

TAVORMINA & YOUNG, L.L.P.
E-NEWS
FEBRUARY 2011

IS YOUR CAREER AT RISK FOR MEDICAL REASONS

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It is undisputed that the railroad has a right to establish reasonable medical standards for each group of employees. In fact, every employer has the right to establish reasonable medical standards for its employees. It is also undisputed that the railroad has a right to know that every employee meets its medical standard both physically and mentally. Should a question arise regarding one's physical or mental condition, the railroad has a right to demand that an employee produce proof that he/she is in compliance with its medical standards.

The fight is always about: (1) what is a reasonable standard; and (2) is the employee in compliance with the standard. In years past, the railroad was in complete control of setting the standard. For example, in years past a "reasonable medical standard" included a provision that prohibited a locomotive engineer who had high blood pressure, or a prior heart attack from operating a train in main line freight service. The second issue was a fight between the doctors. For example, the company doctor might say one's back condition prevented him/her from lifting over 50 pounds while the treating physician might opine otherwise.

Thus, one's medical condition has and continues to be a great concern for a railroad worker, especially as one gets older. Often employees live in fear because of a medical condition that if known by the railroad could result in removal from service. For example an engineer with high blood pressure or a conductor with diabetes may worry that his/her long term career will end prematurely if the railroad finds out about the condition. So they pay for the visits to the doctor out of pocket and they tell their spouse not to say a word to any co-workers about the condition for fear of dismissal.

Today, those fears are somewhat misplaced due to the passage of the American's with Disability Act of 1991. This Federal Law and other similar state laws now prevent the railroad from bad ordering an employee from work so long as their condition¹ does not prevent them from performing the essential functions of their job. Further, the railroad is required to set forth the essential functions of each job in a job description, so that one knows exactly what he/she must be able to do. For example, an essential job function for a main line engineer is to be able to operate a train from the home to away from home terminal and return. One with high blood pressure probably has a disability and thus covered by the act. As long as he is able to operate the train, albeit with high blood pressure, it would be unlawful for the railroad to restrict him/her from the main line.

¹ The condition must be a disability as defined by the act: "The ADA defines a disability as a physical or mental impairment that substantially limits one or more of the major life activities of an individual, a record of such impairment, or being regarded as having such an impairment." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482-83, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999).

Medical issues on the railroad have become increasingly complicated. Federal regulations now require that engineers have 20/40 vision, the ability to distinguish the primary colors and 70 degrees of peripheral vision.² Similar provisions will soon be a reality for conductors³ and the Federal Railroad Administration has proposed other physical standards for engineers and conductors. In an effort to simplify some of these issues I have prepared the following questions and answers.

1. **Q. My doctor released me as a conductor for full duty with a 50 pound lifting restriction. Will the restriction prevent me from returning to work?**
 - A. No. Lifting more than 50 pounds is not an essential function of the job of a conductor. The major railroad's job description states that lifting 50 pounds or more is required only "occasionally" and thus it is not an "essential" job function.

2. **Q. My doctor released me for duty as a conductor, but the release states that I cannot walk on uneven surfaces. Will the restriction prevent me from returning to work as a conductor?**
 - A. Yes. Walking on ballast, which is an uneven surface, is an essential function of the job of a conductor and thus, the restriction would prevent returning to work as a conductor.

3. **Q. I had knee replacement surgery and I now walk with a slight limp, but my doctor has given me a full release without restrictions. Will the limp prevent me from returning to work as a conductor?**
 - A. No. The ADA prohibits the railroad from discriminating and/or refusing to allow one to return to work because of a disability or a perceived disability.⁴ Thus, even if the person did not have a disability due to the knee replacement, a refusal to allow the person to return to work based on the perception of a disability, i.e. the limp would be unlawful.

4. **Q. I am diabetic, but my diabetic condition is fully controlled by taking insulin on a daily basis. Could the railroad bad order me simply because I am diabetic and taking insulin?**
 - A. No. A person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently 'substantially limits' a major life activity and thus, the person does not have a disability under the ADA. However, the issue of the perception of a disability again arises to provide protection. Even though the employee may not have a protected disability, refusing to allow the person to work, who can perform all of the essential functions of the job just because the person is diabetic and taking insulin would be discriminatory based on "perception" and thus unlawful.

² 49 C.F.R. 240.121

³ 49 C.F.R. Part 242, Conductor certification, scheduled to become effective January 1, 2012

⁴ 42 U.S.C. 12111 et. Seq.

5. **Q. Can the railroad pull me out of service and have me examined by a doctor of its choosing if a coworker complains that I have a limp that affects my work or that I am really forgetful?**
- A. Yes. The railroad always has a right to know that an employee is physically and/or mentally fit to perform the job. Thus, if one's physical or mental condition becomes an issue due to a co-worker complaint or from any other source; the railroad has a right to have the employee examined by a doctor of its choosing.⁵
6. **Q. What recourse do I have if the railroad pulls me out of service for a physical condition, has me examined and the company doctor says I cannot work because of the condition?**
- A. First, one should see a doctor of their choosing to see if the doctor agrees with the opinion of the company doctor. If your doctor agrees with the company doctor there is little that can be done at that point. If your doctor disagrees there are a couple of options:
- a. A claim for reinstatement and/or a request for a three doctor panel pursuant to the terms of the labor agreement can be made. Most labor agreements have a provision providing for the establishment of a three doctor panel when there is a dispute between the company doctor and the employee's personal doctor. Typically the agreements provide that the company doctor and the employee's doctor select a third doctor whose decision in the matter is final and binding.⁶
 - b. Secondly, the person could file an ADA claim. In order to file an ADA claim the person must first file a claim for disability discrimination with the EEOC within 300 days of the discriminatory act. At some point thereafter the EEOC will probably issue a "right to sue" letter at which point the employee must file the actual lawsuit within 90 days. If successful the employee could get his job back with backpay.
7. **Q. The railroad recently wrote me a letter advising it has serious concerns regarding my ability to safely perform my job duties due to the fact that I have ADD. The railroad demands that I send them a copy of ALL of my medical records regarding my ADD condition. Do I have to send them the records?**
- A. Of course. The railroad has a right to know that an employee is physically and mentally fit to do his or her work. However, the burden to prove one's has this ability is that of the employee. Thus, if this railroad demands records of treatment to establish that the person is safe to do his/her work, the employee must get them.

⁵ See Third Division Award 28505 rendered in 1990 by Referee Simon

⁶ These provisions are governed by the Railway Labor Act and thus the end result may be arbitration under the Railway Labor Act. Further, when a dispute arises regarding the application of the agreement, the General Chairman is the person vested with the constitutional authority to interpret the agreement.

8. **Q. Under the circumstances of question 7 above, is the employee required to sign a medical release so that the railroad can obtain the medical records of treatment?**

A. No. The employee is not required to sign a medical release. However, the employee must still provide the railroad with a copy of the records.

9. **Q. I have been an engineer for 25 years, but I recently lost the vision in my right eye due to glaucoma. I have 20/20 uncorrected vision in my left eye. Can the railroad prevent me from working as an engineer?**

A. Yes. One must have 20/40 vision in both eyes and have a field of vision in the horizontal meridian of 70 degrees in order to be a locomotive engineer as mandated by the engineer certification standards. However, the medical director of the railroad could override this requirement if he/she thought the engineer could safely do the job.⁷

10. **Q. Does a substance abuse problem qualify as a disability under the ADA?**

A. No. A substance abuse problem does not qualify as a disability under the act. Therefore one could not use the act to defend discipline for using drugs or alcohol.

11. **Q. Is sleep apnea considered a disability under the ADA?**

A disability under the ADA a disability is a physical or mental impairment that substantially limits one or more of the major life activities of an individual, a record of such impairment, or being regarded as having such an impairment. A determination of a disability under the ADA is an individualized inquiry.⁸ However, the ADA would not be helpful, because staying awake at work is an essential function of the job. Generally the ADA provides that an employer cannot discriminate against an employee who has a disability, so long as they can perform the essential functions of the job. However, if the employee could not stay awake he/she cannot perform the essential functions.

12. **A. I have sleep apnea, but my problem is controlled with a CPAP machine. Could the railroad prevent me from working because I have sleep apnea and I use a CPAP machine?**

A. Probably not. So long as the person can stay awake at work and safely perform his duties, it would be discriminatory to prevent the employee from working.

13. **Q. May an employee take a non-narcotic prescription drug and work at the railroad in a safety sensitive position such as a conductor or engineer?**

A. Yes. One may take prescription drugs and work at the railroad. The issue is whether the employee can safely perform his/her work and take the medication. However, many employees take a variety of pain and other medications and safely do their work. GCOR rules do require one that is

⁷ See 49 C.F.R. 240.121 & *Coleman v. Southern Pacific*, 990 F. Supp. 1197 (1998)

⁸ See *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 504 U.S. 184 (2002)

taking medication due to an injury to report the use of the medication to a manager.⁹

14. Q. May one take a prescribed narcotic drug and work at the railroad?

A. Yes. One may take a prescribed narcotic drug and work at the railroad in a safety sensitive position so long as the drug does not affect the ability of the employee to work safely. In order to work, the employee's doctor or the medical director must approve the use of the drug while working.¹⁰

15. Q. I worked as a hostler for ten years before going into engine service. After promotion to engineer, I failed a color perception test and the railroad will not let me work. What options do I have?

A. The certification requirements for a locomotive engineer mandate the person be able to distinguish the primary colors. Many individuals are color deficient and can thus see only portions of the reds, greens and yellows. Regardless the individual must be able to distinguish the primary colors to work as an engineer. One could potentially use chromatic lenses which help clear up the colors in good lighting, but the railroads have severely resisted the use of chromatic lenses, even though some arbitrators have sanctioned their use.¹¹ However, one cannot use chromatic lenses to initially take the color perception test to become an engineer.¹²

16. Q. If injured at work, what medical rights does the injured worker have?

A. There are many:

a. *A railroad carrier may not deny, delay, or INTERFERE with the medical or first aid treatment of an employee who is injured during the course and scope of his employment.*¹³ This is a new Federal law that became effective in 2008 and is commonly referred to as a "whistleblower" provision.

i. This clearly means an injured worker can see doctor of his/her choosing without interference from the railroad.

⁹ See GCOR rule 1.2.5

¹⁰ See 49 C.F.R. 219.103: (1) The treating medical practitioner or a physician designated by the railroad has made a good faith judgment, with notice of the employee's assigned duties and on the basis of the available medical history, that use of the substance by the employee at the prescribed or authorized dosage level is consistent with the safe performance of the employee's duties;

(2) The substance is used at the dosage prescribed or authorized; and

(3) In the event the employee is being treated by more than one medical practitioner, at least one treating medical practitioner has been informed of all medications authorized or prescribed and has determined that use of the medications is consistent with the safe performance of the employee's duties (and the employee has observed any restrictions imposed with respect to use of the medications in combination).

¹¹ See First Division Award 26970, November 2009 wherein the Board held the division did not have the authority to interpret the Federal Regulations (engineer certification); See Award 11, PLB 6681, rendered 2004 by Mr. Charles Fischbach. There Mr. Fischbach held it was permissible to take a field test with chromatic lens.

¹² See 49 C.F.R. 240.121

¹³ See 45 U.S.C. 20109(c)(1)

- ii. It also means that the railroad cannot force an employee to see a company doctor.
 - iii. Further, the railroad may not interfere with the treatment plan prescribed by the employee's treating doctor or the restrictions recommended by the treating doctor.
- b. *If transportation to a hospital is requested by an employee who is injured during the course and scope of employment, the railroad shall PROMPTLY arrange to have the injured employee transported to the NEAREST hospital where the employee can receive safe and appropriate medical care.*¹⁴
- i. This is a new Federal law that went into effect in 2008. It was designed to prevent a railroad from taking an injured employee to a "contract" emergency room or to a doc in the box.
 - ii. A railroad worker does not have to ask for transportation to a medical provider, nor accept transportation if offered from the railroad.¹⁵ However, if under the new law cited above, he/she asks for transportation to a hospital, the railroad shall promptly arrange to transport them to the nearest hospital where they can receive safe and appropriate medical care.
- c. *A railroad carrier may not discipline or threaten discipline for requesting medical or first aid treatment.*¹⁶
- i. This is also a new Federal law that went into effect in 2008.

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About the author:

Steve Young is a second generation railroad worker, having hired on with the Southern Pacific as a track laborer in 1970. He subsequently worked for Southern Pacific as a Clerk, Train Order Operator, Train Dispatcher, Chief Train Dispatcher, Brakeman, Fireman and Locomotive Engineer. He was also an elected union officer, serving as Local Chairman, General Chairman and Alternate Vice President.

Licensed in 1993, his law practice is limited to representing injured railroad workers. He has the unique honor of being the only attorney in Texas designated by both the BLET and UTU.

¹⁴ 45 U.S.C. 20109(c)(1)

¹⁵ See Award 93 PLB 94, Rendered by Chairman Preston J. Moore, 1983

¹⁶ 45 U.S.C. 20109(c)(2)