

Opinion Medico-Legal

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Medico-legal dilemmas in occupational health

Dr Aisling Ní Shúilleabháin provides advice on some challenging areas relating to occupational health

Doctors practising outside the specialty of occupational health – both GPs and consultants – will occasionally 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 and fitness-to-work certification, 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 in relation to occupational health work. Certain issues arise repeatedly, and can involve:

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

Occasionally, the employer and patient may have differing views or agendas and these can be challenging situations for doctors to navigate.

1. 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 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;
- ▶ Who will ultimately have access to it.

Difficulties can arise for a doctor who is both the patient's usual health-care provider and is acting on behalf of the employer (eg, to undertake a pre-employment medical, or a return-to-work assessment).

The Faculty of Occupational Medicine of the RCPI in its *Guidance on Ethical Practice for Occupational Health Physicians* ('the RCPI 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 dictates 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 purpose of the examination, the form that it will take, and the nature and extent of any information to be given to the employer.

2. Consent and extent of disclosure

The doctor should ensure that the patient consents to the process, and where possible, written consent should be obtained. If not, verbal consent should be recorded contemporaneously in the notes. Consent to undergo assessment and disclose clinical information 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'. Typically, the generic term 'medical condition' can be used. The details of the patient's medical history and/or findings should not ordinarily be disclosed to the employer, except under exceptional circumstances and normally only with the express written consent of the employee.

Again, the RCPI 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."*

"... 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."

When 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.

The Medical Council's *Guide to Professional Conduct and Ethics for Registered Medical Practitioners* (2024) states that:

51.2 *"You should be satisfied that the patient understands the purpose and scope of the report and of any examinations or investigations required to support its preparation and that the professional standards for consent and disclosure are followed."*

51.3 *"The report should be confined to the purpose for which the report has been requested. You should inform the patient that you have a duty to the third-party as well as to the patient and that you cannot omit relevant information from the report."*

3. Contemplation of litigation

Where an employer is aware that an employee intends to initiate litigation arising out of an incident that occurred in the workplace, the employer, in engaging a doctor to prepare a report, may be entitled to assert legal privilege over any resulting report. Factors such as a verbal or written threat of litigation, or receipt of an initiating letter from the employee's solicitors, would strongly support an employee's right to assert legal privilege. In that scenario, the employee is not entitled to a copy of the report.

However, the employee would ordinarily receive a copy of the employer's litigation reports – for example, through disclosure and mutual exchange of reports – in the course of the litigation.

4. Storage and access to employee medical records

Doctors attending employees on-site should take extra care regarding security of confidential medical records. Records should not be accessible by management or staff. This remains true 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 advised in relation to whom the records

are likely to be disclosed. The RCPI 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. In this circumstance, specific legal advice should be sought on the requirements around retention of occupational health data (eg, the Health and Safety Authority requires certain health surveillance records to be held for up to 40 years after the employee's occupational exposure).

5. 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.

6. Unexpected clinical findings

Where a doctor, in the process of performing an examination makes an unexpected clinical finding, 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 may be contracted by a company to prepare a report does not obviate the duty of care owed to the patient and appropriate follow-up should be arranged.

7. Standard forms

Occasionally a doctor will be presented with a pre-employment or other medical form that is unsuitable for the intended purpose. The doctor is not obliged to adhere to the exact questions and can give the information they see fit in accordance with appropriate standards of language, clinical practice, and confidentiality.

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 scope of the examination, what information may be disclosed, and the duty owed to all parties. Remember that patient consent is almost always needed for disclosure of medical information to an employer.

Whenever there is doubt consider referring the employee for an independent occupational health assessment, and if guidance is needed, you should contact your indemnifier for advice.

References available on request

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