

FCE innovation could be game-changer in workers' compensation and beyond

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Defense attorneys: Do you want to prove a claimant is malingering?

Claimants' attorneys: Do you want to objectively vindicate your client's subjective complaints of injury?

Both sides: Do you want to successfully challenge an expert witness' testimony regarding the results of a functional capacity evaluation?

Here is how to do it, say an industrial rehabilitation consultant, attorneys and a therapist.

The consultant is Hopedale, Ill.-based Darrell Schapmire of Industrial Rehabilitation Consultants and X-RTS Software Products and Testing Devices.

Schapmire developed a lever arm strength test involving a six- to seven-foot bar upon which weights are loaded as well as a distraction-based testing hand strength test featuring simultaneous testing of both hands.

Denver, Colo.-based attorney Gregory B. Cairns of Ruegsegger Simons Smith & Stern described the hand grip testing system as "a simple grip device, similar to a gun, with five adjustable settings. The therapist sets the meter on a dial facing away from the person taking test. The person squeezes and holds for second or two."

At the same time the person is undergoing the grip test, he or she pinches a separate measuring device with the thumb and index finger of the opposite hand.

Cairns likened the test to patting your head and rubbing your belly at the same time. "The brain can't keep up with it," he said.

When a therapist randomizes trials, subjects cannot consistently give an invalid effort. "The mind can't do it," Cairns said.

In the grip test common in traditional FCEs, a person can give less than a full effort over and over because of the remarkable sensitivity of the human hand.

"With this test," Cairns said, "you can't do that because you can't concentrate on one hand."

That is important, said Charlotte physical therapist Sam McKelvey, “because if we can’t prove sincerity of effort, the data we gather is useless.” McKelvey said a study of the grip test based on 200 subjects showed 99.5 percent accuracy

Schapmire said the lever arm test, like the grip test, is based on distraction. “It gives the visual appearance of work load,” he said.

Initial testing by therapists features unmarked steel bars. During repeat or subsequent tests, therapists add workloads onto the device. Because of the makeup of the device, however, guessing the workload is virtually impossible.

Schapmire said that several scientific studies of his devices and methods are forthcoming. “We have a large controlled study demonstrating that our method is accurate more than 99 percent of the time,” he said. “The odds of compliant subject failing are 1 in 10,000. Persons who try to cheat the test are found out immediately.”

McKelvey said the validity of the hand strength and lever arm tests can be proven and feature a test and retest approach that is lacking in current FCE systems.

McKelvey said traditional hand strength tests are only about 70 percent accurate.

“Traditional FCEs rely on visual estimation for the lifting test, which is faulty at the core,” McKelvey said. “I cannot watch you lift a box and know for certain that was your maximum because you could easily fake me out.”

The new grip strength and lever arm tests are “truly blind,” McKelvey said. “The implications are enormous for companies that want to save money on workers’ compensation costs.”

But both sides can benefit, McKelvey added. “A claimant that gives a sincere effort will be confirmed,” he said.

## Challenging traditional FCEs

Schapmire’s work has not been limited to the development and promulgation of testing products and methods. He also published a book, edited by Cairns, titled *Forensic Dissection of a Functional Capacity Evaluation*.

The book provides a blueprint for challenging traditional FCE processes.

Cairns said that traditional FCE methods used for the past 30 to 35 years do not hold up to basic scientific scrutiny.

“At least 25 studies published in the past two decades have shown that the error rate of the standard grip test is 30 percent or more,” Cairns said.

Traditional FCE methods in general can be skewed by the subjective self-limitation of the patient and subjective impressions of tester. “A con man can whine and groan and sweat and act like he is in pain, and if the tester likes him he’ll say he is doing the best he can,” Cairns said.

Schapmire likened the traditional FCE testing methods to “1,000 learned scientists 4,000 years ago saying the earth was center of universe. They were in agreement with one another, but they were wrong.”

Schapmire said there is not a single FCE in widespread use that is legally defensible.

“It doesn’t matter if an expert gives the ‘right’ answer if he had no way of judging the validity of the subject’s effort,” Schapmire said.

Rockford, Ill.-based attorney Todd S. Reese of Reese & Reese said he used Schapmire’s method to challenge the results of an FCE.

“My client underwent an FCE where the examiner alleged that she was self-limiting and the results were deemed invalid. The testing protocol that was used was mostly subjective in nature. My client then underwent an FCE that used Mr. Schapmire’s devices and methodology. The FCE results were found to be valid. At trial, I used Mr. Schapmire’s materials when I cross-examined the first FCE examiner. The trial court found the first examiner to be not credible and made an award that was favorable to my client.”

McKelvey said the new testing method is important because it establishes a subjective baseline and then retests to establish the true maximum lift.

“If I can prove sincerity of effort occurred, I can do any kind of FCE you want to determine what kind of work would be appropriate for the subject,” McKelvey said.

Cairns said the new method will revolutionize the manner in which workers’ compensation and personal injury cases are handled. It will also alter the landscape of Social Security disability determinations. “Once the Social Security Administration becomes aware of this and begins using it,” he said, “it will save taxpayers trillions of dollars.”

## Big news

Cairns said in two cases in which he used the tests, both times the subjects gave invalid efforts.

“Both people tried to fool the tester,” Cairns said.

Both subjects complained of disability in their dominant arms. In both cases Cairns had obtained surveillance of the subjects using their arms in a manner that conflicted with their effort in the FCEs.

“I sent the surveillance to the clinician and asked her to comment on how the video differed from what she observed in the clinic,” Cairns said. “She wrote a devastating report.”

Cairns said the cases settled on what he described as very favorable terms.

“This is a tool,” Cairns said. “If a doctor thinks a person is not being truthful in treatment or is malingering, this is a good way to find out if the person is playing games. It’s a good way to get fakers to maximum medical improvement. If the test shows they are not fakers, well, now their complaints have been validated.”

In Cairns’ view, “Thirty to 40 years of junk science have been replaced by an objective FCE testing model. I think that is big news.”