Medico-legal dilemmas in occupational health matters

Dr Mary Davin-Power, *Senior Clinical Risk Advisor at Medisec, outlines the obligations of doctors when undertaking occupational health assessment*

Doctors practising outside the specialty of occupational health, both GPs and consultants, will regularly receive requests from patients to complete forms relating to different aspects of occupational health. Medisec regularly assists members with queries ranging from basic pre-employment medicals, through return-to-work certificates to full medical assessments, sometimes in contemplation of litigation or as part of a grievance procedure.

Often these are simple requests for advice, but on occasion members receive complaints from patients regarding certain issues which do arise repeatedly, and can involve:

- ▸ Confusion over who has access to reports – patient or employer;
- ▸ Consent to disclose information to employer;
- ▸ Patient access to occupational health reports;
- ▸ Employer access to occupational health reports;
- ▸ Recreational drugs, disclosure, and screening;
- ▸ Medical diagnoses arising in pre-employment medicals;
- ▸ Unsuitable wording on occupational health forms offered for completion.

Who has access to reports?

The question of access to completed reports can cause confusion to doctors and patients alike. It is important that it is crystal clear to both patient and doctor in advance of any assessment, who has requested the report, the nature and extent of the advice to be reported upon, where it will be sent, and who will ultimately have access to it. There can be particular difficulties in circumstances where the doctor is both the patient's usual healthcare provider and is acting on behalf of the employer, where, say, a pre-employment medical, a return to work assessment or a disability assessment is undertaken.

The Faculty of Occupational Medicine of the RCPI in its *Guidance on Ethical Practice for Occupational Health Physicians* ('the Guide') quotes clearly:

1.2 "It is recognised that the practice of occupational medicine may at times place doctors in positions in which conflicts of interest or loyalty may arise as a consequence of their dual obligations. In all of their relationships with people, occupational physicians should understand the capacity in which they are acting at that time and ensure that other parties also understand that position. In particular, doctors giving occupational medical advice to companies where employees of the company may also be their patients should ensure that the roles are distinct, separate, and that this is understood by all".

Good practice would therefore dictate that in advance of any occupational assessment, a discussion is held with the patient and the situation clarified at the outset, and that the discussion is appropriately noted in the records. The discussion should include the reason for the examination, the form that it will take, and the nature and extent of any information to be given to the employer.

Consent

Generally, any professional consultation with a patient with capacity requires the consent of that patient to be assessed and to disclose clinical information. This of course is usually, but not always, forthcoming. If there is concern that the patient is under duress to present themselves for a medical assessment, the examining doctor should ensure that the patient does indeed consent to the assessment, and if clear consent does not ensue, the consultation should be terminated and further advice sought.

In an assessment for fitness to work, the advice and information given to the employer should be confined to 'fit for work,' 'unfit for work,' or 'fit for work with certain accommodations.' The details of the patient's medical history and/or findings should not ordinarily be disclosed to the employer.

Again, the Guide states:

2. "Individual clinical findings are confidential and information given to the employer should generally be confined to advice on ability and functional limitation."

The Guide continues:

"…. More detailed information should only be disclosed with the consent of the employee. This latter course of action should only be in exceptional circumstances, in individual cases, where more detailed insights on the impact of the condition are necessary and appropriate to enable the employer to come to a decision."

In the event that an employer sends an employee for a review in the context of establishing the employee's fitness to work, the employee will be entitled to receive a copy of the report prepared.

Details of medical history, including replies to any questionnaire, together with the results of a physical examination are confidential and should not be disclosed to the employer except under exceptional circumstances and normally only with the express written consent of the employee. The Medical Council's *Guide to Professional Conduct and Ethics for Registered Medical Practitioners* (2019) reminds us that:

40.2 "Reports must be relevant, factual, accurate and not misleading. Their content must not be influenced by financial or other inducements or pressures."

> *The fact that a doctor is contracted by a company for the purpose of carrying out a report does not obviate the duty of care that a doctor has to a patient*

40.5 "If you are asked to conduct an examination and give the results to a third party such as an insurance company, employer or legal representative, you should explain to the patient that you have a duty to the third party as well as to the patient and that you cannot keep relevant information out of the report. You should be satisfied that the patient understands the scope and purpose of the examination and has given their consent to the examination and the preparation of a report. You should apply the same standard of professionalism to conducting these examinations and preparing these reports as you apply to the care and treatment of patients."

Where the non-specialist, for instance the patient's GP, is assessing the patient and judges that they do not have adequate knowledge of the patient's job and working conditions, or feels that they do not have sufficient expertise to undertake the requested task, then it is reasonable to request that the company arrange an independent occupational health assessment.

Contemplation of litigation

In the event that an employer is aware that an employee intends to issue litigation arising out of an incident that occurred in the workplace, it is arguable that the employer, in engaging the GP to prepare a report, is entitled to assert legal privilege over that report. To satisfy the requirement of "contemplation of litigation", it is likely that the employer will need to be in receipt of an initiating letter from the employee's solicitors. In that scenario, the employee is not entitled to a copy of the report.

However, it is often the case that the employee may inevitably see the reports at the hearing of a case, for example through disclosure and exchange (SI 391/1998) as part of High Court litigation.

Storage and access to employee medical records

Where a doctor is attending to employees on-site, extra care should be taken regarding security of confidential medical records. They should not be accessible by management or staff, but only the appointed medical and nursing staff. This remains true even in cases of litigation, where the records should be only disclosed to the employer with the express informed consent of the employee or on foot of a court order. In order to provide truly informed consent, the employee should be in full knowledge of to whom the records are likely to be disclosed. The Guide states: "Companies or their legal advisors or insurers have no automatic right of access to any medical records or reports."

If the doctor ceases to provide occupational health services to the company, the records should be securely transferred to the new provider, and if the occupational health department ceases to operate, the records should be securely transferred to the patient's GP – subject to the employee giving consent.

Drug screening

Many companies request that employees undergo regular screening for prohibited substances. As can be expected, this is an area beset with ethical complexities. Before agreeing to partake in such screening the doctor should ensure that the employee is clear on what the company policies state and what they require regarding disclosure. The employee's consent is still required, even if testing is required by law as per Section 13 of the Safety Health and Welfare at Work Act 2005 or other legislation.

Unexpected clinical findings

Where a doctor, in the process of performing an examination makes an unexpected clinical finding, whether in the context of a screening assessment or if litigation is in being, they must act in the best interest of the patient and inform the patient of any follow up investigations or treatment that may be necessary, whether with their own GP or a specialist. The fact that a doctor is contracted by a company for the purpose of carrying out a report does not obviate the duty of care that a doctor has to a patient.

Standard forms

Often a doctor will be presented with a pre-employment or other medical form that is unsuitable for today's general standards of medical forms. The doctor is not obliged to adhere to the exact questions and can give the information as they see fit for today's standards of language, practice, and confidentiality.

Conclusion

In conclusion, these are but a few of the aspects of occupational health, which can give rise to challenges for practitioners.

Any doctor who undertakes occupational health assessments and provides occupational health reports should, at the outset, clarify that both doctor and patient understand the reason for the assessment, the extent of the examination, and what information may be disclosed and the duty owed to all parties. Remember that there are ultimately very few instances where patient consent is not necessary for disclosure of medical information to an employer.

Whenever there is doubt – and often there is – consider referring the employee for independent occupational health assessment, and if guidance is needed, do contact your indemnifier for advice.