

Workplace Injury and the Breach of the Social Contract

By Jasen Walker, Ed.D., C.R.C., C.C.M. and Fred Heffner, Ed.D.

“Betrayal, the only truth that sticks.”

- Arthur Miller

Recovery from workplace injury is often refractory and beyond explanation from the known medical models of physiology and tissue healing. Psychosocial phenomena such as injured worker helplessness, secondary gain, and co-malingering have frequently been posited as reasons for employees not returning to work following what medical observers would consider “normal” recovery time from diagnosable injuries. In this article, we explore the hypothesis that a breach of the assumed “social contract” between employer and employee can produce delayed or aborted return to work following occupational accident and injury.

After more than 27 years of conducting detailed interviews of injured workers and providing them with occupational rehabilitation services, it is our observation that Arthur Miller’s view of “betrayal” as the only truth that sticks has substantial merit in the life of the recalcitrant Workers’ Compensation claimant. We have come to believe that the injury itself frequently becomes a secondary issue to the unwillingness and resentment found in an adversarial employer-employee relationship, one that develops following a work-related accident, and sometimes even before that event.

Social contract theory is based on the assumption that individuals live in a state of nature in which group maintenance is difficult. Social contract theory is underscored by the assumption that the individual is either “good” or “evil.” That is, social contracts are necessary in order for the group to survive because without the social contract, the individual would be left to his or her own devices and ruled by his or her own nature. It follows that this would be detrimental to interdependent members of a group. Social contract theory is not without controversy, but for the most part, Western culture has inculcated its members with the necessity of the social contract.

The social contracts that we have identified in terms of employee-employer relations include the expectations:

- of equality and fairness in the hiring process;
- of a safe working environment;
- that work injury will not result in separation;
- that return to work and/or vocational rehabilitation will follow maximum medical improvement; and
- that without return to work and/or vocational rehabilitation, work injury benefits will continue.

Frequently, injured workers tell us that they have been victims of broken social contracts, perceived and unspoken covenants with their individual employers. To varying degrees, these workers’ compensation claimants expressed resentment, anger, bitterness, and quite regularly, a sense of betrayal. They lament that the system, and more specifically their employers, has let

them down. They declare that they have been abandoned and often refer to themselves as “damaged goods.” Sometimes they describe disbelief that the same employer who relied on them for years for faithful service would send private investigators to their neighborhoods to make inquiries about their activities following an accident or injury. With time out of work, these disgruntled ex-employees see themselves as “unemployable,” and more than a few manifest signs of “injured worker helplessness.” Others see themselves as “honorably disabled,” and they seem to wear their occupational injuries as badges of honor, statements that another authority figure in their lives has overstepped his/her bounds and mistreated them. Ultimately, most permanently displaced injured workers find betrayal to be “the only truth that sticks.” The prognosis for any type of occupational rehabilitation in these situations becomes poor.

We have come to believe that proactive disability management programs, recognized by well-managed companies as essential to the health and well-being of the company, are invaluable strategies in recognizing and validating the value of social contracts. Disability management programs can not only validate the social contracts most employees adopt, but can maintain the critical trust levels needed to keep the company productive. Let us review these often unspoken agreements.

The Expectation of Equality and Fairness in the Hiring Process

Discriminatory acts on the bases of age, national origin, race, religion, sex, **and disability** have been deemed illegal by the U.S. federal government. Nearly every worker is familiar with the concept of discriminatory employment practices, and they expect equality and fairness in the practices of hiring, compensation, transfer, promotion, and firing.

When company practices fail to protect individual employees (or particular sub-groups of employees), members of the work population in general resent the lack of protection. Moreover, employees fear and generally reject a company’s philosophy of disparate treatment in the hiring, pay, and return to work of individuals with a history of injury or illness. Recently, we interviewed an African-American longshoreman who declared that he was disabled from returning to work in any capacity except in work for which he was deemed ineligible because it was traditionally assigned to a group completely unrepresented by people of color. The job was in the “white gang,” according to his statements.

Although vocational rehabilitation is also available and applicable to professionals and other high-level job classifications, many individuals in vocational rehabilitation worked in unskilled or semi-skilled positions with relatively limited educational requirements. For this cohort, the fairness of the hiring process is especially crucial. Add to this the reality that even if the hiring practices are fair, they also have to be perceived to be so by the applicant. Factors employers need to consider as they review their hiring procedures for effectiveness and compliance include the following. The applicant:

- has available to him/her, in understandable language, full information on what the job entails;

- is accorded all of the protections explicitly outlined in the Americans with Disabilities Act (ADA);
- is encouraged, even prodded, to ask questions and be assertive about what is happening in the hiring process;
- understands, when pre-employment tests are used, why the tests are given and how the testing process will unfold;
- is guaranteed that the process is standardized and objective;
- feels that he/she is fully respected by the HR professional who is responsible for hiring; and
- is ensured that the information being gathered is truly and specifically only for the purpose of hiring.

Each of these minimum requirements of the hiring process is, at face value, easily acceded to and given assurances for by the HR staff. But the scrupulous adherence to the letter of each is another matter.

Two other significant issues are that the applicants perceive that the hiring process is racially and ethnically fair (that is, there is no test bias) and that there is “procedural fairness.” In terms of procedural fairness, the measure is that it is “not what you do, but how you do it.” The greater the applicant’s perception that the outcome of the hiring process can be favorable, the fairer the process will be.

Obviously, the issue of fairness becomes even more important to the individual who has been displaced from employment by illness or injury. Most workers’ compensation claimants, having carried out unskilled and semi-skilled jobs prior to being injured and displaced, have little experience in finding alternative employment without fair hiring opportunities. As a result, 70 percent of all workers’ compensation costs are driven by the 30 percent of injured workers who have encountered prejudice regarding their injuries and post-accident unemployment.

The Expectations of a Safe Environment

Over the many years of our vocational rehabilitation practice, the comment “I don’t want to go back to that place; it isn’t safe,” is a common injured-worker declaration. In some instances, the statement may have a basis in truth; in others it certainly does not. Still, the failure to protect workers is the most serious mistake management can possibly make.

And the mistake goes beyond the delivery of protection. It is also a mistake to let employees or future employees perceive that they are not safe in a particular environment. Employers have an obligation to satisfy the expectations of their employees and to design and aggressively apply safety and loss prevention programs.

Safety is an interactive and communicative process. Workers need to be educated in how to access information about the work environment and how to better understand and exercise their rights under the Occupational Safety and Health Administration (OSHA). They must be given specific information on how to complain and file a danger report. Further, employees must be

encouraged to participate in the environmental dialogue. Many employees see themselves as disfavored, dissuaded from raising criticism, or discouraged from having their viewpoints heard.

The specific issue here, however, is not that employers create and conduct safety measures, but that they become cognizant of an additional responsibility to make employees aware of the extensive safety measures in place. Employers need to create and nurture a safety culture. Employees have to be empowered to ask questions about safety and even challenge existing practices. They need to be engaged in the process to the extent that there can never be a time when they can say that the environment was toxic to their health and safety or that they will not return to work on the basis of that contention.

There is, in today's workplace, a reality beyond actual safety and wellness. Employers agree when they go into business to a social contract that says their employees will have an expectation that they will be in a safe environment when they are at work. The employers need to assure that safety is no accident and, indeed, happens with intent.

Minimum steps employers can take to address safety and the concerns for safety that employees may have include:

- creating, documenting, and disseminating the company's commitment to safety;
- developing and activating accountability measures;
- involving employees in the formulation, conduction, and day-to-day practice of safety/wellness programs;
- identifying and addressing hazardous conditions;
- investigating and documenting causes of accidents;
- training staff in safety methodologies and materials; and
- evaluating the effectiveness of the safety policies.

In some states, including Pennsylvania for example, employers get a discount on their Workers' Compensation premiums if they plan and put into practice certified safety and wellness committees.

There are other matters that need to be considered with respect to the social contract for a safe workplace:

1. Employees need to be fully informed of their rights under the ADA, especially their right to have job accommodations and to have job descriptions that are based on the "essential functions" of the job.
2. One respected study carried out in Sweden showed that women are at a greater risk of not being involved in work environment issues than men.

The Expectation that Work Injury Will Not Result in Separation

Until recently (within the last five years), having a workplace injury was frequently an opportunity for the employer to separate an unwanted worker from the payroll. The reality was that most injured workers turned out to be, by the employer's thinking, undesirable. In recent years, this trend has slowed. However, while it is still the method of choice in too many cases, there are now limiting factors at work:

1. Federal and state legislation make it more difficult to do so. The principal pieces of legislation in respect to this are the ADA and various Workers' Compensation laws.
2. The departments of labor at both the federal and state levels are vigorous advocates for return-to-work programs.
3. Employers, both small and large, are struggling to fill their job needs from an ever-decreasing pool of qualified applicants.

At this point, legislation and the case law refining the legislation make it more difficult to arbitrarily outsource employees. At the federal level, the Equal Employment Opportunity Commission (EEOC) is charged by the U.S. Department of Labor to set guidelines for the ADA and to vigorously support employees in litigation when they believe employers are in error. State departments of labor now also promulgate proactive approaches to return to work.

The Pennsylvania Department of Labor and Industry, for example, has decided that such programs can:

- reduce the financial burden on employers, workers, and families of workers;
- reduce the negative effects on workers by reducing the length of time off work;
- allow unions to continue to protect the employment rights of their members;
- allow the healthcare provider to develop more specialized treatment plans; and
- provide support for the primary care provider in the return to work.

It is important to note that these labor agencies have, over time, waffled between favoring employers and, as presently, favoring employees.

Through aggressive and high-quality vocational rehabilitation services, employers have come to see that a return-to-work attitude carries benefits for both the employer and the employee. The historic method of returning employees to work was called "light duty." Typically, the employee was paid to just sit around until he/she was able to go back to work. The current methodology is "transition to work," where the employee is placed in real work, but controlled through incremental stages of duration and strenuousness.

Workers should have a realistic expectation that if they are injured at work, they will have the support of their employers in rehabilitating and returning to productivity.

The Expectation that Return to Work and/or Vocational Rehabilitation Will Follow Maximum Medical Improvement

Exemplary disability management programs include minimally essential measures. Among these are:

- immediate and sustained intervention by the employer in the treatment plan;
- application of the resources of a competent and unbiased Case Management service; and
- placement of the injured worker into a Transition-to-Work program.

Following employee injury or illness, Case Management (CM) activities can be initiated immediately. Conducted by in-house rehabilitation professionals or by contracted case managers, CM can facilitate return-to-work objectives – outcomes beneficial to both employer and employee. Employees may delegate case management and return-to-work services, but this does not mean they can, thereby, abdicate their responsibilities for employee management.

Employers who provide extraordinary assistance to highly-valued employees need to come to understand that they have a comparable responsibility for all workers. If there are employees who likely will not receive the full support of the employer in the event of a workplace injury, the appropriate time to deal with that issue is prior to the critical event. When the employer does not intervene in the case of unacceptable employee behavior **before** an accident, the employer is renewing the social contract, and the employee is right to expect a return to work.

In other words, employee maintenance works best when it is seamless from date of hire to date of return to work as well as followed-up with a transition-to-work program. On the other hand, if an employee is nonproductive and dysfunctional, that issue should be appropriately managed before an accident and not after a lost-time injury.

The Expectation that if Vocational Rehabilitation Is Not Successful, the Work Injury Benefits Will Continue

While employee rights in the U.S. need not be as extensive as they are in some social welfare societies in Europe, American employers do have an obligation to provide long-term support to employees who sustained major injuries at work. Most Workers' Compensation laws are built on "no-fault" concepts to "make the injured worker whole." Workers' Compensation was originally considered "social legislation," and it naturally follows that employees would perceive "being made whole" as a social contract.

Losing the ability to care for one's self can happen to anyone at any time. Addressing the issue of disability some years ago, George Will, a columnist for *The Washington Post*, told an audience that while he would never experience gender or racial discrimination, he could be injured on his way home that night and thereafter experience disability discrimination. Disability discrimination can happen to anyone, and disability management programs should build on this reality.

All employees have a right to believe that if they are catastrophically injured in the commission of a work assignment, they will have recourse to the benefits that provide for them for the remainder of their lives. By employing workers, employers are creating a social contract to assist employees in these circumstances.

When this contract is neglected or broken by either the employer or its insurance carrier, the injured worker experiences a sense of betrayal as he or she does when any of the aforementioned contracts are breached.

The Meaning of Betrayal

Betrayal is a personal experience that represents disappointment, letdown, loss, and pain. Those who are betrayed no longer trust the offender. Betrayal is an intentional or unintentional breach of trust or the perception of a breach of trust. Workplace injury followed by the injured worker's sense of betrayal is like "pouring salt into the wound" and that experience makes it difficult for injured employees to gather and maintain the necessary motivation for occupational recovery.

Most work organizations are dependent on trust to survive. Without trust, organizations would be chaotic. Trust is the glue that seals the social contract. However, as Tennessee Williams wrote in *Camino Real*, "We have to distrust each other. It's our only defense against betrayal." Perhaps the only more noxious experience than intractable pain is betrayal. Betrayal destroys the essential fabric of the relationships that keep organizations operating and people engaged in cooperative commerce.

Organizations would do well to advocate for their injured workers as well as understand and maintain the social contracts, spoken or unspoken, that most employees naturally adopt when joining a company. Organizational leaders must delegate but never abdicate their responsibilities to the workers they lead, whether in health or sickness.

It has been our experience that wellness advocacy in the workplace and well-designed disability management programs can significantly reduce the incidence of social contract breach and the consequential injured worker perception and belief that he/she is helplessness to do anything about that betrayal of trust. By proactively maintaining safe workplaces and managing illness and injury when it occurs, employers can maintain trust --- the human adhesive that holds work relationships together and the lubricant that facilitates employee performance.