



THE COMORBIDITY CONUNDRUM OF OBESITY

One of the biggest difficulties in managing challenging workers' compensation claims is that they frequently are accompanied by comorbidities. Diabetes, obesity, mental health issues and addictions are among the most problematic to deal with. **Obesity has become a serious issue in the United States and one that impacts employee health.**

In healthcare, the most frequent and costly diagnosis are various types of back injuries. While it could be argued that obesity may be a contributing cause and/or a pre-existing condition that leads to injuries, the question remains – How do we address the obesity comorbidity?

The issues become even more poignant when obesity is a disqualifying factor in an injured employee's ability to qualify for back surgery. Over the last few years we have seen many cases when a physician has prescribed a diet to an injured employee so that the employee may qualify for surgery. However, we have now seen several cases when a physician has recommended bariatric surgery to assist the employee to lose weight and qualify for back surgery.

THIS BRINGS ABOUT A SERIES OF QUESTIONS:

1. Is the bariatric surgery covered under workers' compensation?
2. If it is prescribed by the treating physician, is the employer required to pay for it?
3. Is it really the responsibility of the employer to help or force the employee to lose weight to qualify for surgery?
4. Will the costs associated with bariatric surgery drive up the settlement award?
5. What if there are complications? Will workers' compensation be responsible to pay for infections, complications or a death claim?
6. Might losing significant weight positively impact back injury pain and other symptoms?
7. Is there any defense to argue against approving weight loss surgery?

Is bariatric surgery compensable?

Missouri Revised Statutes – 287.140.1 states, “In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, *as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.*”

Missouri caselaw opines that the Employer/Insurer is liable for all medical treatment that “flows from” the accidental injury. This standard vs. the “prevailing factor” standard in determining general “compensability” of a claim lowers the burden of proof required for a claimant attempting to have the weight loss surgery ordered.

Missouri has not addressed the issue directly. However, some other states have weighed in that if such treatment may be necessary to relieve a condition or improve the healing then the treatment is compensable. As an example, Minnesota courts have ruled on both sides of the issues. In separate cases Minnesota courts have ruled that such surgery was not reasonably necessary and in one case that it was. Other states have also had contradictory orders, including California and Indiana.

If prescribed by the treating physician?

If the physician states that weight loss surgery is imperative to the person's recovery from the work injury, then the courts are likely to approve it. One might argue that obesity is a pre-existing condition. However, if the physician's opinion is that the work-related injury will not heal or reach MMI (maximum medical improvement) without weight loss treatment, then the argument that it is medically necessary to cure the injury is likely to prevail.

Will the costs of weight loss surgery increase the settlement?

Unfortunately, when judges see the overall costs of the needed medical treatment coupled with the cost of the additional bariatric surgery the permanency valuation is likely to increase. On the other hand, if weight

loss assists in the overall recovery of the claimant, theoretically it could be argued that the permanency value should be lower.

What if there are complications?

There is uncertainty in these types of surgeries. What happens if the weight loss surgery is unsuccessful?

What if there is an infection? Will the employer/insurer be responsible for the additional costs related to the infection. Generally, workers' compensation law will require that the employer/insurer pay all related medical bills for all authorized and/or court ordered medical treatment.

If the claimant dies because of weight loss surgery, it would likely become a compensable “death claim” by the same rationale.

Positive impacts of weight loss surgery?

Losing weight could have a positive impact on back, shoulder, knee or other injuries. In fact, it could also positively impact issues such as diabetes. At that point, surgery could cure the injury and the weight loss may reduce the chances of re-injury, improve rate of healing, reduce disability rating, improve other conditions.

We are not contending that weight loss surgery is appropriate prior to surgery. There are clear alternatives, like diet and exercise.

Is there a defense?

The first and best defense is to direct all medical attention in those states where it is allowed. Next, establish excellent communication and set expectations with your panel physicians. This might include asking them to prescribe weight loss programs, when appropriate – rather than weight loss surgery.

WITH THAT SAID, HOW MIGHT ONE DEFEND SUCH A DEMAND?

Consider the following:

If a claimant is unable to adhere to a prescribed diet without surgery, what is the likelihood that they will follow a prescribed diet after weight loss surgery? Perhaps it could be likened to smoking cessation prior to surgery. We are unaware of courts ordering cessation treatment and medications prior to having surgery – even though the surgeon may require it as a condition of surgery. Instead the administrative law judges have agreed that they have reached MMI if the claimant can't stop smoking. Perhaps this line of logic might prevail.



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