FUNCTIONAL CAPACITY EVALUATIONS AS EVIDENCE OF DISABILITY IN WORKERS’ COMPENSATION CLAIMS

Presented and Prepared by:
Brad A. Antonacci
bantonacci@heyloyster.com
Rockford, Illinois • 815.963.4454
Chicago, Illinois • 312.853.8700

Rachel K. Viel
Ortho Illinois
rachel.viel@orthoillinois.com
Rockford, Illinois • 779.774.1293
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The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.
FUNCTIONAL CAPACITY EVALUATIONS AS EVIDENCE OF DISABILITY IN WORKERS’ COMPENSATION CLAIMS

I. WHAT A FUNCTIONAL CAPACITY EVALUATION IS AND WHAT IT ISN’T

What a Functional Capacity Evaluation Is and What It Isn’t
Addressing the limitations of functional testing in the worker’s compensation environment.
Rachel Viel, Ortho Illinois

Rachel K. Viel MS, PT, CWcHP
• Augustana College
• Washington University in St. Louis
• Certified Workers Compensation Healthcare Provider (CWcHP) with focus on functional testing
• Formal training in 4 FCE systems, informal training/development of others…
Always looking for a better mousetrap!

Questions that need answers:
- What do I look for in an FCE to see if it is good?
- What are the limitations of FCE in a worker’s compensation case?
- What can employers do to be proactive in the current environment?

History
- 40 Years of FCEs.
- A variety of methods and equipment.
- Have not “gotten it right” or one system would dominated the market.
History

• Different but identical.
• Biggest differences – verbiage and letterhead.
• Great if patients giving full effort.

Are all employees being honest?

“After doing 3.8 million background checks, Automatic Data Processing, Inc. announced in April that 52 percent of job applicants had lied on their resumes.”

While 83% of the Americans surveyed in 2003 believed insurance companies were capable of identifying or preventing fraud, only 72% think so today.

More than two-thirds of respondents (68%) said they believe insurance fraud occurs because people believe they can get away with it, up from 49% in 2003.

Sincerity of Effort

• What is it?
• Is the client’s performance consistent?
• Is the client’s performance reproducible?
• When asked to perform like or similar tasks requiring the same physical ability, are the results within an acceptable range?
Current Practices for Determining Sincerity of Effort

• Static testing
• Isokinetic testing
• Physiological "signs and symptoms"
• Visual estimation of effort
• Hand strength testing

Now what?

XRTS Sincerity of Effort

• Repeated Measures
• Statistical Analysis that is applied the same way every test.
• Distraction.

• XRTS Hand Strength Assessment
• XRTS Lever Arm Testing
XRTS Hand Strength Assessment

• HSA:
  – 66 randomized trials
  – Unilateral and Bilateral
  – 5 position grip
  – 3 position pinch
  – 7 validity criteria

XRTS Hand Strength Assessment

• 99% sensitive
• 100% specific
• 199/200 test sessions properly classified
• 99.5% accurate

In the event of invalid effort...
Statements you should see in a report:

• “The XRTS Hand Strength Assessment protocol consists of a total of 66 randomized unilateral and simultaneous bilateral trials. The client failed three or more of the validity criteria. As outlined in the User's Guide, this result indicates the strong likelihood that the client was not complying with the test, and the test result is therefore almost certainly invalid.”

Statements you should see in a report:

• “…On 3 trials for this test, no force production was recorded and the test was terminated. The test was again restarted, with again 3 trials showing no force production. This is most likely indicative of blatant noncompliance and it is impossible to make any comparison to empirically derived validity criteria.”

Statements you should see in a report:

• “The client failed 7/7 validity criteria for the XRTS Hand Strength Assessment. The odds of a compliant subject producing the same result as the client are .016 x .04 (significantly less than 1 in 1,000,000).”
**XRTS Lever Arm Assessment**

**Baseline Lift**
- 10” Bilateral
- 15” Bilateral
- 20” Bilateral
- Unilateral R/L
- Proceed with Lever Arm testing if:
  - Does not meet basic job lift requirements
  - Demonstrates inconsistent behavior

**XRTS Lever Arm**
- 10” Bilateral
- 15” Bilateral
- 20” Bilateral
- Unilateral R/L
- Compare 3-5 of the lifts
- 20% or less variance BL vs. LA=valid
- 25% or greater variance BL vs. LA=invalid
For invalid findings…

“Since the biomechanical positioning is identical during the ‘Baseline’ dynamic lifts and the Lever Arm lifts, a high degree of reproducibility between repeated measures should be present when a maximum safe voluntary effort is given throughout the lifting evaluation. The client failed the validity criteria, based on the following:

• Average variability between repeated measures on all the lifts was >=25%.
• At least one set of comparative lifts has a variability >40%.
• At least half of all comparative lifts have variability >25%.
• Two or more sets of comparative lifts have variability >30%.”

For valid findings…

• “Baseline lifts of unmarked steel bars correlated with the corresponding lifts on the XRTS Lever Arm. The odds of visually estimating the three maximum Lever Arm lifts to the degree necessary to control the outcome of this test and, therefore, successfully feign weakness are approximately 1.5%. Therefore, it is believed these results reflect a consistent effort during this test.”

Functional Capacity Evaluation:

• A set of tests, practices and observations that are combined to determine the ability of the evaluated person to function in a variety of circumstances, most often employment, in an objective manner.
No Functional Job Description…

How to test?

Or this?
Or this?

Or this?

Now what?
Consider the following…

• Have functional job descriptions available.
• Consider light duty/transition to regular duty.
• Find an FCE provider that performs XRTS testing.
• Consider FCE results as they relate to the client’s effort and functional status.
• Challenge FCE reports that use outdated methods to determine validity of effort.

Questions?

rachel.viel@orthoillinois.com
II. FUNCTIONAL CAPACITY EVALUATIONS AS EVIDENCE OF DISABILITY IN WORKERS’ COMPENSATION CLAIMS

Functional capacity evaluations (FCEs) are often used to determine the physical capabilities of a worker’s compensation claimant. They typically occur towards the end of the claimant’s medical treatment, most often after surgery. FCEs can be an excellent tool for providing an objective assessment of claimant’s physical capabilities. The hope, from a defense perspective, is that the FCE illustrates claimant has the physical capabilities which will allow him or her to return to work at his or her usual and customary employment. However, for those of us who are cynics, we might see the FCE as the first step leading to a large wage differential or permanent total disability on a case that previously appeared as if it might resolve based on permanent partial disability. For example, if the treating physician who ordered the FCE initially had a strong expectation the claimant would be able to return to work without restrictions following surgery, why is that same physician now ordering an FCE?

FCEs are not only used to determine a claimant’s ability to perform a previously held job, but they can also be used to determine what type, if any, position the claimant can perform. It may be found that the claimant is unable to function at the physical level required of the previous employment position, and the FCE is coupled with vocational rehabilitation to provide the claimant a new, less physically demanding employment. Frequently, this can expose the employer to increased settlement values and awards, including wage differential claims or permanent total disability claims. It can be troubling when we see an FCE find physical capabilities that fall just short of claimant’s claimed job duties.

The Workers’ Compensation Commission, along with other evidence of disability, will at times emphasize the results of the FCE and place great weight on those results as evidence of a claimant’s disability. Given the risks of increased exposure that can be associated with FCEs, it is critical that the FCE is performed correctly, the FCE correctly measures validity, and the FCE evaluator has the necessary, vital information when performing the FCE to get the best results for the employer. If the Commission is going to place great weight on the FCE results, significant effort should be placed on getting the most accurate results as possible.

In these materials, we will analyze a few cases which illustrate the ways in which the Commission and appellate court have accepted FCEs as evidence of disability. We intend to provide solutions to avoid common issues that cause FCEs to have little value or that provide significant restrictions which seem out of line with other medical evidence. We will additionally provide you with a checklist to get the most out of that FCE to make sure the results are not skewed against you. Hopefully, you will be able to avoid that situation where claimant’s physical capabilities, pursuant to the FCE, fall just below the physical demands of the employment position.

A. Case Law

FCEs can play a key role in determining the claimant’s ability to return to work to his or her previous, regular duty position or whether that claimant is entitled to a wage differential or
permanent total disability. There have been several decisions which illustrate the effect that FCEs can have on workers’ compensation decisions.

In *Kao v. Insight Enterprises*, the results of the FCE played a key role in the Commission’s decision in finding that the claimant was not totally and permanently disabled. *Kao v. Insight Enterprises*, 2014 Ill. Wrk. Comp. LEXIS 66; 14 IWCC 40. In *Kao*, the claimant sustained injuries to his neck and low back when a pallet fell from a shelf approximately 40 feet above, striking the claimant and rendering him unconscious. After an in-patient stay, the claimant was examined by Dr. Levin on March 13, 2006 and reported neck pain, bilateral shoulder tingling, dizziness and back pain. Dr. Levin opined that the claimant suffered a compression fracture at the L2 vertebral body and recommended MRI’s of the cervical and lumbar spine. The lumbar spine MRI revealed a compression fracture at the L2 vertebral body as well as degenerative changes at the L3-L4 disc, L4-L5 and L5-S1 without disc herniation.

The claimant came under the care of Dr. Citow on May 10, 2006, who diagnosed a L2 fracture and opined that a vertebroplasty would be an option. On June 26, 2006, the claimant was examined by Dr. Patzik who recommended the same and scheduled the surgery for July 6, 2006. Dr. Patzik performed the vertebroplasty and on July 21, 2006, the claimant was discharged from care and was not provided with any work restrictions. However, he did not attempt to return to work.

On October 6, 2006, the claimant followed-up with Dr. Citow and complained of a 2-month history of bothersome neck pain which extended into his head. Dr. Citow recommended another cervical spine MRI which revealed significant disc protrusions touching the spinal cord and narrowing the neural foramina from C3 through C7. After a course of physical therapy, the claimant underwent a FCE on March 21, 2007.

The FCE, conducted at the direction of Dr. Citow, indicated that the claimant was functioning at the medium to heavy physical demand level. Following this, the claimant did not return to work despite not having any orders from any treating physicians reflecting he was unable to return to work. Further, the claimant continued to receive epidural steroid injections. In fact, on August 22, 2008, the claimant followed-up with Dr. Citow, who recommended that the claimant could return to work full duty.

On December 23, 2008, the claimant, at the direction of his attorney, underwent an independent medical examination with Dr. Blonsky. Dr. Blonsky opined that the claimant was totally disabled and was unable to return to work, as determined by Social Security. Dr. Blonsky admitted he did not see the results of the FCE and did not review Dr. Citow’s complete records. Dr. Citow continued to treat claimant and on February 22, 2010, he performed a cervical fusion C4-C7. Dr. Citow opined the claimant could attempt to return to his normal work duties three weeks after March 19, 2010. The claimant presented to other doctors for pain management treatment including injections. Dr. Citow recommended physical therapy, followed by work conditioning, which claimant underwent.
The claimant then underwent another independent medical examination by Dr. Bauer, who opined that claimant could return to work pursuant to the FCE. Dr. Bauer reviewed a written job analysis and a job duties video. Dr. Bauer took it a step further and indicated that the claimant could have returned to work based on Dr. Citow’s recommendations made in March. On October 28, 2010, the claimant again underwent another FCE. This FCE objectively revealed that the claimant could perform at the medium demand level with some components of the heavy physical demand level. According to the FCE, the claimant was able to return to his former employment based on the evaluator’s review of a written job description. The evaluator determined that claimant’s employment fell in the medium physical demand level. On November 19, 2010, Dr. Citow reached this same conclusion based on the FCE. Dr. Bauer prepared an addendum IME report. After reviewing the second FCE and job analysis, he agreed with Dr. Citow that claimant could return to full duty work. Claimant then obtained a work restriction note from Dr. Lu, a treating pain management physician, indicating claimant could only work 3 hours per day. There was no indication this was a permanent or temporary restriction and no documentation of treatment on the date the slip was obtained.

During trial, the claimant admitted that although he had been released to return to work following the July 6, 2006, vertebroplasty, he did not return to work because he thought he was unable to perform his job. When questioned why he did not return following the March 21, 2008, FCE, he again indicated that he felt like he could not perform the job. The same testimony was provided in regards to the cervical fusion and FCE in 2010.

Claimant proceeded under the theory that he as permanently and totally disabled based upon the opinions of a vocational counselor. The Commission affirmed the arbitrator’s award of 45% person as a whole. In rendering his decision, the arbitrator relied on the opinions of Dr. Citow and Dr. Bauer, who both concluded that the claimant could return to work at the medium to heavy physical demand level. He also noted Dr. Bauer opined claimant could return to his former employment. Of importance are the factors relied upon by the arbitrator in rendering this decision. The arbitrator noted that to find the claimant was permanently and totally disabled would have totally ignored the objective results of the FCE completed on October 28, 2010, and the opinions of both Dr. Citow and Dr. Bauer, who both opined the claimant could return to work pursuant to the FCE. The Arbitrator continued in his decision, expanding on the importance he placed on Dr. Bauer’s opinion that provided the claimant’s ability to return to work was rooted in the FCE and a job duties video as well. Further, the Arbitrator made note of the claimant’s refusal to even make an attempt to return to work.

The significance of building a defense consisting of several components is evident here. Although an FCE may be supportive of a claimant’s ability to return to his former employment and relied upon by the Commission in its decision, it is important to have other, objective evidence that corroborates the FCE results. Here, the Commission relied not only on the FCE but also the opinions of treating physicians and an IME physician who supported the opinions of the FCE evaluator.
In *McClory v. Armstrong Relocation*, the employer used surveillance in conjunction with the invalid results of a FCE to urge the Commission to find the claimant was in fact, able to return to work full duty and thereby reduce the benefits previously awarded to the claimant by the Arbitrator. *McClory v. Armstrong Relocation*, 2013 Ill. Wrk. Comp. LEXIS 382; 13 IWCC 411. The arbitrator had awarded maintenance benefits and vocational rehabilitation.

Following an injury which arose out of an in the course of the claimant’s employment, claimant’s treating physician released him to full duty work with his right hand and a 25 pound lifting restriction in regards to his left hand. He was advised to follow up with his treating physician following a FCE. The respondent’s IME recommended the FCE. The FCE was conducted and the evaluator found that the testing was invalid. During the testing, the claimant exhibited extensive upper extremity “shaking,” however the carrying and lifting positions during which the shaking occurred put little, if any, strain on claimant’s injured hands. The FCE evaluator noted the test was not a valid indication of claimant’s function, even though the conclusion was that claimant could not return to his former position as a house mover.

The claimant returned to his treating physician and complained of left hand pain as well as occasional, intermittent pain to the radial collateral ligament of the thumb and to the fifth digit. The claimant’s treating physician eventually released him to full duty work with no restrictions. Surveillance was conducted on the claimant which showed him engaged in various activities at a funeral home, including carrying a casket with both upper extremities. The surveillance video showed the claimant exhibiting no signs of difficulty performing these activities. The employer’s IME physician opined that, based on the results of the invalid FCE, the surveillance video and his examination of the claimant, the claimant was at maximum medical improvement, and capable of full duty work. Based on this evidence, the Commission reversed part of the Arbitrator’s decision awarding maintenance benefits and vocational rehabilitation.

The *McClory* decision again illustrates the importance of the FCE results being considered along with other factors to determine disability and permanency. Here, the invalid FCE results were corroborated by favorable surveillance, the opinions of the treating physician and the opinions of the respondent’s IME physician. The respondent was able to avoid what very likely could have become a wage differential or permanent total disability. A quick review of the FCE evaluator’s conclusion that claimant was not able to return to his former employment as a house mover would be misleading. It was clear upon further review of the report that the FCE results were invalid.

Following the trend of taking several factors into consideration when determining disability, including the results of the FCE, the Third District Appellate Court issued a decision in the case of *Professional Transportation, Inc. v. Illinois Workers’ Compensation Commission*. *Professional Transportation, Inc. v. Illinois Workers’ Comp. Comm’n*, 2012 IL App (3d) 100782WC. The claimant drove a multi-passenger van and transported railroad workers. He was required to load packs weighing 60 to 70 pounds. He filed an Application for Adjustment of Claim for a right knee injury. The claimant alleged that he stepped down from the vehicle onto a frozen piece of ice and rock and twisted his knee. An MRI of the right knee was ordered, which revealed a large tear
of the medial meniscus. An arthroscopy of the claimant’s knee was performed, and the claimant remained off work for approximately 3 months. At that point he attempted to return to work, however this lasted only four hours when his knee began to swell.

After being examined by several physicians, the claimant eventually underwent total knee replacements to both knees. His left knee became symptomatic, allegedly due to overcompensation due to the injury to the right knee. However, all physicians agreed the left knee was not related to the work accident. After some postoperative complications, the claimant’s treating physician testified that he restricted the claimant from squatting, kneeling, frequent use of stairs, climbing and lifting or carrying in excess of 40 pounds. The respondent’s IME physician felt the restrictions were reasonable, but found no reason why claimant could not return to work as a van driver. The respondent’s risk manager testified that the employer could have accommodated claimant’s restrictions, but claimant had been terminated due to a lack of communication from claimant following treatment. The claimant underwent a FCE. During the evaluation, it was found that the claimant provided maximum effort and demonstrated the physical capability for work in the light and medium-light duty categories. The FCE report, along with the claimant’s age, education and work experience led a vocational rehabilitation expert, retained by the employer, to opine that the claimant could not return to his former employment as a van driver for the employer. He concluded claimant had no transferrable skills but could return to work in a cashier position. Claimant’s IME physician concluded claimant was restricted to sedentary work.

When issuing a decision, the arbitrator relied on the results of the FCE, including the opinions of the therapist of the effort put forth, when reaching his conclusion that claimant did not prove entitlement to a permanent total disability. The arbitrator relied on the FCE to make the decision that the claimant could find work in the light and light-medium physical demand level categories, thereby not meeting his burden to establish his entitlement to permanent total disability benefits.

The Commission reversed the arbitrator's finding and awarded permanent total disability benefits under an “odd-lot” theory, but this award was eventually reversed by the appellate court. However, again what we must focus on here is the use of the FCE when determining permanency. It is evident that the opinions of the therapist were relied on in this matter as it was stated the claimant demonstrated maximum effort. The FCE established the baseline for the claimant’s abilities and had a direct effect on the decisions and awards made in this matter. The claimant’s physical capabilities as noted in the FCE were used in conjunction with other evidence, including the opinions of the treating physicians and IME physicians to establish claimant’s physical capabilities and capacity to work, at least at the sedentary level. The claimant was found to be entitled to a PPD award rather than a permanent total disability award.

Other factors can play a significant role in the outcome and opinions found in a FCE as demonstrated in *ABB C-E Services v. Industrial Commission*. ABB C-E Services v. Industrial Commission, 316 Ill. App. 3d 745 (5th Dist. 2000). The claimant in this matter sustained an injury while employed as a carpenter and millwright for the employer. The claimant was working on his
hands and knees when a 16-inch, cylindrical brass bar which weighed between 9 and 10 pounds fell nearly 40 feet and struck the claimant in the lower back. Surgery was recommended. An independent medical examination was also conducted at the request of the respondent. The IME physician concluded that the claimant had a pre-existing spinal stenosis in the lumbar spine which became symptomatic following this occurrence. The IME physician also recommended surgery. The IME physician then became a treating physician and performed a bilateral decompressive lumbar laminectomy at the L4-L5 level. There were surgical complications which required two additional surgeries. The claimant then underwent a FCE where it was determined that the claimant could perform at the medium-heavy demand level for an eight-hour day.

As a result of the injury and subsequent surgery, the claimant was prescribed Lortab. The claimant noted that while under the influence of this prescription his speech was affected, his reflexes were slower and his mood was affected. Surveillance was conducted of the claimant as well which showed the claimant working around his farm, bending and lifting objects. During this time, the claimant’s prescription for Lortab was refilled and it was opined by the IME physician who became the treating physician that he believed the claimant would be 100% disabled.

The claimant was eventually determined to have reached maximum medical improvement and he attempted to return to his prior employment. The claimant prepared scaffolding which required him to climb. By the end of the day, the claimant was in severe pain and took a Lortab. The claimant returned to his physician who indicated that working while under such heavy pain medication was contraindicated. Following that appointment, the physician indicated that the FCE in which the claimant participated did not adequately reflect the claimant’s capabilities. During the evaluation, the claimant was under the influence of Lortab which affected his performance and skewed the results.

The physician opined that the claimant was going to be totally disabled from any job that the claimant had previously held. Further, he indicated that the claimant could not lift more than 10 to 15 pounds and would not be able to sit for more than an hour or two without severe pain. He opined that the claimant would not be able to do any twisting, turning, bending, stretching or repetitive movement of his lower spine, and the long term use of the Lortab prescription would be required. He later opined that this claimant was totally disabled. The respondent had claimant evaluated by another IME physician. This IME physician concluded claimant was precluded from even light duty work because of his Lortab prescription. The surveillance did not affect his opinions. The only way claimant could return to light duty work would be if he was weaned off his narcotic medication, according to this IME physician.

Relying on the statements of the physician that the results of the FCE was not determinative of the claimant’s abilities had he not been under the influence of the prescription, the Arbitrator found the claimant permanently and totally disabled. The Commission affirmed, as did the circuit court. The employer maintained that pursuant to the FCE, the claimant could perform at the medium-heavy physical demand level, and this was corroborated by the surveillance conducted. The appellate court affirmed the decision of the circuit court finding that the
decision that claimant was permanently and totally disabled was not against the manifest weight of the evidence.

The result in *ABB C-E Services* shows how outside factors can play a substantial role in the outcome of a FCE. Additionally, unlike the prior cases, the defense appeared to be relying solely on the FCE results to defend the permanent total disability. The FCE was the crux of the respondent’s defense, but no other evidence supported the FCE conclusions. Although there were no overt efforts on behalf of the claimant to affect the outcome of the evaluation, it is apparent that external factors, such as pain medications, can affect the objective outcome of such evaluations. The claimant’s prescription medication skewed the results of the FCE, and claimant allegedly would not be able to work while taking the medication. It probably did not help that the treating physician who offered the permanent total disability opinion was previously the respondent’s IME physician. One option for the respondent may have been to determine if claimant could be weaned of the narcotic pain medication or replace that medication with another medication that would have allowed him to return to work, per the FCE results. Another option may have been to require another FCE with a medication claimant could take while working.

Other factors can play a role in the court’s interpretation of the results of a FCE. In *Storberg v. Illinois Workers’ Compensation Commission*, the Second District Appellate Court found that the results of the FCE were not determinative of the claimant’s entitlement to an award of further benefits and prospective medical care. *Storberg v. Illinois Workers’ Compensation Comm’n*, 2015 IL App (2d) 140724WC-U. Not only did symptom magnification on the part of the claimant play a role in this decision, but the claimant’s own physical attributes, aside from his alleged work injury also were a key factor. Although this is an unpublished opinion by the court, it is instructive in illustrating the detailed analysis of the FCE by the Commission.

The claimant, a water operator in the water and sewer department for the Village of Lake Zurich, lifted a water pump and motor, and felt pain down his back. The claimant was initially diagnosed with a low back strain and placed on light-duty restrictions. Later, the claimant complained of neurologic/urological symptoms and was immediately sent for an MRI, which revealed essentially normal findings. The claimant was eventually referred to a neurosurgeon who recommended an epidural steroid injection and restricted the claimant from all activities. An EMG revealed normal findings. An IME was performed at respondent’s request, at which time the examiner found that the MRI films were essentially normal and that the level of pain the claimant reported during his examination did not correlate with the objective findings. The examiner went as far as to say that the claimant’s claim made no sense, and the findings were consistent with symptom magnification.

The claimant’s physician recommended a FCE. At the time, the claimant was still restricted from work. The FCE was completed and revealed that the claimant’s physical capabilities rested in the light to medium physical demand level. The claimant could lift 39 pounds occasionally and frequently lift 17 pounds. The results of the evaluation prevented the claimant from returning to his regular position. The FCE evaluator recommended work conditioning.
The independent medical examiner reviewed the results of the FCE. He found that the FCE was properly performed on the claimant; however he opined that it was not medically necessary as it related to the claimant’s work injury. Continuing, the independent medical examiner opined that what the FCE did not address is whether the claimant’s fitness level would be the basis for the results of the evaluation rather than the workplace injury itself. The claimant was noted to be morbidly obese and deconditioned, and not as a result of the work injury. The IME physician issued an opinion finding that the results of the FCE were not related to the claimant’s work injury. Rather, the claimant’s morbid obesity and physical deconditioning played a causal role in establishing the findings in the FCE. Following this, the treating physician recommended work conditioning.

During arbitration, the arbitrator relied heavily on the opinions of the independent medical examiner and agreed that the findings in the FCE were the results of the claimant’s physical condition, not the workplace injury. The arbitrator further noted in his decision that the findings of the MRI, the opinions of the independent medical examination and the subjective complaints made by the claimant, which did not correlate with the objective findings, all played a role in the decision to deny the claimant his demand of temporary total disability. The Illinois Workers’ Compensation Commission affirmed the decision of the arbitrator, as did the circuit court. This decision was eventually then affirmed by the Second District Appellate Court.

*Storberg* is again a great example of not only how the Commission has taken a detailed approach to the use of the FCE when determining an award, but how the use of the FCE in conjunction with tools such as the independent medical examination can be of benefit to an employer, even when the results of the FCE seem to create a daunting task to overcome. Even when the results of a FCE, on its face, seem to preclude a claimant from returning to his or her former employment, it is important to evaluate the FCE results in the context of all evidence regarding disability.

The above cases confirm that the Illinois Workers’ Compensation Commission does take FCE results into consideration when determining disability awards. The formulation of a multi-layered defense is key in using FCEs to the advantage of the employer. One obvious step to aid in the defense is to obtain an IME to comment on claimant’s ability to return to work and comment on the FCE results. Additionally, if the Commission is going to place great weight on the results of the FCE, it is imperative to give the FCE evaluator as much information as possible regarding claimant’s former position before reaching a conclusion as to whether claimant can return to that former employment. Effort and validity testing should be closely reviewed. A close evaluation of the results of a FCE can help an employer determine whether the results should play a significant role in determining a claimant’s physical capabilities. One big mistake is to simply accept the treating physician’s opinion that claimant can “return to work per FCE” or the opinion that provides restrictions which are greater than those noted in the FCE. Below you will find some key points to take into consideration when reviewing and analyzing the results of a FCE.
III. FCE CHECKLIST

1. Confirm that the functional capacity evaluator is provided with as much detail as possible regarding the claimant’s position.
   - Do not rely on claimant’s description of the job duties.
   - Provide an accurate, detailed, written description of the claimant’s job duties.
   - The job description should include a detailed description of the physical demands of the position.
   - Consider an ergonomics/job analysis to expand on this detail.
   - Consider a video analysis of the claimant’s position.
   - Ensure there is a solid basis for the evaluator’s opinion regarding ability to return to work.

2. Evaluate effort/validity of FCE testing
   - Consider conducting surveillance on claimant if there are “red flags” regarding claimant’s effort in FCE.
   - Review entire body of FCE, not just conclusions/summary section, determine if there are multiple comments concerning lack of effort which lead to questionable results.
   - Do the FCE results corroborate with physical exam findings?
   - Do the FCE results corroborate with objective, radiological testing?

3. Obtain your own Section 12 Independent Medical Examination.
   - When doing so, it is best to provide the physician with the results of the FCE to allow the physician to critique the FCE.
   - Provide the physician with the description of the claimant’s job duties (including a written job analysis, physical demands and job duties video).
   - Ask the physician whether the results of the FCE are causally related to the work injury or whether the results are due to an unrelated health condition – e.g., deconditioning, morbid obesity, unrelated injury.
   - Ask the physician to evaluate the claimant’s subjective complaints and alleged capabilities against the objective findings and objective testing conducted.

4. Do not simply accept treating physician’s opinion that restricts the claimant “per the FCE” without providing detail on the specific restrictions.
   - If you have permission to contact the treating physician, make certain the physician understands the claimant’s job duties, notes whether the restrictions are due to work injury, fully evaluated the FCE relative to effort and validity.

5. Do not simply accept the treating physician’s restrictions which are more restrictive than those contained within the FCE.
   - The physician ordered the FCE, why isn’t he or she accepting those results?
6. *Is the claimant under the influence of any medication during the FCE that he will be unable to take while working due to the side-effects?*
   - Will these medications skew the results of the FCE?
   - Can claimant be prescribed a different medication that can be taken while working?
   - Does the FCE need to be performed again?

7. *Does the claimant require work conditioning/work hardening?*
   - If performed, would this improve claimant’s functionality?
   - Was the FCE performed too early in the process? Was the claimant at MMI/deconditioned?

8. *Consider offering claimant work within the restrictions of the FCE, if available.*
   - If claimant makes no attempt to return to work in any capacity, Commission may not look at this favorably for the claimant.
Brad concentrates in the areas of workers’ compensation and civil litigation. With extensive experience defending hundreds of employers before the Illinois Workers’ Compensation Commission, Brad has arbitrated many workers’ compensation claims as well as argued numerous reviews before the Workers’ Compensation Commission during his career. He has also argued appeals of Workers’ Compensation Commission decisions before the circuit court. Brad has spoken on and authored articles regarding employment layoffs and temporary total disability benefits. Brad has also spoken on updates to Workers’ Compensation case law. He has authored articles regarding the Workers’ Compensation Fraud Statute. Brad also co-authored, “Loaning Employer Not Liable . . ., Personal Comfort Doctrine,” for the Illinois Defense Counsel Quarterly (2008). In 2012, Brad was named to the Illinois Super Lawyers Rising Stars list. He is a member of the Winnebago County Bar Association in its workers’ compensation section. Brad is also a member of the drone law practice group, which advises clients on issues relating to drone operations.

Brad has spent his entire legal career with Heyl Royster in the Rockford office beginning in 2002 and became a partner in 2013. Brad received his J.D. from Northern Illinois University School of Law, where he was an editor of the Law Review, and a B.A. from the University of Illinois.

Significant Cases

- **Ordoniz v. Dano Auto Body** - Petitioner claimed he injured his low back and allegedly suffered a herniated disc while removing a car door from a vehicle. He amassed approximately $225,000 in outstanding medical bills for treatment in the form of chiropractic care, physical therapy, medications, numerous spinal injections, a radiofrequency ablation and numerous radiological tests. The Workers’ Compensation Commission relied on our IME and Utilization Review reports in finding petitioner suffered a lumbar strain and in denying approximately $225,000 in alleged outstanding medical bills as unreasonable, unnecessary and causally unrelated to the work injury. The Commission awarded 3% person-as-a-whole.

- **Alanis v. Woodstock Christian Life Services** - Petitioner injured her lower back while pushing a cart and slipping and falling on some water. She received medical treatment for approximately one month, was released from treatment and was released to return to work. She eventually began treating with a pain management physician who performed a series of lumbar spine injections as well as a radiofrequency ablation. When the pain management physician released petitioner after one year of treatment, the petitioner had accumulated an extensive amount of outstanding medical bills which we denied. Relying on our IME physician, the Workers’ Compensation Commission denied approximately $34,000 in alleged outstanding medical bills and awarded 6% person-as-a-whole for a lumbar strain.

- **Hieber v. Glass and Mirror Company** - Petitioner suffered a compensable and accepted right shoulder injury. Following right shoulder surgery, petitioner developed an infection in the right shoulder which resulted in a revision surgery. Subsequent to the second surgery, the petitioner suffered from kidney failure and eventually required a kidney transplant. On behalf of glass and mirror company client (Company) the firm presented evidence and an expert opinion that the renal failure was not related to the right shoulder surgeries and infection, that petitioner had risk factors for developing renal failure, and that petitioner subsequently developed renal failure in the transplanted kidney. The arbitrator found the petitioner’s renal failure to be causally connected to the right shoulder work injury and awarded all benefits related to the renal failure. On review, the Worker’s Compensation Commission found no causal connection between the work injury and the petitioner’s kidney condition, and the circuit court affirmed on appeal. The Commission’s decision resulted in a reduction of the arbitrator’s award of more than $300,000.
**Publications**

**Public Speaking**
- “All I Want for the Holidays is a Drone: Permitted Uses Today and What to Expect Tomorrow”
  Heyl Royster Governmental Lunch & Learn Seminar, Rockford, IL (2015)

**Professional Recognition**
- Named to the 2012 and 2013 Illinois Super Lawyers Rising Stars list. The Super Lawyers Rising Stars selection process is based on peer recognition and professional achievement. Only 2.5 percent of Illinois lawyers under the age of 40 or who have been practicing 10 years or less earn this designation.

**Professional Associations**
- Illinois State Bar Association
- Winnebago County Bar Association

**Court Admissions**
- State Courts of Illinois
- United States District Court, Northern District of Illinois

**Education**
- Juris Doctor, Northern Illinois University School of Law, 2002
- Bachelor of Arts-Sociology, University of Illinois, 1999
Rachel has been working in the Rockford, Illinois area since 1997 honing her skills as an expert in the area of functional testing and management of work-related injuries. She has received training and certifications in several nationally-recognized functional testing programs and has been using the XRTS hand strength assessment and lever arm in her practice since 2007. Rachel completed formal training in the XRTS FCE system including the report writer in October of 2010 and has been using the XRTS product exclusively for functional testing ever since. Rachel has also provided educational training to insurance adjusters, case managers and attorneys regarding functional testing. She is currently employed as a Certified Workers’ Compensation Healthcare Provider and Certified XRTS FCE provider at Ortho Illinois.