



ErgoScience is familiar with Indergard and believes that there are three important reasons that the Ninth Circuit Court of Appeals vacated the summary judgment: flawed procedures for job analysis and test development; flawed testing methodology; and improper communication of test results. All of these reasons are directly related to the specific protocols and procedures used by the job analysis professional and the occupational therapist performing the test. ErgoScience utilizes a testing protocol and reporting procedures that specifically address and avoid these issues, while maintaining safety of the applicant.

**Flawed Procedures for Job Analysis:** In the Factual and Procedural Background section of Judge Goodwin's opinion it states, "Blickenstaff (therapist who performed the job analysis) interviewed employees who worked in these positions and identified the physical demands of the positions..." A valid and reliable job demands analysis protocol should include interview of the employees and supervisors to obtain information regarding the essential tasks of the job. However, to determine the **physical demands** associated with those essential tasks, the job analyst must observe and/or videotape each essential task, measure the forces associated with the task with a force gauge, measure distances over which those forces are exerted, document frequency and quantify the percent of day spent performing each physical demand. Once the job demands analysis report is completed, it should be reviewed by supervisors and incumbents to make sure that nothing has been omitted or erroneously recorded. If this procedure had been followed for the job analysis, the allegations by Indergard that she did not have to lift 65 or 75 lbs for the two positions could have easily been refuted by quantitative reports that had been reviewed and approved by employees performing the job.

The ErgoScience Quantitative Job Demands Analysis (QJDA) protocol has been carefully developed so that the job analyst systematically steps through each phase of the analysis and provides objective data upon which a job-specific test can be based. The importance of the quality and integrity of the job analysis on which job-specific testing is based is clearly an issue in the Indergard case.

**Flawed FCE Procedures:**

- Testing included test items that were not correlated to the job. A treadmill test has poor job correlation. At work, employees typically set their own pace for walking and walk on a surface that does not move. In a treadmill test the pace is pre-set and the surface is moving. Treadmill testing is typically designed to determine an overall MET level for patients with cardiovascular disease and as such is strictly a medical test and not related to job function.
- The testing included static lift testing that has been shown to be poorly correlated to the functional lifting that occurs in the work place by numerous studies.



ErgoScience does not include either treadmill or static lift testing in its protocols for the reasons described above. Instead we stay strictly focused on job-related function for return to work testing. This type of job-specific FCE can easily be shown to be “job related and consistent with business necessity.”

ErgoScience monitors heart rate and blood pressure prior to testing to insure the safety of the patient/applicant being tested. To omit this pre-test check of the blood pressure and heart rate would be inconsistent with the safety precautions established as best practices guidelines prior to strenuous testing. These guidelines have been established by such prestigious and well-respected organizations as the American College of Sports Medicine, the AMA, the American Heart Association and the CDC. To omit these tests would be negligent behavior on the part of the evaluating clinician. However, these measures do not need to be included in the report as noted below.

In addition, ErgoScience monitors and records the heart rate response to functional tests throughout the test to ensure safety. If the heart rate exceeds safe limits during the test, the task that has elevated the heart rate is stopped to protect the well-being and safety of the worker. In some tasks of the test, the heart rate is part of the formula that is calculated to determine the worker’s safe duration for performing the physical demand. These formulas were developed and validated through research making the ErgoScience FCE a safe and accurate FCE. Again, only summary data regarding the duration of the day a worker can perform a physical demand, not heart rate is reported in our summary report to the employer.

**Flawed FCE Report:** The return to work FCE Summary Report that is sent to the employer should not include heart rate, blood pressure, or musculoskeletal data in the report. In addition, the report should not recommend return to work. The report should instead focus exclusively on the functional abilities of the worker compared to the job demands. When requested by the case manager or employer, possible work site modifications or additional work conditioning recommendations can be made. However, the report should never have recommended return/no return to work.

**Additional Comment Regarding Indergard:** It is important to realize that Indergard addresses a very specific return-to-work use of functional testing. Indergard is a classic example of what not to do in job-specific FCE. We believe that the current manner in which the ErgoScience protocol is administered and reported is both safe for the worker and compliant with the ADA, EEOC and will be consistent the Ninth Circuit Court’s decision in Indergard.