SOLVING THE "SELF-SERVING" MEDICAL NOTES PUZZLE

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Why Medical Notes?

- Honda v. Keays – employer entitled to sufficient evidence from employee of inability to work (or restrictions on ability) as part of right to manage workplace
- Recent increases in rates of disability - medical notes have increased impact on employment relationships
- But doctors receive little or no training in return to work methodology

- May view medical notes as a service to patients or nuisance
- Many are conscientious about providing objective notes (especially FAFs for return to work in WSIB cases)
- But may at times take “whole patient” approach - providing subjective or one-line notes when employees complain that life events making it harder to work

- "Medicalizing" common stressors
- Employer has to distinguish between genuine disabilities and short-term medical conditions, and employee "cherry-picking"
- Privacy - efforts by medical community to ensure that diagnosis is not available to employers
- But under WSIA, entire medical file available

What Information is an Employer Entitled to?

- Ontario Human Rights Tribunal has held that employer is generally not entitled to a diagnosis – OHRC guidelines say the same
- However, is entitled to know enough to make an assessment of the *bona fides* of leave request and what accommodations might be made to return employee to workplace (see *Baber v. York Region District School Board*, 2011 HRTO 213 (CanLII))

Medical Note "Reality Check"

"I recognize that the real world is not an ideal one. In the ideal world doctors would have perfect knowledge of the relevant medical matters, their patients and their patients' workplaces, and would be completely objective… But that is not the real world, or at least not the one I am familiar with. Medical health professionals are also human beings. The fact is that they are not always entirely objective. It is quite appropriate for medical health professionals to act as advocates for their patients in medical matters within their competence, but not when the advocacy extends beyond their medical expertise or matters of which they have direct knowledge, such as when they have little or no knowledge of the workplace or their patient's job or employment situation other than what their patient decides to tell them."

-Arbitrator G. T. Surdykowski, *Providence Care, Mental Health Services v. OPSEU*, 2011 CanLII 6863 (ON LA)

- While legitimate goal of withholding diagnosis is to avoid discrimination, fails to recognize that (1) employees have significant impact on what doctors say and therefore note needs to have and be seen to have objective basis and (2) restrictions and limitations may be comprehensible only when underlying condition is clear
- Goal can be achieved through human rights complaint if discrimination occurs

- Many employers fear intruding too far into privacy or challenging doctors
- Leads to reluctance to challenge medical notes at all, leading to culture where any medical note is accepted out of fear of human rights complaint, and often abuse as a result
- We will address today how to respond to various kinds of medical notes

Medical Notes With Restrictions Unrelated to Condition

- Employee entitlement under human rights law is to reasonable accommodation of disability, short of undue hardship
- Therefore restriction must be related to condition or accommodation not required
- Where condition is known and restrictions seem to exceed it, no reason to accept without question

- Doctor may sincerely believe that for patient as a whole person, day shift would be better
- Could be said of anyone who works shifts
- Issue is whether shift change is causally related to condition or not

- Obtain consent of employee to communicate with doctor regarding reasons for particular accommodation if not clear
- Often request is employee's own and is "slipped in" as part of "whole patient" approach

- If employee refuses to provide consent, consider accommodating only those restrictions which are clearly related to condition
- May induce consent while providing defence to human rights claim

Defence Against Human Rights Claim

- Under human rights law, employee has obligation to demonstrate why accommodation is required and to cooperate by providing sufficient medical information and if need be, attending independent medical examination
- Do not refuse to accommodate employee in other ways if some restrictions are self-evident pending explanation of other restrictions

- Supplementary medical may explain need for shift change eg. medication required to control condition has impact on sleep patterns
- However, question of whether controllable by dosage could be raised with doctor and/or lead to independent medical examination

Medical Notes Requesting Specific Position Within Company

- Such notes suspect if doctor has no job descriptions or information allowing him or her to make recommendation
- A “wish list” from employee
- Seek consent to communicate with doctor
- When communicating with doctor, request specific restrictions and limitations to which employee is subject

- Once these exist, employer can place employee in any position which accommodates restrictions and limitations without regard to request for specific position
- Right is to reasonable accommodation – employee cannot dictate what that will be
- Consider asking for doctor's reasons for recommendation

- May elicit complete withdrawal of recommendation by doctor or provision by doctor of information which is incorrect and demonstrates employee's agenda
- Look behind request for specific position
- Are there other reasons employee wants to move from position, eg. recent discipline or poor review, increase in workload?

- Are reasons legitimate eg. sexual harassment?
- Employee refusal to consent can lead to termination - defensible in event of human rights claim

Medical Notes Requesting Specific Schedule or Hours of Work

- Again, such restrictions must be specifically related to condition
- Temporary phasing-in or “work hardening” common in both physical and psychological disability cases
- If short-term, generally comply

- Longer term restriction on schedule or hours of work should prompt request for consent and communication with doctor re causation
- If based on purported drug reaction, consider follow-up re dosage or independent medical
- If related to purported fatigue, consider independent medical
- Objective testing may be available
- Other ways to accommodate other than desired hours or schedule

Questionable Claims of Total Disability

- Frequently employer receives note that states employee is “off work for medical reasons”
- Initial two weeks often not troubling to employer, but if renewed repeatedly without question, difficult to challenge later
- Not really acceptable for any period of absence exceeding a few days unless related to previously verified condition

- Where absence exceeds a few days, seek consent and communicate with doctor regarding limitations and restrictions which preclude employee from working
- Reference obligation to accommodate in the workplace and express willingness to do so for human rights defence purposes

- Goal is to compel doctor to produce list of restrictions and then if possible accommodate in workplace to prevent employee being off work
- Particularly important if absence immediately follows poor performance review or altercation with superior, or if only reason given is “stress”
- No such thing as “stress leave”, per se

- Recognized leaves in Employment Standards Act or medical in nature
- "Stress" per se not a disability
- Inability rather than disinclination to work required
- If pressed for details, doctor may curtail leave
- Important to turn request around quickly but may be difficult to get detailed response within two weeks

- Where employee healthy and capable of working before altercation or performance review issue, questions should be raised from first day of absence
- Accommodation applies regardless of whether issue is work-related, but home-life stress need not be accommodated per se unless disabling or relates to family status (childcare, eldercare)

- Not “stress” being accommodated, but care needs
- Stress of being away from child does not require accommodation
- All working parents have this
- Where pattern of total disability seasonal, eg. employee unable to work eight weeks every summer, repetition should attract letter to doctor from first day

- When writing to doctor, we normally ask for diagnosis as well as restrictions and limitations and prognosis, to put restrictions and limitations in context
- With employee consent, doctor should provide this information
- Some doctors play lawyer, and decline to provide for privacy reasons despite consent

- Consider letter to doctor from lawyer pointing this out
- Some restrictions and limitations only have meaning in context of identified disability
- If refused, consider independent medical examination

Independent Medical Assessment

- Consider independent medical assessment where doctor will not provide answers to questions despite consent being provided
- Particularly where safety considerations
- WSIB can order an Independent Medical examination subject to the right of the worker to object. No right of appeal on WSIB IME decisions

- Particularly where restrictions and limitations appear unconnected to condition or no condition is known and restrictions and limitations amount to “cherry-picking” ie. desirable shift, hours of work, duties
- Honda v. Keays- requiring attendance at medical examination to clarify discrepancies between employee behaviour and own doctor’s recommendations not discriminatory

- In unionized environment, expressly reserve right to independent medical examination in collective agreement where possible
- If agreement silent, human rights law requires cooperation by employee and union with independent medical examination where medical information equivocal or unclear and is necessary to establish nature of restrictions to be accommodated

- In unionized environment, to demonstrate fitness for work, but only where compelling reasons ie. nature of work, nature of precipitating event
- Where employer has control over pay for sick leave, requirement as a condition of payment for lengthy leaves reasonable
- Where independent medical assessment conflicts with employee's doctor's recommendation, rely on independent medical assessment

- May lead to return to work where employee absent completely or refusing to communicate with employer
- Double-edged sword – independent medical examination may corroborate restrictions and limitations or even increase them and employer bound to accommodate
- Point of such assessments is corroboration not disallowance of employee claims

- Request should always be communicated in positive rather than negative manner
- Require cooperation or terminate employment (subject to WSIA considerations, where applicable)
- In unionized environment, resulting grievance may be settled with requirement of independent medical examination as condition of reinstatement

WSIB and Medical Notes

- WSIB will generally not accept generic medical notes without further medical evidence.
- Some cases “slip through the cracks” and restrictions are accepted with limited evidence
- Employers must ensure that sufficient medical is received to justify restrictions

Using WSIB to Obtain Further Medical

- Raise any concerns with medical notes immediately with the WSIB
- Ask the Case Manager to seek further medical information
- Do not be afraid to address concerns about the Case Manager's approach to senior management of WSIB in appropriate cases

WSIB Policy on "Suitable Work"

- "Suitable work" is defined by WSIB Policy as "…post-injury work (including the worker's pre-injury job) that is **safe**, **productive**, **consistent with the worker's functional abilities**, and that, to the extent possible, **restores the worker's pre-injury earnings."**
- "Work" is defined broadly to include the combining of tasks/duties which together may constitute temporary work

WSIB Return to Work Meetings

- Attended by the workplace parties and a WSIB "Return to Work" Specialist
- "Return to Work" Specialist makes recommendations to the Case Manager on suitability of work
- The Case Manager usually follows the recommendations of the Return to Work Specialist

- Workers are increasingly bringing union representation to Return to Work Meetings
- Recommendations of the Return to Work Specialist are difficult to get overturned
- It is highly recommended that employers have representation at Return to Work meetings
- Employers need to be fully prepared for the meeting

- Ensure that a Return to Work Plan is signed by all parties at the meeting
- Ensure that the employer has a list of available jobs, PDAs and job descriptions
- Employer should make it clear that it expects the worker to comply with the plan and must be prepared to honour any commitments made to the worker

Appeals of Suitability Decisions

- Worker and Employer have the right to appeal suitability decisions and rely on new evidence at the appeals stage
- Important to have all issues documented for the file
- Appeals process can take years and it is not uncommon for personnel changes at the employer to occur while the appeal is underway