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Workers' Compensation Costs


- If injured worker cannot return to job of injury (JOI) and cannot perform other reasonably continuous gainful employment in the general labor market, the person is deemed to be permanently and totally disabled.
- Must be able to work same number of hours per week. No partial pension.

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Workers' Compensation Costs

Total disability analysis considers the whole person including age, education, work experience, transferable skills, pre-existing disabilities & physical & mental residuals of the injury.

- Age is a factor.



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Workers' Compensation Costs

- Permanent total disability is paid for the rest of the person's life – not until retirement age.
- Benefit is 65% of wages (including health care benefits) tax-free if married (60% if single; plus 2% for each dependent).
 - Capped with a Maximum benefit of \$4816.20 monthly meaning those earning over \$89,000 do not receive 65% of actual wages.

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Occupational diseases

Washington allows claims for an occupational disease if distinctive working conditions **aggravate a pre-existing disease.**

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Occupational diseases

Pre-existing disease can already be symptomatic, i.e. if work makes an already symptomatic disease more symptomatic, the employee can obtain workers' compensation benefits.

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Examples of aggravations

- Employee had prior ACL knee surgery as a result of a ski injury. Condition got worse and needs a total knee replacement – no traumatic event. Is it an OD? Probably for nurse or OR tech. Probably not for medical billing clerk.

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Examples of aggravation

- Employee had prior low back symptoms and was treating with chiropractor both before and after beginning employment. Filed a claim for low back occupational disease.
 - Depends on whether the low back condition is aggravated. Have the symptoms increased in nature, frequency or intensity? If it is a continuation of the same condition, the employer is not responsible.
 - Hospital still has to address any disability and accommodations.



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Ramifications

- Age is a critical factor in awarding a pension so preventing injuries to older workers will reduce the rate of pensions.
- Returning injured workers to work will limit direct workers' compensation costs.
 - Will also reduce likelihood of disability discrimination lawsuit, but can lead to another claim.
- Repeated injuries can build up to a pension.

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Ramifications

- It is important to address performance concerns of any person with a chronic health condition before a new claim is filed. If an employee is unable to perform the essential functions of the job, transfer him or her to a more appropriate job or terminate if no job is available.



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THE BAND-AIDS

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Preventative Hiring Practices

- Consider what physical and mental qualities are needed to perform the job.
- Decide whether a demonstration of the job will be requested before interviews so all candidates are asked to demonstrate; not just the old or unhealthy-appearing applicants.

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Preventative Hiring Practices

- Obtain a written job description to provide to each applicant.
- Ask candidate if he can perform the essential functions of the position with or without accommodations.
- Reference checks
- Post offer medical examinations

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PREVENTION

- Motivations for older workers to work:
 - Income (76%);
 - Enjoy the job; enjoy working (70%)
 - To save for retirement (64%)
 - Health Care Benefits (61%)
 - It makes me feel useful (52%);
 - Need to support family members (42%);
 - To qualify for Social Security (42%)
 - To fulfill pension requirements (41%).

AARP (2007)

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Role of social, psychological & intrinsic work rewards

"Co-worker support is the most important predictor in deciding to remain working, regardless of hours worked or gender."
"For full time workers, stress is the second most important predictor. Age discrimination is also a factor."

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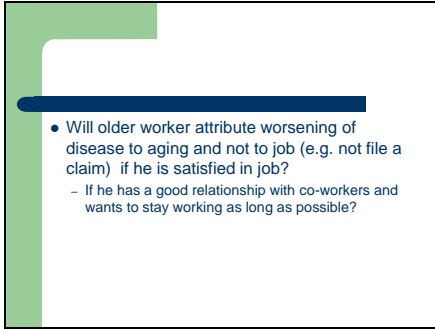
Prevention - Reality

- 76% of people over 65 reported having good to excellent health (60%-black; 63% Hispanic). 80% reported good to excellent health between 65 and 74.

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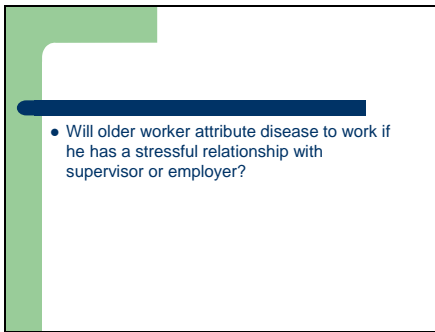
- According to NOD (2001), 55-64 year olds have a 21.9% chance of developing a disability.
- 42% of those 65 and older reported functional limitations. (2005)

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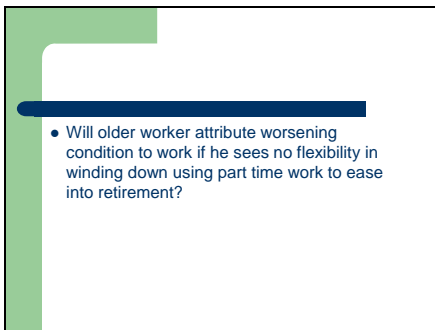
- Will older worker attribute worsening of disease to aging and not to job (e.g. not file a claim) if he is satisfied in job?
 - If he has a good relationship with co-workers and wants to stay working as long as possible?

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- Will older worker attribute disease to work if he has a stressful relationship with supervisor or employer?

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- Will older worker attribute worsening condition to work if he sees no flexibility in winding down using part time work to ease into retirement?

Slide 43

PREVENTION before Injury

- Modifications to jobs to avoid injuries for all age groups, e.g. patient lifts (EEOC).
- Ergonomic Assessments for individual work stations or entire departments.
- Altering work situation to remove physical & mental stress.

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SERIAL INJURIES

Factors/Ideas to consider post-injury:

- Thorough investigation of every claim filed
 - Were prior restrictions being followed?
 - Were any policies or safety rules violated?
 - Does claim qualify as a compensable claim?
- FMLA notice that fitness for duty certificate will be required before re-entry.
- Ergo assessment;
- Any additional accommodations to prevent re-injury?
- Job shadow for a day for loss prevention purposes;

Slide 45

Band-aids

- Interactive process with employee addressing the number of claim/incidents and analyze reason for each claim to see if safety standards violated or whether additional equipment needed to perform job.
- Enlist supervisor's support in preventing further injuries. Make supervisor part of the employee's success.
 - Make sure supervisor does not suppress the filing of a claim.
- Consider paying for general health assessment under claim to see if other health factors are causing accidents, e.g. vision, dizziness, foot drop, low blood pressure

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Band-aids

- Make sure he can and is performing essential functions of position. Address performance concerns if he is not, which could ultimately lead to termination.
- Discipline if violating safety standards BUT....

Slide 47

Worker' Comp Discrimination

An employer cannot discriminate against an employee because the employee filed or communicated an intent to file a claim –

BUT an employer can take action against a worker for the worker's failure to observe safety standards adopted by the employer and the frequency or nature of the job-related accidents.

RCW 51.48.025

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Workers' Comp Discrimination


Warning: Be very careful about relying on this statute.

However, it can be the backdrop of a conversation with an employee to address nature and frequency of past accidents and explain disciplinary consequences of future accidents resulting from violation of safety standards.

Deterrent effect?

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Be extremely careful of disciplining or terminating because of frequency or nature of accidents.



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Two Paths

Return employee to work successfully in an appropriate position which avoids future injuries/claims; or

Recognize that person cannot perform any position in your organization and terminate employment after considering reassignment to any vacant positions.

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Competing tensions

- First path (return to work) decreases workers' compensation costs;
- Second path (remove from workplace) increases workers' compensation costs due to increased likelihood of permanent total disability award.

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**Injury Management:
How and Why to Return to Work**

Early return to work is critically important:

1. Reduces workers' comp costs;
2. Most likely prevents disability discrimination or ADA lawsuit;
3. Keeps employee connected with workplace & interested in the social relationships;
4. For older workers, they may be less likely to view it as an alternate form of retirement.


Slide 53

Injury Management

- Importance of early and regular communication:
 - Notifies employee that you care about their contribution and expect him/her to return to work;
 - If supervisor calls, it keeps positive social connections intact (if there is a positive relationship already);
 - Tell person how team misses him and how important he is to team;
 - Ask when he thinks he'll be able to return.
 - Ask what employer can do to assist him in returning to work.
- Call-in Policy

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Injury Management



- Importance of Communication with Doctor:
 - Need to ascertain restrictions to identify accommodations to regular position or what other positions may be appropriate;
 - Let doctor know that modified duty options exist.
 - Will be regularly asking for updates on work status;
 - Submit job descriptions of all work other than claimant's regular work to attending provider for approval with copy to injured employee.
 - Not by supervisor (avoids possible FMLA issues);

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SET EXPECTATIONS...

with employee and doctor that employee will be returning to work in regular job, modified job or reassigned job.

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Return to work

Employer possesses legal duty to provide Reasonable Accommodation without Undue Hardship to Employer and without a Direct Threat to the Health or Safety of the employee or others, e.g. patients.

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Return to work process

- Determine whether any physical or mental restrictions exist from doctor.
- Evaluate returning to regular job, modified job or new job.
- Review priorities for returning to work.
- Provide JA of job of injury to doctor so he will have accurate description of job and will not be relying solely on worker's description.
- Provide JA of anything other than regular job to doctor for approval with copy to worker. RCW 51.22.090(4)
- Engage in Interactive Process with worker.
- Stay at Work program for WA state fund employers pays 50% of base salary for 86 days up to \$10K, plus training costs. Must continue health benefits and have job approved.

Slide 61

Fear of Reinjury

- Employer cannot refuse to return disabled employee to work because of fear of reinjury or future workers' compensation costs.

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PREVENTION

- Scenario:
 - 61 yr old registered nurse with prior rotator cuff surgery under an earlier claim with permanent shoulder restrictions then sustains a low back injury. He has an unrelated heart condition with a pacemaker. You want to try to return him to work but how do you avoid another workers' compensation claim?

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- Scenario: Before his 12 weeks FMLA leave expires, his doctor releases him to work without restrictions as a result of this low back injury.

Question: employer thinks return to the regular job will lead to another claim. Must the employer return him to that position?

Slide 67

F

- Scenario: Doctor releases with restrictions of no lifting over 25 pounds and no lifting with right arm above shoulder level.

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F

- Can you reasonably accommodate?
- Analyze to see if nurse can perform essential functions of regular nursing position with modifications. If not, can restrictions be accommodated in other nursing positions e.g. NICU? Do not have to consider charge nurse even if it fits restrictions if it would be a promotion.

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F

- Scenario: Accommodated as NICU nurse but then census down or unit closed.
- Analysis: Obtain updated restrictions & search for modifications of nursing position or alternative positions in other depts.
 - Point: Have continuing obligation to reevaluate accommodations when earlier accommodations no longer viable.
 - Humphries v. Memorial Hospital (9th Cir); Fritsino v. Seattle School District (2011)

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Issue: Hospital is concerned about 62 yo Environmental Service Tech employee.

Observations: Productivity slowing overall.

Solution: Address as a performance issue. Can ask if he has any concerns that might be affecting work performance. He may raise health problem. Address in Interactive Process – determine nature and extent. Determine whether he can perform with accommodations.

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Twist: Productivity is on track but hospital concerned that, because of age and weight, Environmental Services Tech will have difficulty lifting on job. Hospital is considering moving him into a "safer" position to avoid accident and claim.

Answer: Cannot do.

Question: Do you have to wait for accident to happen or OD claim filed to change position? Yes. Band-aids: Insist on realistic perform evals. Look for unsafe work practices. Measure productivity & address any failings (keeping in mind that older worker may see filing of claim as only alternative to being fired for lack of production).

Slide 72

Twist: Productivity is on track but hospital has objective reason to be concerned about ability to perform job.

Answer: If employee has filed a number of injury claims or employer has observed unsafe practices in order to overcome physical limitations or observed near misses, employer can take action.

Slide 73


Reasonable accommodations in health care industry:

- Modification of work schedules;
 - E.g. night to day shift but check union contract.
- Equipment such as patient lifts;
- Working at home when physical presence is not necessary & confidential files not removed (Raford v. State);
- Leave of absence beyond FMLA.
- Reassignment to vacant position.

- Importance of patient safety emphasized in cases. No accommodation if there is a "direct threat" to patient safety.
- Importance of individualized assessment for each employee!!

Slide 74

When can employee be terminated for inability to perform essential function of position?



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First Step: Is it an Essential Function?

- An essential function is a "job duty that is fundamental, basic, necessary and indispensable to filling a particular position, as opposed to a marginal duty divorced from the essence or substance of the job."
 - [Davis v. Microsoft](#), 149Wn2d 521 (2003)
- Direct patient care is essential function of head nurse even though primary duty may be supervision of nurses (analysis depended on review of a JA).
 - [Davis v. New York City Health](#) (2nd Cir. 2013). No WA case.
 - But EEOC says not an essential function if RN only spends a few minutes/day repositioning patients or transferring between bed and gurney. No consideration of emergencies.

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Regular attendance as an essential function

- First, comply with FMLA if applicable;
- Apply attendance policies, if absences are not related to medical condition.
- Attendance has been viewed by courts as essential function, but be very careful about relying on lack of attendance as basis for termination.
- Tharp v. UW—Dr. said he could not work for 10 days to 12 weeks. Employer asked Dr. for clarification stating that attendance & punctuality are essential functions of position as mason. Dr. never responded and claimant did not respond to requests for updates. Claimant on unpaid leave over a year. Ct. stated that showing up at work is an essential function of job.

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Attendance as Essential Function

- Attendance policies: EEOC targeting systemic discrimination in the form of leave & absentee policies if they are inflexible "no fault" absenteeism policies in which disabled employee is terminated with no consideration for reasonable accommodation(e.g. leave). Settlements with Sears (\$6.2 mill) and Verizon (\$20 mill).

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Productivity as a Essential Function

- EEOC's view: Production can be an essential function. Example: when there are a limited number of people to complete the work.
- Make production standards part of the essential functions. State production requirements in Job Description. Convey to employees.
 - Disabled worker could not meet production standard & terminated. Employer had made change to business increasing production to increase profit. Required speed & quality for grocery selectors. 10th Cir Ct held "Altering or reducing production standards" is not a reasonable accommodation. No WA case.

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Overtime as an Essential Function

- Overtime can be an essential function in some positions.
- Failure to be able to work overtime b/c of disability can result in discharge in some positions.
- **Davis v. Microsoft** (WA Supreme Court 2003): System engineer required to work 60-80 hours/week, travel & work in different time zones. Hep C prevented more than 40 hr/wk. Microsoft offered different position with better hours. He refused. He requested accommodation of continued systems engineer work 40 hr/wk. Microsoft sd. ability to work flexible time zones more than 40 hrs/wk essential to job. They offered a 6 week paid search for alternate positions or 6 month unpaid search. He was discharged after 6 mo search.

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- Ct. cannot redefine the systems engineer position (flexible availability, frequent travel and extended hours are interrelated aspects of job; not discrete requirements).
- Court cannot tell Microsoft how to organize its workforce and structure individual jobs.
- Court cited case finding overtime was essential function of HR Director of hospital saying ability to be present during portions of all 3 shifts is essential.

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How to take action against serial claimants

Terminate based on inability to perform essential functions.

If employer has knowledge of disability or constructive knowledge that disability may exist, it can and should engage in interactive process. Obtain restrictions from doctors. Ask employees for release of pertinent medical records. Consider all limitations from all health conditions. Talk about ability to perform essential functions of position, with or without accommodations. Ask employee what difficulties he has performing position and what accommodations he thinks will enable him to perform essential functions safely and completely. Figure out whether any reasonable accommodations, if any, will allow person to perform essential functions. If so, try those accommodations. If they do not work, try others.

Slide 82

Explain expectation that person must be able to perform essential functions of job with accommodations. If not, he will be removed from that position.

If employee cannot perform job of injury with accommodations (either based on restrictions given by doctor or attempted accommodations fail), tell person that they must be separated from that position, but that you will search for suitable alternate positions for reassignment, following any collective bargaining agreements.

Set up job search method, explain what is expected of claimant during search and consider duration of search. Affirmatively assist claimant during search.

If no suitable jobs are located in reasonable time period, terminate employment.

Result: Not changing or eliminating job b/c of age-related concerns or disability. Changing job b/c of objective info verifying effect of disability on ability to perform essential functions.

Slide 83

Termination upheld for inability to perform essential functions

- **Henry v. State:** wildlife restoration biologist requested ability to work at desk rather than in the field due to disability. Court said we have no authority to tell Dept. how to structure job.
- **Preston v. State:** Job reorganized as a result of budget cuts. Additional duties added. Although worker w/ disability had been performing position at state capital for 40 years, he could not do additional tasks or perform job without another person present. Termination upheld.

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Separation from Position

- When a disabled employee can no longer perform the essential functions of the position with or without accommodations, the person can be separated from the position.
 - This employment action is contrasted from separation from employment. The employee remains an employee for a determination of whether other positions might be suitable and vacant.
