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RECENT CHANGES AT WSIB: WORK REINTEGRATION POLICIES AND NEER

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The Workplace Safety and Insurance Board (WSIB) has implemented five new policies relating to early and safe return to work, re-employment obligations, responsibilities of the workplace parties in the return to work process, and work transition (Labour Market Re-Entry, LMR). The WSIB has also released a draft Work Reintegration NEER policy, increasing the NEER window from a three to a four year window beginning with the 2008 accident year. The following Work Reintegration Policies took effect on December 1, 2010:

- 19-02-01, Work Reintegration Principles, Concepts and Definitions
- 19-02-02, Responsibilities of the Workplace Parties in the RTW Process
- 19-03-03, Determining Suitable Occupation
- 19-03-05, Work Transition Plans
- 19-03-06, Work Transition Expenses

WSIB has implemented the above changes in an effort to ensure a worker's opportunity for a successful return to work and under the principle that a successful return to work is best achieved with the injury employer. WSIB will no longer use external LMR Case Managers and WSIB Return to Work Specialists and Work Transition Specialists will manage a worker's return to work.

It remains to be seen how these changes will impact return to work processes, but it stands to reason that the WSIB will be putting greater pressure on accident employers to bring workers back to work.

Proposed Changes to NEER Window

Effective for 2008 claims, it is anticipated that the WSIB will review claim costs for a given accident year on September 30 of the **four** following years. The recalculation of claims costs under NEER throughout the four-year review period would take into account any additional benefits or approved cost relief made on the claim. The other experience rating plans (CAD-7 and MAP) are not affected by the proposed changes.

Responsibilities of the Workplace Parties

Employers continue to have a re-employment obligation under WSIB when the following conditions are satisfied:

1. The worker has been "unable to work" as a result of the work-related injury;
2. The worker was employed with the employer for at least one year prior to the date of injury; AND
3. The employer regularly employs 20 or more workers.

Under this obligation, employers are required to offer to re-employ the worker in the position that the worker held on the date of injury or with work of the same nature and with comparable earnings. This obligation continues until the earliest of:

- The second anniversary of the date of injury;
- One year after the worker is medically able to perform the essential duties of his or her pre-injury position; or
- The date on which the worker reaches 65 years of age.

Workers who are terminated within six months of being re-employed will now have three months to ask the WSIB to investigate the reasons for their termination.

Under the new WSIB Work Reintegration Policies; the employer's obligation to cooperate has also been confirmed. The workplace parties must cooperate with each other and the WSIB in the return to work (RTW) process by:

- Initiating early contact;
- Maintaining appropriate communication throughout the worker's recovery;
- Identifying and securing RTW opportunities for the worker;
- Giving the WSIB all relevant information concerning the worker's RTW; and
- Notifying the WSIB of any dispute or disagreement concerning the worker's RTW.

Workplace parties have always been required to cooperate in the return to work process, however, the WSIB will now be taking a much more active role in the process and will be scrutinizing the workplace parties' interaction. Where a worker is capable of suitable work, WSIB mandates a return to work meeting no later than 12 weeks after the date of injury.

Penalties

In assessing whether non-cooperation has taken place, WSIB generally looks at the pattern of actions and behaviours of both workplace parties. WSIB also allows parties to correct their behavior and provides a verbal warning prior to levying a fine. For a non-cooperation penalty to be levied, the WSIB must be convinced on a balance of probabilities, that a workplace party had knowledge of his or her obligation, had the capacity to carry it out, and did not carry it out.

WSIB initially provides a party with verbal notice of a breach which is later confirmed with a written notice that a penalty will be levied. For an initial

penalty of a worker, WSIB reduces the worker's wage loss benefits by 50% from the date written notice comes into effect. If the non-cooperation continues beyond 14 calendar days, WSIB reduces the worker's wage loss benefits to reflect the earnings of an experienced worker in the suitable occupation. A work transition assessment or plan may also be terminated.

Where an employer is found to be non-cooperative, WSIB will levy an initial penalty of 50% of the cost of the wage loss benefits to the worker from the date that the written notice comes into effect. If the non-cooperation continues beyond 14 calendar days, the WSIB levies a penalty of 100% of the costs of the wage loss benefits payable to the workers in addition to 100% of any costs associated with providing work transition services to the worker. This penalty can continue to be levied for up to 12 months. Unlike a re-employment obligation, the duty to cooperate is not time limited.

Accommodation and Undue Hardship

The new WSIB Policy specifically references an employer's duty to accommodate a worker under the *Ontario Human Rights Code* to the point of undue hardship. If a job becomes available that can be made suitable through accommodation, and the accommodation does not cause the employer undue hardship, the employer must provide the accommodation. WSIB does not define undue hardship, but refers employers to the Ontario Human Rights Commission (OHRC) *Policy and Guidelines on Disability and the Duty to Accommodate*, which is available at www.ohrc.on.ca.

Work Transition (WT) Plans

WSIB's focus under the new Work Re-Integration Policy is to ensure that an injured worker returns to the injury employer. The WSIB provides a hierarchy of return to work opportunities in the following order:

- Pre-injury job with the injury employer;
- Pre-injury job with the injury employer, with accommodation where required;
- Work comparable in nature and earnings to the pre-injury job with the injury employer, with accommodation where required;
- Alternative suitable work with the injury employer, with accommodation where required;
- Work comparable in nature and earnings to the pre-injury job in the labour market with accommodation where required;
- Alternative suitable work in the labour market, with accommodation where required.

The new WSIB policy on WT Plans, unlike the prior Labour Market Re-Entry Program, places far more involvement in the hands of the injured worker. The worker is encouraged to provide input and supporting research in identifying a suitable occupation (SO) and any suggested plan activities. Worker will also be provided with choices regarding specific education/training providers and programs. There remains a thirty day time limit for employers to appeal a WSIB decision relating to return to work or a work reintegration plan.

The WSIB has also implemented a specific option for workers aged 55 or older. A worker aged 55 or older who requires a WT plan can chose to either participate in a WT plan aimed at achieving the SO, or choose a 12 month Transition Plan focused on self directed work re-integration.

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