

**Newfoundland and Labrador
Health Boards Association (NLHBA)**

Response to the
WHSCC Position
Paper: *“Duty to
Accommodate Injured
Workers in the
Workplace ... Shared
Responsibilities”*

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Introduction

The Newfoundland and Labrador Health Boards Association (NLHBA) is the federation of provincial health boards for the Province.

In March of this year, the Workplace Health, Safety and Compensation Commission (WHSCC) distributed a discussion paper entitled, “Duty to Accommodate Injured Workers in the Workplace ... Shared Responsibilities”. The discussion paper was in response to the provincial government’s concern over employers’ duty to accommodate injured workers and their corresponding belief that the requirement of employers to accommodate injured workers should be strengthened.

As a stakeholder in the WHSCC, the NLHBA was asked to provide feedback on numerous questions posed in the document. Accordingly, the NLHBA formed a committee comprised of representatives from various health boards to develop the enclosed response.

The provincial health boards employ a large portion of the provincial workforce. The provincial health boards recognize the importance of return to work programs and the need to work in collaboration with all stakeholders to improve the quality and effectiveness of these programs. The NLHBA appreciates this opportunity to provide feedback on the discussion paper and is confident that the WHSCC will give thorough consideration to the enclosed comments.

1. *Do current programs meet the needs of workplace parties?*

- Some of the return-to-work programs offered by the Commission are effective in returning injured workers to the workplace. There are a variety of return-to-work programs that are designed to meet the individual needs of injured employees returning to work.
- In the current programs offered by the WHSCC, there are few or no incentive programs for employers and employees which would further facilitate early intervention and return to work. Neither are there negative incentives to deter non-compliance and unsafe practices.
- Recently, the WHSCC has implemented a new step in the claims management process which has been designated as the Early Intervention Team. This team will manage a claim for the first 10 weeks after an injury occurs before it is forwarded to a case manager. Unfortunately, the Early Intervention Team is not meeting the needs of employers and injured workers. While the idea is positive, it has not been effective. Employers want early intervention but unfortunately the Early Intervention Team has only added another step in processing claims, thereby creating further delays. There have been some positive experiences reported but since the Team was comprised of new case managers it is difficult to fairly evaluate the effectiveness of such a team.
- The adjudication time for recurrences can be unacceptably long i.e., weeks or months. This results in delays in accessing programs such as physiotherapy and occupational therapy. It appears that there is a correlation between the time for acceptance and the age of the recurrence.
- Current programs offered by the Commission do not address issues relating to the duty to accommodate, assessing undue hardships and permanent accommodation of physical restrictions and limitations.

2. *What are the current obstacles for effective return to work for injured workers?*

- Health care employers experience delays in having claims processed through the Intake Adjudication level and thus, early intervention is compromised. The delays may be due to the fact that health care employers continue to pay employees while awaiting claim adjudication. Thus, injured workers are not pressing the Commission to process their claims.
- There are insufficient resources (case managers, employers, health care providers) to coordinate and closely monitor return to work programs. Proactive monitoring would ensure that rehabilitation programs are not continued for an unreasonably long time and that any problems with the program are identified and resolved quickly.

- There is some overlap between the employer's role and the WHSCC role. For example, some employers are actively involved in early intervention. Both the WHSCC and employers may be calling employees and health care providers for the same information. This is not an efficient use of resources. Improved communication between all stakeholders would help overcome this obstacle.
- Workplace modifications to facilitate a return to work can be very costly for employers and this should be considered in assessing undue hardship.
- Collective Agreement language often hinders a successful return to work. Provisions such as seniority, recall and layoff are often in conflict with accommodating injured workers back into the workplace. Also, in a unionized environment, there are "work of the bargaining unit" issues. For example, an injured nurse may be physically suited and qualified for a NAPE LX position in blood collection but because it is the work of another bargaining unit, NAPE LX members will have preference for the position. While there have been recent decisions in other jurisdictions which suggest that bargaining unit lines can be crossed in some circumstances, this will certainly place a strain on labour relations.
- Some of the return-to-work programs offered by the Commission are not suited to the operations of employers. For example, many of the employers have 12-hour shift schedules, so it may be difficult to accommodate ease-back hours and/or permanently accommodate a reduced workday tolerance.
- Employers lack confidence in the W.C.R.D. Appeal Process. Extended earnings loss decisions and return-to-work plans are often successfully appealed by the employee to the W.C.R.D. The corresponding rationale for the overturned decision is often in conflict with the present legislation and policies of the Commission.
- The WHSCC should attend W.C.R.D. hearings. Unfortunately, the WHSCC is not represented at most hearings and thus the responsibility falls on employers to be experts in WHSCC policies, procedures and legislation.
- In some areas, long waiting lists to see specialists results in delayed treatment, diagnosis and/or delayed implementation of return-to-work programs.
- In rural areas, injured workers may have to travel long distances to see specialists.
- In some cases, employees fail to put forward full effort during the treatment and rehabilitation process.
- Health care providers often fail to give adequate consideration to return-to-work options. Medical reports submitted by primary care givers are often vague and lack objective clinical findings. Oftentimes, primary care providers will recommend that a worker not

participate in a return-to-work program or remain off work based on subjective complaints of pain rather than objective clinical findings. It appears that primary care providers are placed in the difficult position of attempting to balance the subjective complaints of their patient against the patient's physical abilities. Furthermore, it is financially beneficial for health care providers to extend treatment. To deal with this problem the WHSCC should educate health care providers regarding the impact they have on the WHSCC system. Also, the form 8/10 (Physician's Reporting Form) should be revised to ask direct questions regarding a worker's return to work capabilities.

- There are no positive or negative financial incentives for injured workers to participate in return-to-work programs. In some cases, it is financially beneficial to remain at home. For example, injured workers with children will be able to care for their children when they are receiving temporary earnings loss benefits. If required to participate in an ease-back program, the employee will incur child care expenses as well as travel costs.
- Some employees have disability insurance on their loans and mortgages. When an employee suffers a workplace injury resulting in decreased income, disability insurance on a loan can compensate for that lost income. However, when an employee returns to work on an ease back program, even though the income level does not increase, the disability insurance may cease. For this reason, there can be a financial disincentive to participate in ease back programs.
- In some cases employers are left with the responsibility of developing creative return to work programs. For example, the Health Care Corporation of St. John's had developed a Transitional Work Program whereby the employer will fund and create project work for injured employees which may or may not be related to his/her pre-injury work.
- There is no requirement to have regularly scheduled meetings regarding return to work issues between the WHSCC, the employer, the employee, union representative and health care providers.
- Unions are often uncooperative with respect to accommodation issues and grieve attempts by the employer to accommodate injured workers.
- High caseloads hinder the case manager's ability to promote early intervention, return to work and close monitoring of each worker's progress. Thus, the case manager is unable to be as proactive as he/she would like to be. High caseloads of Intake Adjudicators hinder their ability to thoroughly review claims.
- In collective agreements that enable workers to exercise bumping rights, this can disrupt the working relationships as there may be animosity between the person bumping and the person being bumped. This obstacle can be addressed by providing the injured worker with priority status for future vacancies and reassigning tasks rather than initiating a bumping process.

- There is a perceived problem with acceptance of the injured worker by peers and managers.

3. *What are the roles and responsibilities of the following stakeholders in returning injured workers to work?*

a) Employer

- Respect an employee's right to confidentiality regarding diagnosis and other health information.
- Become educated in employer roles and responsibilities regarding the duty to accommodate.
- Appeal decisions of the WHSCC that were not made in accordance with policy. Attend W.C.R.D. hearings and lobby for WHSCC presence.
- Explore all options in consultation with other stakeholders regarding potential modifications to the working environment and/or alternate employment options.
- Offer support to injured workers by listening to their concerns and accommodating "reasonable" requests for modifications to the workplace or work schedules.
- Maintain contact with major stakeholders and provide regular feedback regarding return to work issues.
- Educate workers on safety precautions and implement safe work practices.
- Promptly and thoroughly investigate accidents and incidents in the workplace.
- Be an active participant in the return-to-work goals.
- Assign an internal person to monitor injured employee claims.
- Consider implementing a pre-placement screening process and conduct job site analyses on existing positions within the organization.
- Become educated in the return-to-work options offered by the Commission.
- Educate employees regarding workplace injuries, return-to-work programs, etc.

b) Worker

- Provide all necessary medical documentation as required.
- Obtain clearance for return to work from the health care provider when required.
- Fully participate in the return-to-work process.
- Follow safe work practices.
- Maintain regular communication with stakeholders and keep them informed of progress.
- Keep scheduled appointments with physicians and other health providers.
- Be honest regarding the status of the injury, limitations and restrictions.
- Follow the advice and direction of physicians and other health care providers.
- Work with the case manager and other stakeholders to explore the best treatment options and/or return to work plans.
- Report injuries immediately so they can be investigated and reported to WHSCC.

c) Health Care Provider

- Be objective, timely and proactive with treatment options.
- Terminate those treatment or return-to-work options that are not providing positive results.
- Consider all treatment options and select those that will most likely result in a positive return-to-work experience.
- Maintain regular contact with the case manager regarding recommendations and objective findings.
- Consult with the employer when considering return-to-work options.
- Be supportive of return to work programs.
- Limit judgements to clinical assessments.
- Provide service within acceptable time frames and self-evaluate client outcomes.

d) *WHSCC*

- Investigate questionable claims.
- Attend all W.C.R.D. hearings.
- Provide relevant information to health care providers and the employer.
- Access cost-effective and necessary clinical intervention related to the worker's injury.
- Develop performance measures for, and evaluate outcomes of, health care providers such as physiotherapists and occupational therapists.
- Compare incident rates, adjudication duration, and claims duration with other provinces and share this information with stakeholders.
- Regularly evaluate the outcomes of services provided by the WHSCC to the employers.
- Incorporate health and safety into compensation services through a team model.
- Consider extenuating circumstances before issuing fines to employers in cases where reporting of an injury is delayed. This will provide employers with the necessary time to conduct a thorough investigation.
- Contact the worker and employer, as well as the health care provider, in a timely fashion.
- Make efforts to reduce the waiting list to see specialists.
- Educate employers and employees as to their roles and responsibilities in the return-to-work effort and accommodation issues.
- Maintain regular contact with the stakeholders.
- Use statistics to determine the most effective treatment options. Keep apprised of new treatment and rehabilitation programs offered in other jurisdictions as well as the effectiveness of same.
- Consider all evidence in adjudicating claims. Adjudicate in an effective and efficient manner.
- Conduct safety audits of employers and provide feedback on safe practices.
- Quickly initiate return-to-work programs.
- Educate and train stakeholders in return to work programs and accommodation issues.

- Initiate a program of positive and negative financial incentives for stakeholders with respect to return to work programs and accommodation of injured workers.
- Provide funding for small employers to support accommodation of injured workers.
- Fund clinical tests and assessments to identify reasonable return to work programs.
- Promote the human and financial benefits of return to work programs and accommodation.

e) *Union*

- Actively support accommodation options and cooperate with the employer and the WHSCC in providing reasonable accommodation alternatives to the point of undue hardship.
- Provide feedback on the return to work process and outcomes.
- Respect an employee's right to confidentiality regarding diagnosis and other health information.
- Support the injured employee through exploring alternate work options and/or modifications to the work environment.
- Cooperate with the employer and the WHSCC in facilitating a successful return to work for the injured employee.
- Educate members on the importance of safety in the workplace.
- Educate union members on the importance of accommodating injured workers.

f) *Co-Workers*

- Support the injured worker through assistance with physically demanding tasks when formally requested by the employer.
- Offer encouragement to the injured employee.
- Adopt safe practices at work to prevent injuries.
- Advise the employer of any hardship resulting from the accommodation of an injured worker.

4. *What needs to be done to ensure that everyone carries out their roles and responsibilities effectively?*

- Conduct compliance audits of employers to ensure that they are fulfilling their roles and responsibilities.
- Consider implementing policies to clarify the onus on employers and unions to accommodate injured workers.
- Train and educate all stakeholders regarding services and programs offered by the WHSCC.

- Conduct regular meetings between the employer, injured worker, union representatives and WHSCC, and where possible, healthcare providers, to facilitate a cooperative return-to-work program.
- Offer incentives for employees who participate in return-to-work programs. (i.e. full salary with an option for the employer to either share the cost with the WHSCC or have the WHSCC fully fund the full salary)
- Send a letter to the employee outlining his/her obligations in the return to work effort and the consequences of non-compliance.
- Develop statistical information on, and research the duration and effectiveness of, various treatment programs and return-to-work options.
- Strengthen the wording of the WHSCC policies to place more onus on employees to participate in return-to-work programs.
- Monitor the effectiveness and duration of rehabilitation/treatment options and develop outcome expectations for health care providers.

5. *Do you believe the injury employer has a greater responsibility to accommodate injured workers than other employers?*

- Yes, this will motivate employers to maintain a safe working environment. Accommodating injured workers will help control the cost of claims by reducing claim duration. Furthermore, the employee will be able to maintain employment benefits such as pensions and group insurance. The employer will benefit by retaining valued human resources.

6. *Are new programs required? What do you suggest?*

- The WHSCC should consider hiring a team of rehabilitation specialists (Occupational Therapist, Physiotherapist) in each of their regional offices to offer objective advice on the duration of treatment programs and to treat injured employees in communities where rehabilitation services are not currently available.
- Caseloads of case managers is a concern. It is difficult for case managers to provide efficient service when managing 70 or more cases. The Commission should consider piloting an outcome measurement program to determine the effect of a reduced caseload on claim duration and cost. As well, the effectiveness of the case management system should be evaluated.
- The WHSCC should continue to research creative return to work options.

- Incentive programs, both positive and negative, would benefit and motivate all parties to actively participate in the return to work process.
- There are presently several return to work programs offered by the WHSCC, but consideration should be given to the uniqueness of each job situation and each employer.
- The Commission should become more aggressive in conducting investigations stemming from information provided by employers and others.
- A separate investigation file should be kept to maintain confidentiality of persons providing information for investigations. Investigations should be removed from the Legal Department and placed in the Compensation Services Department to promote a team approach to claims management.

7. *Should existing or new programs include incentives for either employers or workers?*

- Yes. Currently, there are limited incentives for employers to implement safe practices. Also, there are few incentives for employees to return to work. As previously noted, many employees incur greater costs while participating in return-to-work programs versus simply staying at home.
- Incentives for employers should include the following:
 - Merit system for implementing return to work programs.
 - Provide funding to employers for internal assessment services such as occupational health and occupational therapy.
 - The WHSCC should provide support for investigating questionable claims.
- Incentives for employees should include the following:
 - Provide additional financial support for employees who participate in return to work programs.

8. *What are the challenges for small businesses?*

- Not applicable.

9. *Is the role of health care providers satisfactory?*

- Health care providers should be more accountable for their recommendations. For example, primary care providers often recommend that injured workers remain off work due to subjective, rather than objective, findings.
- Physicians are often in a conflict between maintaining a positive relationship with their patient and providing objective information to the WHSCC.

- Functional Work Assessments are very effective in providing objective data to develop a return-to-work program. Health care providers should be required to provide thorough and objective data regarding the work injury and treatment plan.

10. *Should legislation enforce duty to accommodate?*

- No. There are some concerns that enforcing the duty to accommodate through legislation would result in "forum shopping". At present, an injured worker can enforce a duty to accommodate through human rights legislation, and possibly through the grievance and arbitration process. Adding "duty to accommodate" to the WHSCC legislation would provide another avenue for redress. Thus, an employer may have to defend itself in three different forums.
- The objective of accommodating injured workers back into the workplace can be achieved through existing mechanisms. Recent court decisions regarding the application of human rights legislation indicates that there already exists a duty upon employers to accommodate injured workers. Rather than implementing legislation, the Commission can take a proactive role regarding the duty to accommodate through their policies. This can be accomplished by clearly stating the roles and responsibilities of stakeholders in the duty to accommodate. In addition, the Commission can promote the duty to accommodate through publications and information sessions with stakeholders.
- Legislation would help resolve some of the problems that employers encounter regarding the language of collective agreements. Some collective agreement language limits an employer's ability to accommodate an injured worker. Since legislation would take precedence over the collective agreement language, employers could take a more flexible approach in accommodating injured workers back into the workplace. However, given recent developments in the common law and Human Rights legislation, this flexibility already exists. Thus, the solution is education rather than legislation.
- Legislation that incorporates "duty to accommodate" may reduce long term claims costs.
- Legislation that enforces the "duty to accommodate" may encourage employers to be more proactive in health and safety issues.
- If the duty to accommodate is legislated, larger employers may find it very difficult to establish "undue hardship" due to the size of their operations, even where there exists a legitimate and significant negative impact, financial or otherwise.

11. *Should legislation outline the rights and responsibilities of workplace parties?*

- Again, there is some concern that outlining the rights and responsibilities through legislation may result in an additional forum for redress where these rights and responsibilities are seen to be violated.
- Outlining the rights and responsibilities of workplace parties through legislation may motivate parties to cooperate and actively participate in the return-to-work process. However, this can also be accomplished through policy development and education.
- At present, unions are seen as having very little, if any, responsibility for accommodating injured workers. This responsibility rests squarely with employers. However, restrictions imposed by collective agreement language as well as union interference often create the greatest impediment to accommodation. Although we do not agree that legislation in this area is necessary, if it is enacted, it should outline the union's responsibilities as well as the employers and they should be held equally accountable.

12. *Is it more important to educate stakeholders before developing new programs or implementing new laws?*

- It is extremely important that stakeholders be made aware of new programs or new laws as this may have an impact on the manner in which they conduct business or do work.
- Stakeholders must be educated in new programs and new laws in order to determine the feasibility of implementing same.
- Stakeholders must be educated in order to know how to implement these programs or laws.

13. *What guarantees should injured workers have that they will not be laid off after being accommodated?*

- This may be an unrealistic expectation as employers are often unable to foresee the circumstances that could result in a layoff situation.
- At present, there exists human rights legislation which would guard against discrimination of employees on the basis of disability. This should be sufficient to address concerns of improper layoff.

14. *What needs to be done to protect the rights of co-workers who may be affected by the accommodation of an injured worker in the workplace?*

- If legislation or policy is enacted to implement the duty to accommodate, consideration should be given to whether the displacement of an employee as a result of accommodating an injured worker would constitute undue hardship.

Conclusion

The NLHBA supports the need for creative and effective return to work programs, including accommodation of injured workers. Human Rights legislation prohibits discrimination on the basis of disability and corresponding developments in case law regarding accommodation make it unnecessary and in fact redundant to include the duty to accommodate in the WHSCC legislation.

If you require further information regarding this submission, please do not hesitate to contact Mr. John Peddle, Executive Director of the NLHBA, at 364-7701 (ext. 317).