



Submission to the WHSCC Corporate Policy
and Research Department

Consultation on Early and Safe Return to
Work and Labour Market Re-entry Policies

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INTRODUCTION

On June 27, 2001, the Workplace Health, Safety and Compensation Commission (WHSCC) circulated copies of the Ontario Workplace, Safety and Insurance Board (WSIB) policies regarding early and safe return to work and labour market re-entry programs. The WHSCC requested that stakeholders review the policies and submit corresponding comments to the Commission for consideration. The NLHBA and our member health boards welcomed this opportunity to provide input into the policy development process.

The Newfoundland and Labrador Health Boards Association consulted with our member health boards in formulating the attached response (a list of our members is attached as appendix "A"). This consultation process involved circulating copies of the WSIB policies to our member health boards for their consideration and comment. A working group comprised of representatives from various health boards then met to discuss the policies and their potential application in the province of Newfoundland and Labrador. These comments were compiled into the attached response.

The title of the Ontario WSIB policies on which we have provided comments is highlighted in this document the corresponding comments follow each heading.

Policy 19-02-02, The Goal of Early and Safe Return to Work and The Roles of the Parties

Policy 19-02-02 identifies the roles of those involved in the early and safe return to work process. The parties include Employers, Workers, the WSIB and the health care practitioner. The workplace parties are identified as Employers and Workers. The policy requires that the workplace parties cooperate and be self-reliant in returning the worker to suitable and available employment. However, it appears that a crucial party has been omitted from this goal, and that is, the union. There are numerous unions that are key stakeholders in the health care sector. They include the Canadian Union of Public Employees, the Newfoundland Association of Private and Public Employees (Hospital Support, Lab and X-ray), the Newfoundland and Labrador Nurses' Union, the Association of Allied Health Professionals, and the Professional Association of Interns and Residents. In order to ensure the success of return to work efforts, cooperation from these unions is critical. Unions are key advocates for their members and ensuring that they are an active party in the return to work process will help prevent miscommunication and clarify roles and responsibilities. The union's duty to cooperate should include:

- the duty to cooperate with reasonable modifications to the work environment;
- the duty to cooperate in order to determine what the essential duties of a job are.;
- the duty to educate member employees on the duty to cooperate.

Policy 19-02-02 refers to returning the worker to suitable and available employment. In the guidelines of this policy, there is a definition of "suitable work". Among the other items listed, suitable work is defined as work that "the worker has, *or is able to acquire*, the necessary skills to perform." The phrase "or is able to acquire" is a very broad one, without limitations. Thus, the process of skill acquisition could potentially span a period of several years. Accordingly, we suggest the insertion of time frames to qualify this statement so that the acquisition of skills would not span an unreasonable period of time.

On page 3 of Policy 19-02-02, the role of the WSIB is outlined. This role is vastly different from the present role of the WHSCC. This policy reflects a shift in responsibility for return to work programming from the Commission to Employers. This causes our members great concern since they rely in the WHSCC to provide guidance regarding the medical condition of injured workers and appropriate rehabilitation programs. Since the information available to employers is limited, implementation of such a policy in our province would see employers developing rehabilitation programs based solely on functional abilities information. Without complete information, return to work efforts may be compromised in cases where there are factors other than functional limitations impacting on the injured worker's rehabilitation.

Another concern of our members with this devolution of responsibility is the lack of human resources and knowledge to manage the return to work process. The NLHBA has recently spoken with a representative from the Ontario Health Boards Association regarding this shift in responsibility. She indicated that these policies and associated changes to the legislation have resulted in Employers having to dedicate a person solely to the role of coordinating return to work efforts. Also, she noted that the elimination of the rehabilitation counsellor role in Ontario has been a negative change since employers who lack knowledge about return to work programs no longer have the resources of the WSIB to draw upon. In fact, it has been recommended by numerous employers that the rehabilitation counsellor role be reinstated in the WSIB system.

The geography of Newfoundland is such that it may not be conducive to the WHSCC adopting this "hands-off" approach. Many of our boards service large areas of the province with a head office in a major centre. Most of our members do not have the resources to comply with the onerous task of return to work programming and corresponding management of WHSCC claims. Thus, it will be difficult for our boards to comply with the Ontario policy requirements. There is also concern that Employers do not have sufficient training or expertise to adequately develop a return to work program that ensures the safety of the injured worker and his or her coworkers. Thus, intensive training will be required for Employers.

The role of the health care practitioner is outlined on page 3 of policy 19-02-02. In the present WHSCC system, Employers often find that health care providers are not aware of the duties and tasks involved in an injured worker's job and thus, they are unable to make an informed decision regarding job restrictions. Accordingly, there is a need for greater education of health care providers. We suggest that the WHSCC provide a listing of the available job site analyses to treating physicians and provide access to the job site analyses through the WHSCC website.

To ensure that health care providers are familiar with and understand the importance of the functional assessment forms, we suggest that the WHSCC provide copies of the forms to all health care providers. This will also help to prevent delays in situations where a worker may have misplaced or forgotten to bring the form to the health care provider. Also, there should be some mechanism whereby the health care provider would be required to provide updated reports of an employee's functional abilities as the employee's physical status changes.

Policy 19-02-03, Workplace Party Cooperation

Policy 19-02-03 outlines the roles of the Employer, the Worker and the WSIB in cooperation. Under the guidelines regarding workplace party cooperation, employers are required to provide suitable employment that is "*available*". Our members have

concerns about the use of the term “available” since it does not appear to be defined in the policies. Some questions that arose included:

“Suitable jobs exist but they are occupied by other employees. Does the term, “available” mean that unionized employees can displace other employees according to their seniority?”

“Does this mean that the job posting procedure under the collective agreements can be bypassed such that senior candidates cannot avail of the job competition process and a new “suitable” job will automatically be awarded to the injured worker?”

With respect to the WHSCC role in cooperation, we recommend that any change in the WHSCC role be phased-in since such a radical change will be disruptive and is likely to cause much confusion between injured workers, employers and unions.

At page 3 of policy 19-02-03, the consequences of employer and worker non-cooperation are documented. As noted previously, the NLHBA recommends that unions be added as a workplace party that has an obligation to cooperate in the return to work process.

Also on page 3 of this policy, where an employer is found to be uncooperative “the WSIB then provides the worker with a labour market re-entry (LMR) assessment to determine if further LMR assistance is necessary”. Rather than initiating an LMR assessment immediately following notice of non-cooperation, it is suggested that the WHSCC give the employer guidance and a timeframe in which to cooperate prior to resorting to the LMR assessment. This would enable employers to change their practice in an attempt to meet the cooperation requirement.

Policy 19-02-04, Functional Abilities Form for Timely Return to Work

Under the opening statement of Policy 19-02-04, it states that a worker “must consent to the disclosure of functional abilities information to the employer...”. To ensure that injured workers comply with this obligation, there should be a determination of non-cooperation where a worker fails to provide this consent. Also, since the policies acknowledge that some employers may develop their own functional assessment forms, there should be some mechanism by which completion of the employer’s form is made mandatory when such a form has been approved for use through the WHSCC.

Policy 19-02-04 contains an illustration of a functional abilities form called Form 2674A. Our member employers are concerned about the box that is labelled “as tolerated”. This imports great subjectivity into a document that is intended to be an objective analysis as to the injured worker’s physical abilities. If an injured worker was noted as being able to perform tasks “as tolerated”, it would be very difficult for an employer to develop a suitable return to work plan.

Policy 19-02-05, Resources and Evaluations

Policy 19-02-05 lists some of the services and evaluations available to the workplace parties. It appears that the information available to employers is limited to the employee's functional abilities. Accordingly, employers may be missing some vital medical or other information that could significantly impact on a return to work plan. To overcome some of the concerns of employers in this regard, the NLHBA suggests that the WHSCC take the role of summarizing relevant medical information from all health care practitioners so that the employer can compile a return to work plan that is not in conflict with the worker's medical diagnosis and at the same time, the privacy of the injured worker will be protected.

Another concern of our member employers is the issue of resolving conflicting functional assessment forms in instances where an injured worker is under the care of several health care providers. Employers do not want to be placed in the position of having to make a determination as to which functional assessment form should be preferred.

Policy 19-02-06, Mediation Services

If the workplace parties are unable to resolve a dispute, this policy enables the parties to avail of mediation services provided by the WSIB. In discussing the application of this particular policy with Ontario employers, it appears that, in Ontario, the Commission employs trained mediators. Thus, in order to ensure that the WHSCC can properly perform the mediator function, it is imperative that the WHSCC undertake to employ and train experienced mediators.

Policy 19-03-05, LMR Plans

The LMR function is performed by the WSIB. An LMR plan is prepared based on the results of the LMR assessment. Employers are concerned about the duration of LMR plans. On page 1 of Policy 19-03-05, a program and/or plan can continue for as long as needed. The NLHBA recommends that there be a maximum timeframe placed on the duration of a LMR plan to ensure that these plans are effective and cost-efficient.

Policy 19-03-06, LMR Expenses

On page 2 of Policy 19-03-06, it states that if an employer has a duty to accommodate but demonstrates that the full cost of accommodation will cause undue hardship, the employer is required to pay to the extent that the cost will not cause undue hardship. This is a very subjective statement and thus the NLHBA questions, who would make the determination as to the point at which undue hardship occurs?

Policy 19-04-03, Compliance with the Re-employment Obligation

At the top of page 1 of Policy 19-04-03, it states that the employer is required to “provide alternative employment *similar* to, and at earnings comparable to, the employment on the date of injury”. “Similar” is not defined in the policy, thus, leaving it open to interpretation. Without an adequate guidelines as to what this term means, employers will have nothing upon which to make a determination as to whether or not a job is similar to the job previously held by the employee. For example, in the health care sector, many jobs involving patient care that are completed during the day are more strenuous than the same job during the night, simply because the demands of patients/residents are fewer during the night time when most patients are sleeping. Thus, while an employee may not be physically suited to the day shift job, they may be physically able to complete the job during the night shift. Accordingly, would the job on the night shift be sufficiently “similar” to the job on the day shift?

At page 4 of the policy, there is a section titled, “Change in Fitness Level”. It notes that if a worker is able to perform suitable work and then later able to perform the essential duties of the pre-injury job, the employer is required to offer to re-employ the worker in the pre-injury job or an alternative job of a comparable nature. Such a practice could be quite disruptive to the workplace if the job previously held by the injured worker has been filled on a permanent basis and there are no comparable jobs available.

Policy 19-04-04, Determining Essential Duties

On page 1 of Policy 19-04-04, the process is outlined for determining the essential duties of a job for the purposes of the early and safe return to work. The decision maker (WSIB) makes this determination of the essential duties by following several guidelines. However, these guidelines contain no requirement that the decision maker consult with the employer prior to making such a determination. Considering that the employer would likely have the most information about the nature of the business and the details of all jobs within that business, the NLHBA suggests that the guidelines include consultation with the employer.

Policy 19-04-07, Accommodating Workers

Policy 19-04-07 requires employers to provide modifications or assistive devices to accommodate the injured worker back into the workplace. Undue hardship is determined through reference to the Ontario Human Rights Commission’s guidelines for assessing accommodation requirements for persons with disabilities. Since Newfoundland has no comparable guidelines, the NLHBA questions what guidelines the WHSCC will apply to determine undue hardship.

Policy 19-04-10 – Re-employment Provisions and Collective Agreements

Policy 19-04-10 is very broad and states that where there are re-employment provisions covered in both a collective agreement and the legislation, the WSIB compares the two and determines which provides the worker with the greater rights. The NLHBA recommends that this statement be qualified so that the worker would be provided with the greater rights as they relate to re-employment provisions only.

GENERAL COMMENTS

In order to successfully implement policies regarding early and safe return to work and labour market re-entry, it is vital that the WHSCC provide educational sessions on the duty to cooperate to all workplace parties. At the present time, an injured worker handbook is provided to employees at the time of acceptance of their claim. This handbook should be modified to clarify the new legislative role of the worker in the return to work effort.

Since the new legislation and corresponding policies will dramatically change the roles of the workplace parties, extensive educational programs are essential. Employers will require an educational package that they can deliver to employees regarding the new policies of the Commission. Senior management will also require training so they can learn to properly implement a successful return to work program. To ensure consistency and the accuracy of information, the WHSCC must take the lead role in developing these educational programs.

Our member employers are very concerned about the additional costs that will result from the implementation of these policies. Additional staff will be needed to monitor and manage claims and employers will now be responsible for funding workplace modifications. These expenses will place an additional burden on the already strained budgets of the health boards.

Since employers do not have the power to levy penalties/fines, it should be reflected in the policies that employers can avail of the assistance of the WHSCC in obtaining information from health care providers and other sources.

Our members are also concerned about how the duty to cooperate interacts with the compensability of a claim. For example, in cases of recurrence, there are occasions on which it may take three or four months before a claim is adjudicated. Thus, the employer may have already established a return to work plan, following the guidelines of the WHSCC policies, only to find that the claim has been denied.

CONCLUSION

While it is certainly beneficial to the well-being of injured workers to heighten the workplace parties' knowledge as to their obligations in return to work efforts, consideration must be given to the nature of our geography and the small size of employers in this province. It may not be wise to adopt the Ontario policies, carte blanche and some modifications of the Ontario policies are necessary to accommodate the limited resources and the geographical constraints of employers in remote areas.