



The nation's oldest quarterly newsletter published for professionals concerned with human factors and disability management in the workplace.

Spring 2010

Disability as a Process: Being Disability Prone

"There is no substitute for hard work." –Thomas Alva Edison (1847-1931)

Vocational disability, losing time from gainful employment following the onset of injury or illness, is frequently the result of a social process that begins before the start of an identifiable medical impairment, before the injury or illness itself. In the late 1970s, M.R. Weinstein conceptualized disability as a process and detailed recognizable stages in the process. It has been our experience, over more than 30 years of conducting thousands of vocational/disability assessments, that social and psychological dynamics are present and influential in a worker's life at the time of an injury and often prior to the accident or trauma, the so-called explanatory event. The social and psychological dynamics present at the time of the "explanatory event" are retrospectively understood as representing "disability proneness."

Disability proneness is defined as the susceptibility of an individual to lose time following an explanatory event, not because of injury or illness per se, but because of the individual's psychological characteristics and social experiences antecedent to the injury or illness and not necessarily as a consequence of it. The lost time is, in fact, not actually a result of the explanatory event but rather is an extension of tension build up and susceptibility to dysfunction that began well before the accident or injury in question.

Key to the disability process is a basic concept that the accident or illness can be a way to realize lost time from work. Weinstein called the perpetuation of lost time a "Crystallization of disability." This concept, as set forth by Weinstein, is defined as:

Decreased expectation of improvement, increased dependency on family and agencies, increased concern over money, increased preoccupation with making the 'system' work, increased defensiveness, and anger when 'pushed.'

Below we provide five illustrations of disability as a process and attempt to illuminate behaviors of individuals who in retrospect may have been considered disability prone. We also comment regarding those who might enable the disability prone individual to remain in the process. In conclusion, we speak to the importance of proactive social and workplace programs to ameliorate the consequences of disability proneness.

The High School Science Teacher:

The reasons for continuing to claim total vocational disability and lost earning power are sometimes inseparable from the psychosocial antecedents to an accident and compensable claim.

Maryann F. was, in 2008, a 39-year-old female with a high level of intelligence. She achieved a 3.79 grade point average (GPA) in her undergraduate studies and a 3.84 GPA in her master's degree program.

While working as a high school science teacher, she experienced an incident at work that led to protracted lost time as she claimed total disability. While unplugging a hotplate that was used in a classroom experiment, she received an electric shock. The shock caused her to fall backward, and in the fall, she struck her head on a blackboard behind her.

The consequences she reported of her "shock" were a state of confusion, general overall weakness, difficulty with short-term memory, headaches, seizures, and discernible changes in her speech, although these changes in her behavior and functioning came about slowly.

It should be noted that subsequent testimony from a school nurse was that Maryann was seen in the school dispensary two classroom periods before her accident. She told the school nurse at that time that she was feeling lightheaded and thought that she might pass out. She said that she was under a great deal of stress regarding disputed custody of her son.

Throughout the year after the accident, the plaintiff was examined by numerous professionals, including psychologists, medical doctors, and vocational professionals. One psychologist concluded that Maryann identified herself as a "disabled individual with a brain injury" and by doing so "she is able to avoid dealing with other problems in her life." Largely, these reports stated that she "enjoyed the attention of being a patient" and that there was no "evidence of any resultant disability from the workplace injury involved."

Further complicating the putative disability were domestic issues that arose well before Maryann's occupational injury. Her father was emotionally abusive. Her mother was described as always very controlling and said to be "intrusive" following the incident in question, thereby "stifling her daughter's recovery." Also, Maryann had a dramatic falling out with her 14-year-old son approximately a month before the accident. He threatened to run away and never see his mother again.

Moreover, there was domestic litigation with the ex-husband, and in a court case on the matter, the court decreed custody of the son to the father. Custody issues continued after the accident and apparently contributed negatively to Maryann's state of mind. She became markedly distraught about losing custody and began to attribute all of her emotional trauma and personal difficulties to the work-related accident. During one custody hearing following the accident, her ex-husband's lawyer observed Maryann speaking quite normally and ambulating without evidence of the limp that she had demonstrated to healthcare providers since being absent from work. A day later, when she went before a workers' compensation judge, Maryann again limped and spoke in a childlike voice, problems she causally ascribed to the effects of brain injury.

Following the advice of her personal injury lawyer, Maryann applied for Social Security Disability Insurance (SSDI) and claimed that she was totally disabled from any and all gainful activity. Her marriage and family lawyer advised her that by doing so, she may be perceived by the domestic trial judge as incompetent to manage her son, and Maryann withdrew her SSDI claim.

After considering all of the data made available, including interview and test information gathered from our own examination of Maryann, our conclusions were that although Maryann retained sufficient mental ability to continue to teach, her immediate potential to take up an occupation could not be accurately and completely determined at the time we evaluated her for reasons questionably related to the indexed accident. Our report stated that her "reasons for continuing to claim total disability and loss of earning power are inseparable from

the psychosocial and litigation dynamics antecedent to and as a consequence of her multiple claims (i.e. workers' compensation, marriage and family issues, and personal injury)" arising from the occupational incident from which she alleges total disability. It is our opinion, however, that Maryann's claim of total occupational disability was fueled by factors other than actual impairment stemming from her work-related accident.

The Textile Factory Worker:

Central to the total disability claimed by the woman in the following study were the hardships she experienced early in life. These hardships served to heighten the potential for a less than satisfactory work life. In this case, the forces detrimental to success on her job aligned with prior unfinished business in her life to render her disability prone, and the outcomes were readily predictable.

A woman in her early 40s when she was referred to us, Norma Rae was liked by her work supervisors and had been given several promotions up the ladder prior to her work-related knee injury. The accident occurred two years prior to her referral to us. In the interim, she had undergone numerous tests, including imaging studies and diagnostic arthroscopic procedures, and had received medication prescriptions as well as physical therapy and work hardening.

Numerous independent orthopedic examinations failed to find disease to explain her continuing muscle atrophy and skin changes. As a result, Norma Rae grew depressed while the medical professionals concluded that her physical complaints were subjective and in excess of objective findings. Her employer refused a return to work for her unless she could perform at "full duty."

A complete history of Norma's life to that point showed that she was oldest of nine children in a family living under the harsh conditions of a coal mining father and part-time seamstress mother in the mountains of West Virginia. The father was verbally and physically abusive, and after her mother died, Norma was given the responsibility of raising her siblings. At age 19, she got a job as a sewing machine operator, moved into an apartment, and became the legal guardian of three of her siblings.

Norma joined the AFLCIO and trained in union organizing and recruiting strategies. She often felt that if her father had had union protection, he would have been a better person, and she felt determined to create a safer environment for the men and women she supervised. After eight years on the job, a new manager came into the company. From the start, the relationship between Norma and the new manager was problematic, and the tensions between them increased. When she tried to gain support from the workers, she learned, however, that rather than fight management, they would do anything to keep their jobs. Two days after this critical moment in human relations, Norma injured her knee at work.

A retrospective cost analysis found that with wage replacement, medical, administrative, and legal costs, Norma Rae's accident cost the employer's insurance carrier more than \$675,000 before they reached an agreement to commute her workers' compensation benefits.

The Boss' Daughter:

Sometimes disability proneness is found in the social "process of disability," and a closer look at that phenomenon allows one to see the contribution of individuals who are "co-malingering." Co-malingers are individuals who enable the primary actor, the disability prone individual, to carry out the disability process, sometimes manifesting lost time (disability) without disease. Even when real, identifiable disease is present, individuals who manifest disability following injuries or illnesses sometimes find others in their social systems to support their lost time and claims of incapacity. That is, a retreat from work and an ongoing claim of partial or total disability can be reinforced by friends, family members, coworkers, employers, attorneys, and physicians.

Kathy G., a 47-year-old female, claimed vocational disability and lost earning power within the context of a personal injury lawsuit arising from a motor vehicle accident that took place in October 2007. Kathy, a former director of human resources, alleged that the motor vehicle accident caused spine and hip injuries that prevented her from returning to work.

Kathy was well-educated. She had earned a Ph.D. in psychology from a highly respected university. Kathy's mother was a college graduate and retired high school teacher. Her father had completed graduate school and earned both undergraduate and graduate degrees in engineering. He owned and operated a manufacturing business providing equipment to the military.

After completing her doctoral program, Kathy had worked for a government contractor designing psychological testing for applicants for federal government jobs. Although she had no real experience in human resource management, her father made her the director of human resources for his manufacturing operation. Her father's business had recently won a contract for a multi-million-dollar federal government allocation.

Kathy worked for one year and earned \$60,000. In 2002 she had her first child, yet her father maintained Kathy on the payroll well beyond normal maternity leave while she reportedly worked from her home. Kathy continued to receive annual wages and increases while she was employed by her father's company until she ceased working altogether in January 2005.

Kathy gave birth to twins in February 2005 and remained at home. Unfortunately, one of the twins was born with significant developmental impairments and required substantial care. Kathy had made a decision not to work so that she could attend to her three preschool age children. Her father stopped paying her in January 2005, even though she had not worked in his business for nearly 2.5 years. Prior to her second maternity leave, Kathy continued to receive \$60,000 per annum, much of which was taxpayers' money through federal funding of the shipyard project. She would later argue that her automobile accident would result in lost earning power of more than \$30,000 annually because she would be medically restricted to part-time employment.

Kathy's motor vehicle accident was minor. Although her automobile was rear-ended, the cost of damages to both cars was less than \$195 as no more than tail light plastic was broken. Kathy, however, complained of cervical spine, lumbar, and hip pain. Her family practitioner recommended physical therapy, but Kathy instead went to a chiropractor that had been treating her husband.

Kathy's lawyer recommended that she begin seeing a neurologist, who prescribed spinal injections. Kathy submitted to two lumbar spine injections, but she stopped because she did not experience relief of her low back and/or hip pain. Her cervical spine pain apparently ceased being an issue.

The neurologist authored a medical report in the context of Kathy's personal injury case for her lawyer. Actually, the neurologist wrote two reports. The reports were issued on the same date and were exactly alike, except in one report the neurologist said that Kathy would be restricted to part-time work. In the other report, there was no such restriction, only limitations in her sitting, standing, walking, and lifting no greater than 20 pounds. Vocational assessments would follow.

Kathy argued through her vocational expert that because she was restricted to part-time work, she could only generate \$30,000 per annum and not \$60,000 per year as she had in the past. The defense vocational expert, taking a very thorough history, discovered that Kathy's father was actually her former employer.

At trial, defense counsel vigorously cross-examined the neurologist regarding the two reports of the same date and how they became exactly alike with the exception of the additional restriction of part-time work. It also became known for the first time that Kathy had never worked anywhere earning \$60,000 a year except at her

father's place of employment, and legitimate questions regarding her attitude of "entitlement" were raised as the jury heard about Kathy's remaining on payroll while taking extended leaves of absence to care for her children.

When Kathy confirmed for the first time that her father owned the company that paid her to remain home, she lost considerable credibility among the jurors. Even the judge commented after the trial that Kathy's claim of disability and lost earning power in the context of prior collusion with her father made her personal injury claim seem spurious. A defense verdict was rendered.

The Hair Stylist:

The inability to establish and maintain lasting and satisfactory personal relationships can readily translate to finding new ways to cope, even if the coping requires the co-conspiracy of others. In the following case, the husband takes on the role of an enabler or "co-malingerer."

It is also crucial to understanding that neurosurgeons and other physicians generally have no training in assessing occupational disabilities. Physicians can diagnose and treat impairments, but only employers and vocational experts can determine if the functional limitations of the impairment can be accommodated to a specific job description (with or without the employer providing assistance to the employee as specified by the Americans with Disabilities Act).

When her case was referred to CEC Associates, Inc., in 2009, Karen C. was a 36-year-old mother of three living with her third husband. Karen's family and social backgrounds were replete with psychological trauma and multiple betrayals. Her father abandoned the family when she was 13 years old. She manifested symptoms of anorexia. She left high school because she was pregnant, and her first husband was repeatedly unfaithful. Her second husband, a police officer who had struggled with drinking, was killed in a motor vehicle accident while intoxicated. Karen was a single parent again for three years before meeting the man who would become her third husband.

In May 2005, Karen was involved in a motor vehicle accident and was taken to the hospital. Imaging studies of the neck and spine at the time read as normal with no signs of trauma, and in fact, Karen functioned as a hairdresser for three years after the accident. Although Karen's medical records document her evolving complaints of neck and upper extremity pain and numbness after the accident, those records also include family practitioner office notes referencing similar complaints for several months before May 2005.

After the accident, Karen continued to complain of neck pain, radiating arm pain, numbness in her hands, low back pain, and radiating right leg pain. Four months prior to her vocational assessment in July 2009, Karen underwent lumbar spinal surgery, but the records failed to establish that she required this surgery as a consequence of the motor vehicle accident injuries.

While there were a number of medical reports relevant to her case, two were of particular significance. One of these reports was authored by her neurosurgeon who, reacting to her complaints of severe low back pain and radiating right leg pain, carried out a lumbar discectomy and fusion of vertebrae in March 2009.

In October 2008, a second neurosurgeon reported that although Karen may have experienced a cerebral concussion and cervical sprain as a result of the accident, continuing clinical and diagnostic investigations (more than a year following the accident) did not reveal any evidence of spinal or peripheral nerve injuries. This neurosurgeon reported that the available records proved that Karen had chronic neck, back, and leg pains that preceded the accident.

The most troubling aspect of the case is that the neurosurgeon who performed the operation may have caused disabling impairment. Karen clearly responded to the neck surgery, but she did not fare well following her

lumbar fusion. In his final report, the surgeon stated that Karen was "incapable of even 'low stress' jobs" as a result of continuing low back symptoms, probably stemming from post-surgical scarring. The logic of the situation is that if that was the outcome of the operation, did the medical intervention in fact cause the disability? Health-care-induced injury is sometimes a consequence of medical treatments.

The records also contained numerous surveillance videos taken over time to show that Karen did not, in unguarded situations, display any of the symptoms that she claimed in pressing her case for total disability. She was videotaped driving her children to athletic events and sitting for prolonged periods on hard gymnasium bleachers. Karen and her husband were filmed at the beach and Karen was captured on tape while she carried a beach umbrella across yards of sand. In contrast, during the medical and vocational evaluations that took place concurrent with videotaping, Karen's husband physically assisted her in opening office doors and changing her posture from sitting to standing during examinations.

The findings of the vocational evaluation were that Karen's status of being unemployed and claiming total vocational disability was explained retrospectively by her long history of marginal psychosocial adjustment, somatic (physical) complaints, and unmet dependency needs. Further, in her third marriage, Karen had found a partner willing, at least temporarily, to meet and yet reinforce those needs. The vocational assessment found that Karen was capable of sedentary and/or light customer service work, comparable in pay to her work as a hair stylist for three years after the motor vehicle accident.

The Job-Hopping Auto Mechanic:

When a worker accumulates an exceptionally high number of different employers over a relatively short time, it signals concern regarding the stability of that worker. When that history of instability is compounded by multiple occupational accidents, it also suggests that the worker has become disability prone and that the proneness may manifest itself through lost time in future employment opportunities.

Bill B. claimed a work-related injury that occurred in June 2006. The specific injury reported was to his left ankle, and he now claimed to have "nerve damage" as a result of the accident. In the course of the occupational assessment, Bill stated for the compilation of a pre-accident health history that there was "nothing else...out of the ordinary" in his past in terms of a health issue. Documentation, however, included prior employment records, which referenced occupational accidents and injuries in three out of five prior work assignments.

During the assessment interview, Bill denied that he had ever had problems with substance abuse, a fact that was also not consistent with the documentation that accompanied the referral. Further, he failed to mention specific employment he had in the past. In fact, the total number of employers Bill had indicated that he had not persisted with any of his employment opportunities for one reason or another.

Test scores showed "long-term personality maladjustment," which clearly preceded Bill's accident-related injury from which he was now claiming occupational disability. In terms of achievement, Bill's linguistic abilities were measured as slightly below average, but his nonverbal intelligence was found to be superior.

It was deemed in the assessment that Bill had "long-term maladjustment that likely manifested itself in a number of critical domains, including work." Although Bill did not have medical impairment that resulted in total vocational disability, he clearly had work dysfunction, a history of chronic personality difficulties causing problems adjusting to employment, and although it was felt that Bill could work, he probably would not work under the circumstances that brought him to the vocational/disability assessment.

Conclusion:

The complete histories of chronically disabled employees sometimes tell us, in one way or another, that they

were troubled at work and/or in their personal lives before an explanatory event, a so-called "work-related accident," from which they claimed disability. Although our experiences do not suggest in any way that accidents do not happen, we have come to appreciate the ideas and contributions of insightful occupational medicine specialists like Behan and Hirschfeld, who recognized many years ago the process of disability without disease. They recognized injury cases in which individuals claimed incapacity when healthcare providers had difficulty finding identifiable disease, let alone prescribing a cure for the patient's complaints.

Whether there are disability prone employees in today's organizations is a moot, and perhaps only an empirical, question. All of us can socially and emotionally struggle at points in our lives and, under the right conditions, some of us will turn those struggles into lost time from work. Well-meaning healthcare providers and others will "help" us transform occupational limitations and resultant lost time into acceptable disability and permanent vocational disability.

The disability process is troublesome on several fronts. First, the process itself is pernicious, a waste of human productivity and dignity through work. Second, the process generally results from failures in other systems, including family and educational institutions. Had family and schools been more effective, the disability prone individual would likely not exist. Here we call for a national conversation about building resiliency programs into public school curricula. Third, work organizations often fail in identifying the individual "at risk" and making human resource programs available to the disability prone employee. Employee Assistance Programs (EAPs) and Disability Management Programs (DMPs) are designed to prevent workplace tension buildups that result in "explanatory events," and should they happen, these programs are said to respond rapidly and sufficiently to transition people back to productivity whenever possible. To the extent that our social systems have failed, disability prone individuals continue to manifest their interpersonal and internal conflicts through lost time without occupationally significant injury and/or illness.

Workplace interventions need not be altruistic or outside the realm of good human resource management. Employers who cynically believe that proactive disability management is an excuse that benefits malingerers, exaggerators, frauds, and slackers in the workplace do not understand the message. Unions and the legal profession may believe that EAPs and DMPs are intended simply to manipulate people back to work. In fact, proactive strategies of transitioning troubled employees back to work are usually good for both employer and employee.

As the worker population ages, more and more valued employees will become susceptible to musculoskeletal wear-and-tear disorders as well as non-exertional stressors that seem to be associated with aging. In a downturned economy, those stressors are generally exacerbated and disability proneness arguably may be considered a character flaw, but if not recognized, it can certainly be considered a failure in the human resource management systems of our work organizations. In the long run, disability proneness may result from a dereliction in our collective responsibilities as a society – one in which citizens have a right to maintain independence through work. If not checked, disability proneness will continue to be very expensive for both employee and employer. How labor and management address the problems of disability in the workplace remains a significant issue more than 40 years after Behan and Hirschfeld began finding "disability without disease."

References:

- ◆ Behan, Robert C., and Hirschfeld, A.H., "Disability without Disease or Accident," Archives of Environmental Health, Vol. 12, May 1966, pp. 655-659.
- ◆ Weinstein, M.R., "The Concept of the Disability Process," Psychosomatics, February 1978.

Risk Assessments

While the Occupational Safety and Health Administration (OSHA) does not mandate that every employer

periodically conduct and document risk assessments for their employees, OSHA itself conducts risk assessments when it is ascertaining whether or not a company is in compliance with OSHA standards.

Since risk assessments are largely cost-free activities and easy to do, it is prudent for business managers to consider doing an assessment periodically. Guides to risk assessment are relatively straightforward and can be found at a number of websites. One such example, provided to "carry out a risk assessment," gives 5 steps for the process. See www.businesslink.gov.uk.

Underreported Workplace Injuries and Illnesses

As reported by the Society for Human Resource Management (SHRM), "underreporting of workplace injuries and illnesses is widespread, and the U.S. Occupational Safety and Health Administration's (OSHA) auditing process has failed to identify and correct this." Referencing a study performed by the Government Accountability Office (GAO), SHRM also reported, "A third of the 1,187 occupational health practitioners surveyed said they had been pressured by employers to provide insufficient treatments to hide or downplay work-related injuries or illness." (www.shrm.org/hrdisciplines/safetysecurity/articles)

"This report confirms that when it comes to the documenting of workplace injuries, we can't just take employers at their word," said U.S. Senator Patty Murray, Chairwoman of the Subcommittee on Employment and Workplace Safety. The article lists five steps the GAO is recommending for OSHA.

When Workplace Injuries and Illnesses Can't Be Resolved by the Employer

When employees are truly too injured or ill to return to work, they become, in most cases, applicants for Social Security benefits.

The Social Security Administration's (SSA) disability workloads have grown significantly in recent years "as the baby boom generation started to reach their more disability-prone years."

While the worst recession since the Great Depression appears to be ending, the SSA is inundated with an unprecedented flood of disability applications. In fact, pending claims are expected to jump 70 percent in 2009. In raw numbers, the 70 percent spike equates to more than 3 million new applications.

The State of the Art in Occupational Safety and Health

The National Institute for Occupational Safety and Health (NIOSH) is one of the agencies under the aegis of the Centers for Disease Control and Prevention (CDC).

It is exceedingly informative that the web page for the NIOSH (www.cdc.gov/niosh) lists "other sites" where information about its activities may be found, including:

- ◆ Facebook
- ◆ Flickr
- ◆ MySpace
- ◆ Twitter
- ◆ YouTube

As modern technology continues to evolve, organizations committed to proactive disability management are wise to expand their online social networks. On that note, CEC Associates now has its own Facebook page. We encourage our readers to become "fans" so that they can remain up to date with our activities.

How Effective Is Your Disability Management Program?

To be successful, Disability Management (DM) programs need to show results. Basic procedures and methods such programs need to consider to demonstrate accountability include:

- ◆ measuring on an ongoing basis the fiscal return of the DM program,
- ◆ documenting the specific responsibilities of supervisors/HR personnel to their employees in respect to managing present and potential disabilities,
- ◆ documenting the specific responsibilities of medical providers and occupational rehabilitation providers,
- ◆ assigning responsibility and accountability to a specific individual for program outcomes,
- ◆ integrating and resolving the competing interests of healthcare benefits, insurance issues, workers' compensation, health and safety education, labor/ management issues, and, when relevant, third-party providers.
- ◆ evaluating and addressing deficiencies in staff competencies to conduct an effective DM program,
- ◆ addressing the issue of the organization's leadership to understand the impact of the economy and labor market on the practice of rehabilitation and return-to-work programming.