Injured Workers' Consultants
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CONSULTATION ON
EARLY AND SAFE RETURN TO WORK POLICIES

Submission by
Injured Workers' Consultants Community Legal Clinic
to the workers' compensation board of Ontario: WSIB

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WSIB/WCB CONSULTATION ON EARLY AND SAFE RETURN TO WORK POLICIES

SUBMISSION OF INJURED WORKERS' CONSULTANTS COMMUNITY LEGAL CLINIC

I Introduction

A Step Forward with a Useful Process

These eight draft policies represent an effort to address longstanding problems with the policies of Early and Safe Return to Work (ESRTW) which have frustrated many participants over the past eight years. The resulting complex document attempts to take the rough edges off of the self-reliance model and there is no doubt that will be of benefit to injured workers. The recognition of the need for healing time is very helpful. The detailed look at what constitutes suitable work begins to recognize the complexity of both injuries and of workplaces. The recognition that there are differences between short-term accommodation and long-term is important. Also important are the recognition of the need for sustainable work, the need for bona fide offers of work, that benefits should continue while work arrangements are being made, and the key concept that the Board must be involved in the return-to-work process.

We are pleased with these developments, as a step forward, and believe that they will result in more effective return to work for many workers, who have suffered injury and illness at work, by better supporting healing, dignity, and genuine workplace recovery.

The Board did have several forums on the developing policy with interested parties at which times it received some feedback on the direction it was taking. Those opportunities were appreciated and hopefully were helpful. At this point, with the draft policies available, it would be particularly important to find a way to get direct input from injured workers who have had the first-hand experience with the different stages of both recovery and return-to-work.

Weaknesses

The weakness of the policies exists at two levels. Within the present logic of the policies, the positive measures are lost both in the complexity of the document and in weak and even contradictory language. We will endeavour to address these points as they arise in the sectional analysis. At another level, the logic of the policies is founded on inappropriate assumptions, goals and measures. It is our view that these fundamentals need to be addressed before the policy can truly serve meaningful return to work.

Objective Needs to Be Changed

The first clear signal that the policies are resting on a weak foundation is found on the first page with the following statement:

> *"The effectiveness of the workplace parties' return to work activities can be measured by how soon the worker returns to suitable work with the accident employer that restores his or her pre-injury earnings."*[1]

[1] p.1 Guidelines. Return to Work Objective

What are we to make of this measure which immediately undercuts the notion of timely return to work?

This measure suggests that the key objective of the draft ESRTW policies remains the reduction of compensation payments. While savings to the system can be a happy outcome of successful employment of injured workers it is our submission that it is inappropriate as the purpose.

What should be the object of the policies?

It is our view that the object must suit the historical and remedial purpose of the legislation. Although it is true that the legislation of 1998 hampers the pursuit of these purposes, it nevertheless rests upon them and we believe that, through policy, the Board must seek to elevate its role to support and protect injured workers from negative consequences of their injury.

It was more than twenty years ago that a thorough study of Ontario's compensation system was last conducted. As he set out to consider how to reform the system, Professor Weiler dedicated his first chapter to exploring the philosophy of worker's compensation. He noted:

> *An injured worker does not enjoy his form of compensation as a matter of grace. He has been required to give up a common-law right of action enjoyed by everyone else. That right would now be worth a great deal. In return he must be considered entitled to full (bold is in the original) enjoyment of the statutory right he was promised in exchange. There still remains in workers' compensation considerable dilution in the degree of income maintenance afforded disabled workers. My inquiry about the validity of such limitations begins with a strong principal of full redress for such income losses, a principle that should be overridden only for cogent and compelling reasons.* [2]

He continues on the same page:

> *It is illegitimate in principle to argue that the Workers' Compensation board must tighten up on claims and cut back on benefits because its total budget is growing too large, too fast, for the economy to afford. This should be as unthinkable as would be a suggestion to the Chief Justice that the number and level of tort awards be restrained by his judges because insurance premiums are getting too high. In both cases, the same answer is appropriated: the only proper means of containing the bill for accident losses is to reduce the number of accidents themselves.*[3]

These statements echo those made in the founding documents of our system in 1915 and through the decades in the commissions and task forces which have taken the time to enquire into the system. They are fundamentals and we submit that they should be fundamental guides to the policies on ESRTW.

What do these fundamental principals mean for the ESRTW policy?

We believe it means that the policy must have as its main objective, to restore the worker with care and dignity to the position he/she would have been in had it not been for the accident. Thus the policy has to protect and assist with maximum medical recovery. There can be no room for policies that leave the door open for the worsening of the workers health, both physical and mental. The worst situation would be where an injury that could have been temporary becomes permanent through inappropriate measures. Thus also, the policy must also protect and assist with maximum restoration of earnings including the ability to ascend the social scale. There can be no room for policies that legitimize employment that keeps a worker at a lower level than their potential. There can be no room for policies that could lead to poverty in the future due to the injury.

We believe that the policies would be strengthened by a broadly stated purpose that captures these notions.

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[2] Reshaping Workers' Compensation for Ontario, Paul C. Weiler, a report submitted to Robert G. Elgie, M.D., Minister of Labour. November 1980. p.15

[3] ibid, pp. 15 –16

As we review the policies, these are the notions we will have in mind. To put it more graphically, we take note of recently completed research on homeless and underhoused people in Toronto which indicates that of the people surveyed: "57% had WSIB claims in the past and this injury was part of the disabling process."[4]

Will the draft policies change that statistic?

Our question will fundamentally be, does the ESRTW draft policy use the full authority of the Board under the Act to prevent poverty of injured workers?

[4] Barriers to Disability Benefits for Homeless and Underhoused People, Street Health Community Nursing Foundation, funded by the Wellesley Central Health Corporation

II Some Fundamentals

There are many different ways of stating fundamental principles and guides. Bearing in mind our points above, here are ten conceptual areas that we believe will enhance the overall policy.

1. Purpose of the Policy

As indicated in our introduction we believe that the ESRTW policy must set out its purpose and related objectives in language which elevates the process to one which seeks to do the maximum possible to support and protect injured workers from the negative consequences of their injury.

The statement of purpose needs to include enough language to give some spirit to its intent, so that adjudicators and other readers, can immediately and clearly understand that the activities are to support a dignified and as full a recovery as possible from the impact of the injury.

The statement needs to clarify at the outset that there are two distinct return-to-work situations with the accident employer. One is during recovery, where appropriate, and that this must be entirely rehabilitative in nature. The other is in instances where there is a permanent impairment that will require special attention for possible accommodation and for considering long-term possible medical and economic consequences.

2. Measures

As indicated in our introductory remarks, the speed with which an injured worker returns to work in an entirely inappropriate measure of success of the policy. That measure will cancel the effort to recognize the need for healing time without work obligations. The January 2005 introduction to the Board's work on the policy performance measure had better suggested wording: "New measures of RTW outcomes go beyond duration on benefit, to measure actual RTW. Overall RTW performance to be measured by: the percentage of injured workers that return to work on a timely basis, with no wage loss, to their pre-injury job, without recurrence and are satisfied." (slide 16)

We believe that there need to be distinct measures for the two types of return-to-work.

For short-term rehabilitative return to work, the question must be: Did the modified work enhance the worker's maximal medical recovery? The examination of this would need to ensure that the worker was not forced to return too soon or to unsuitable work due to experience rating pressures on the employer.

For long-term work, the question must be asked many times, essentially until the worker reaches age 65, and here the question must be: Did the accident employer maintain suitable employment and advancement opportunities which allowed the worker to earn and grow as he/she likely would have had it not been for the accident? This question is not to suggest that we think all employers have the capacity to do this, but within the ESRTW policies which seek to restore the injured worker to their former employment, it is the question which indicates the level of success of the policy.

3. Simplicity

The draft policy is exceedingly complex. It is our view that this complexity essentially stems from the mistaken purpose of the policies as cost-containment and further complicated by attempting to mitigate the negative features of the experience rating (ER) pressures on employers. While it is perhaps not in the scope of this policy initiative, it would aid the policy tremendously to have a concomitant adjustment to the ER policies such that they do not begin to impact an employer until a worker has reached MMR. (At the very least, there should be no ER for the first 12 weeks of a claim.)

If the purpose of the policy is understood to have two parts with the distinct goals of first rehabilitation and then permanent, suitable work, the complexity falls away.

There is much to be said for simplicity and it is the concept that our system is fundamentally based on. The intention is for a non-adversarial process which handles claims with expertise responding to human needs and is able to do so at minimal expense. At the time that Professor Weiler wrote, he noted that due to this non-adversarial simplicity (compared to auto claims or to American compensation systems) we had very low administrative costs—at that time 9%-- and the " . . . fund of assessment revenues can be concentrated on supporting injured workers . . ."[5]

4. Security

A fundamental purpose of the compensation system is to provide economic security to someone who is unemployed or under-employed by virtue of their injury. The draft policy does make some steps forward in ensuring that a worker is not cut off benefits in a manner which does not allow him/her to either rectify the situation or at least time to make some other arrangements. Clearly stated policy to allow for continuity of benefits during discussions and transitions will enhance the ability of the Board to support the recovery of the worker and prevent additional damage caused by the extreme stress of economic pressures or of the premature attempt to work.

5. Recognition of Power and Capacity

The unequal power relationship between workers and employers is the big unspoken truth that underlies what happens to a worker after injury. The draft policy takes a step forward in recognizing that there is an unequal power relationship. It does this principally by putting the Board back into the picture regarding return to work processes. We are left however with policies which will still put the injured worker in an adversarial situation working out the conflicting demands of his/her interests versus those of the employer who is responding to either ER pressures or production interests. Especially where there is no union, the Board should take special care of the interests of the injured worker.

The situation is probably worse in small workplaces that often do not have the production capacity to absorb a worker in either rehabilitative or permanent modified work. There is no point in being punitive to a company that realistically cannot accommodate a worker. The result will inevitably be to transfer the punishment to the worker.

The "discourse of abuse" which is so clearly revealed in the research by Joan Eakin ("Return to Work in Small Workplaces: Sociological Perspective on Workplace Experience with Ontario's Early and Safe Strategy," November 2002) will continue under the present policies in many workplaces, both large and small. The policy should clearly recognize the differences in power and capacity and provide compensating assistance.

6. Rehabilitative Return to Work

The ESRTW policy still seems to carry the inherent belief that it is in the worker's interests to return to work as soon as possible as this will ensure that they do not lose attachment to work and that is in the employer's interests so they do lose a valuable worker. We are not aware of any qualitative research that has provided evidence of this. If there is any, we would appreciate being apprised of it. The WSIB requested a systemic review of research on return to work after injury. The researchers noted: "A limitation of this review was the paucity of high quality qualitative research relevant to the topic of workplace-based return to work."[6]

Rather, what we have seen in the "as-soon-as-possible-approach" is worsening of conditions, frustration, deteriorating labour relations and attendant depression. During recovery from an injury, the primary need and task of a person is to attend to healing. Often that requires rest initially and then active and specific exercises to which the worker must give their attention and energy. Sometimes there are surgeries requiring further recovery time. If the person's injury and work are both of a nature to allow some level of continued duties before full healing has occurred it makes sense to encourage this if it aids in recovery, or at the very least does not hinder it. The key is it must be rehabilitative. It must support recovery both physically and psychologically.

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[5] see note 2 above, p.20

[6] The Process of Return to Work After Injury: Findings of a Systematic Review of Qualitative Studies, p. 30, IWH Working Paper #299, Sept. 2005, Ellen MacEachen et al.

The policies make some distinction between short-term and long-term return to work but these do not go far enough. The distinction needs to be incorporated into the initial description of the purposes of the policy. For short-term return to work, its rehabilitative nature must be clearly described and supported.

7. Return to Work for the Permanently Impaired

The policy emphasizes two concepts to support permanent work with the accident employer. One is the idea that a worker could get training for a different position with the employer. This is very helpful. The other is the critical concept of sustainability. One weakness of the policy is that in an effort to deal with the impact of deeming it does not allow an employer to pay a worker more for their modified work than the position would otherwise pay. This is laudable, but actually reduces the flexibility to arrange what might be a good arrangement. On the other hand it helps to prevent a non bona-fide job situation within the experience rating environment.

This is a conundrum that may be difficult to solve without legislative change, however we would suggest that a return to the concept of a sustainability award such as used to be given to FEL recipients would help. This would be a $1.00 LOE payment that could then reviewed if the job became unsuitable or was lost for any reason.

Other than the points noted above, we do not find anything to protect a worker in long-term employment given that the legislative obligation only lasts two years.

Given the importance of suitable permanent work, it is important that the policy ensures that worker is not forced to return to an accident employer where that is not in their interests even if there is apparently suitable work. This is important for example in the case of young workers and new immigrants who are new entrants to the labour force and likely injured in work that is not reflective of their potential.

The most important outcome of the policy must be the economic security and social integration of the injured worker. It is in its success in securing suitable permanent work that this will be evaluated.

8. Privacy and Dignity

In the increasingly adversarial arena of return to work fueled by experience rating, workers are subject to loss of dignity as they are forced to defend the fact that they are injured and to appear at work in degrading situations. The policy must strongly protect against this and appears to do fairly well in this regard through both the recognition of healing time and definitions of suitable. The loss of privacy and dignity is still at risk however in regard to access to medical information and even the treating professionals. The fact that employers have access to a worker’s file with medical information is beyond the scope of this policy. The policy however encourages an employer to contact the treating physician. Even if the purpose of the contact is only "clarification regarding the functional abilities information provided on the WSIB's FA from," this brings the employer into inappropriate contact that can undermine the privacy and dignity of the worker/patient. All aspects of the policy must be checked against fundamental principals of privacy and dignity.

9. Take into account the impact of experience rating.

Experience rating was recommended on an experimental basis by Paul Weiler as a possible means of giving incentives to employers to improve workplace health and safety. The New Experimental Experience Rating (NEER) has mutated into a permanent and expanding lever to get workers off benefits through offers of suitable work. The improvements indicated in the draft policy are fundamentally in response to the negative features of the ER system. Under the pressures and enticements of experience rating, employers will, however, still do all they can to pressure injured workers to return to work under any circumstances. To paraphrase the issue, if the meter is running up the employer's bill while the injured worker is healing, the employer has a direct financial interest to forget the healing and stop the meter from running by getting the worker back on the job. And if they are thwarted in this practice by the new policies, they will have a stronger incentive to put more pressure on workers to go through S&A benefits rather than compensation. None of this will benefit the injured worker.

In order to ensure that these policies are implemented by employers in the spirit in which they are written, it is our recommendation that the ESRTW policies include a parallel change in experience rating. Experience rating should only come into play after the Board has issued a decision that a worker has reached maximum medical recovery, or is fit to return to suitable work. This does not mean that employers may not offer suitable work before that date, only that the basis of the offer will be not be driven by the wrong motives. (At the very least ER should be delayed 12 weeks which is the general rule of thumb of the time to capture most short-term claims.) This will enhance offers based on goodwill, which research has shown is the most important component of successful return to work efforts.[7]

10. Take into account the impact of deeming.

Under the present legislation, return to work (and LMR) are intricately related to a workers future support from the workers' compensation system. An apparently successful return to work at no wage loss or an offer of such which is determined to be suitable, generally signals the end of the Board's assistance. As indicated in our introduction, a recent study showed that 57% of the homeless or underhoused people surveyed had a compensable injury, which played some part in their current situation. Despite the effort of the policy to ensure that a permanent job reflects a generally available job, there is nothing to ensure that it would be available on the open market to an injured worker. What if the permanent job is a modified job? It is even less likely that a worker would obtain such in the open market were they to lose the position with the accident employer.

The deeming system must be changed in order to provide realistic economic security to injured workers. In the meantime the re-institution of the sustainability award as mentioned above to protect a worker who is working at no wage loss, will be of assistance.

[7] see for example, p.14 - 16, The Process of Return to Work After Injury: Findings of a Systematic Review of Qualitative Studies, IWH Working Paper #299. Ellen MacEachen et al.

Policy 19-02-02
Return to Work: Key Concepts and Definitions

We believe that an effective Return to Work policy must contain in its key concepts and definitions considerations of the kinds of points which we have reviewed in our introduction and exploration of fundamentals. Below are some comments on specific points within the policy.

GUIDELINES

Return to Work Objective:
Given the importance of return to work in the Act, it requires a stated objective which matches that importance and which provides a vividness which will help guide the readers in the spirit of goodwill which is so critical to the process. The objective needs to include the understanding that workers rely, through the historic compromise, on the board to do its best to restore them with care and dignity to the position they would have been in had it not been for the accident. The objective needs to identify the two primary types of return to work and their separate objectives: short-term rehabilitative RTW, and long-term permanent RTW for those with permanent impairments

The statement of the measure of success needs to be changed. Two questions are required. For short-term work the question should be: Did the modified work enhance the worker's maximal medical recovery? For the long-term work, the question must be: Did the accident employer maintain suitable employment and advancement opportunities which allowed the worker to earn and grow as he/she likely would have had it not been for the accident?

Shared Responsibility
A key understanding for the Board over the past eight years is that self-reliance has not worked. The statement in the draft policy makes it sound like it is still being relied on. This section needs to be re-worded to make it clear that the Board will play an active role. It should include wording that signals the understanding that a worker needs particular assistance in the process which the Board will provide, especially if there is no union.

Role of the Workplace Parties
The roles of all concerned are different for the two different types of return to work. The policy should be organized around these two types and the distinct activities involved.
We would be pleased to work with you on exploring how to change the document in this way.

The role of the workplace parties is explored in our commentary on policy 19-02-03.

Role of the Treating Health Professional

We find this section unsuitable. In the first instance it is patronizing to the health professional who does not need to be told by policy that they are responsible for "diagnosing and treating the work-related injury/disease." (etc.) This sort of language, if reproduced for the benefit of the health profession, is not going to garner their respect.

Reference to reassessing a prescription drug is undue interference in the doctor's treatment and the worker's relationship with the treating professional. It should be removed.

We note that on form 3042A there is a box that asks the employer if the doctor has been contacted. While not cited in this policy, since it is related to the return-to-work process, this seems to be the correct spot to say that the form should be revised to remove this section. Under no circumstances is it appropriate for an employer to contact an employee's doctor directly.

We recommend that the section be simplified to:

Role of the Treating Professional.
The treating professional will assist the return to work process by,

- *considering the workers fitness to work and discussing this with the worker.*
- *when the worker is able to work, to identify this to the Board on its forms indicating modified work (including modified hours) or regular work.*
- *when the worker is able to work, to fill in a FAF if it is requested by the employer.*

Role of the WSIB
This is dealt with in our comments on policy 19-02-05 The WSIB's Role in Return to Work.

KEY CONCEPTS AND DEFINITIONS

Return to work as a process
The term "disability management" has slipped into the board's vocabulary in the past eight years. This term fits with the experience rating induced work offers which have nothing to do with helping the worker, but do succeed in "managing the disability." "Disability" is understood in this term, and for that matter in many of the quantitative research studies, as *being on benefits*, rather than the impact of the injury on the worker. The wording here would be improved therefore, by being more explanatory. It could say for example: "…(e.g. workplaces that have established policies and programs for rehabilitative return to work, retaining and retraining, and hiring of injured workers.)"

Early (timely) return to work.
This section represents a key improvement in the policy. Due to its importance and that it needs to be well understood, it would be useful to add to the description something along the lines that while some injuries do not result in lost time, there are others which require time off work. Rest is an important part of the healing process and active treatment also takes time and energy.
The concluding paragraph re-introduces the previous concepts of return to work. To fit with the understanding that time to heal is important, it should be reworded slightly, perhaps along these lines:

"Timely return to work emphasizes a return to work *when* the worker is *medically (physically and emotionally)* fit to return to some form of suitable work. *If full recovery has not been achieved the suitable work must be rehabilitative. In those cases where the worker needs to be off work due to the nature of the impairment and related treatment and healing*, no offer of work is considered suitable, but the workplace parties are expected to maintain communication.

NOTE
This note indicates that work can include combining of duties. This would not be suitable if the combining of duties consisted of tampering with other worker's jobs, unless by mutual consent in a union setting. The combining of duties opens the door to create co-worker resentment and possibly increase the danger of their jobs. Studies show

that co-worker attitude is critical to successful return to work. This combining of duties would need to create a *new* additional job that is productive in nature and does not cause co-worker resentment. The note also indicates that work can include a short-term training program that leads to a job with the accident employer. This could be improved by leaving out the idea that it needs to be short-term. Why limit it?

Suitable work

Suitable work is defined as that which is safe, productive, remunerative and sustainable.

We recommend two additional criteria.

1. Rehabilitative. This would be described as a criteria for work before the worker has reached maximum medical recovery and/or for the re-entry of a worker who has been off for some time; and
2. Appropriate. This would be described as being suitable for the personal characteristics of the person, including their age. The list used in the FEL legislation could be a guide for items to be included here.

These criteria are important for both types of return to work, but are most important for the long-term return to work.

The definition of safe needs to indicate that the worker must fit the worker's functional and *psychological* abilities.

The definition of productive is very helpful.

The definition of sustainable needs a lot more work. The definition here relates only to concerns about the accuracy of the deeming that will occur due to the job. While that is a valid concern, it is not what we mean by sustainability. Sustainability has to have an element of assurance that the worker will be able to keep the job. If it is not likely that the worker will be employed with the accident employer for a substantial period, the worker needs to have the option of retraining or the Board's assistance in finding other employment. This is difficult to determine.

It is our sense that the best solution, for now at least, is to re-institute the *sustainability benefit* as described earlier in our submission. With the sustainability LOE, the worker could accept a job offer with confidence, which he might otherwise view with skepticism.

The concept of sustainable needs to provide for additional help beyond the 72 months for those who will clearly have difficulty in obtaining employment in the general labour market due to their injury and have lost their accident-employer employment

If an employer is willing to pay higher wages for the purpose of keeping a valued employee we can have not argument. This is only acceptable however if it is clear that the worker wants the job i.e. it is not an offer for the purposes of experience rating that the worker is simply forced into. And in such a situation, the worker must be protected with a wage loss benefit from the Board if he/she should loss the job even after the 72-month period. Once again the sustainability award would be useful.

It is our view that the NOC's are not a good indicator that a job is sustainable. The NOC indicate what is considered a real job, but does not help us know if it is sustainable for the individual injured worker, nor does it tell us if the job is available in the worker's town or area of living

Short-term vs. long-term suitable work

The distinction of what is considered suitable for the two types of return to work is useful. As indicated already, it is our view that these two types of return to work need to be highlighted at the beginning and to be treated quite separately. We believe the policies will be greatly simplified in this way. Short-term work should be more clearly understood with a slight change to the second sentence: "If suitable work is provided on a short-term basis *during healing* (*usually* 12 weeks or less), the criteria of . . ."

Available work

The exploration of what would be considered "available" is very useful and will help to protect injured workers from constructive dismissal situations and from a worsening of their condition if still in the healing stage.

We are concerned however about the concept of "work at home arrangements." The fact that they are identified as having to be "mutually-accepted" arrangements is helpful, but given the power relations between workers and employers we do not have confidence that a worker could easily refuse. Work at home arrangements open up a host of problems that will only complicate the return to work picture even more. We recommend leaving work-at -home arrangements out. Some people 's employment is primarily out of the home, in their cases suitable work could be developed at home, however care would need to be taken that they specifically do not work if they are in a stage of healing with a doctor's recommendation not to work.

Policy 19-02-03:
Workplace Parties Key Return to Work Activities

Stop emphasizing "Early"

This policy begins by listing "initiating early contact and maintaining communication throughout the period of the worker's recovery" as a "proven good practice." The Board has heard from the injured worker community that the focus on "early" return to work has been harmful to injured workers. It has led employers to hand generic notes requesting workers to report for work at their usual time for 'suitable modified work tomorrow at no loss of wages' as they are taken away by ambulance after traumatic accidents. Rates of re-injury and further lost time after return to work illustrate that injured workers are being pressured to return to work before it is medically appropriate and they often suffer further injury or aggravation of their original injury.

That is why the Board recognizes in the previous "Key Concepts" section (19-02-02) that the emphasis should not be on "early" return to work but rather on return at an appropriate time when there has been sufficient healing that the worker is functionally fit to return to suitable work. For many injured workers, every call from their employer about returning to work before they are fit to return to work is an argument: 'Are you ready to come back to work? Why not, we have light duties? How can you say can't do it until you come in and give it a try.' If the worker is not fit to return to work then these contacts are seen as harassment, which is upsetting. Inappropriately early contact interferes with recovery and creates tension between the parties that will poison the atmosphere before the time comes to begin to discuss return to work.

Frequent employer contact before a worker is fit to return to suitable work can be perceived as discrimination against injured workers. When a worker calls the employer and says they will be off for a week because they have the flu, or were in a car accident, should the employer call every day to see if they are ready to work, or perhaps to come back part time? Why are injured workers subjected to a greater level of scrutiny than those who are disabled by non-occupational conditions?

The policy should not begin by calling for "early" contact. The word "early" has proven counterproductive and harmful to injured workers. Instead of using the word "early," the policy should consistently refer to contact at the appropriate time when the worker has had sufficient time to heal and is functionally fit to return to suitable work. Given the range of injuries and the range of recovery times, it is not appropriate to link the timing of everything to the date of the accident. The determination that a worker is fit to return to suitable work should be the starting point for the return to work process. The policy should specify that discussion of return to work should be initiated when the injured worker has been determined to be fit to return to suitable work.

Responsibility for Deciding Fitness to Return to Work

The decision that the injured worker is fit to return to suitable work is the key starting point of the return to work process. However, the policy does not give anyone the responsibility for deciding that the injured worker is fit. The Board used to have that responsibility and would start the return to work process by issuing the 'WFIT' notices that the worker was considered fit to return to work. The problem with that was that the Board often did not have the full medical picture from the treating doctors when the decision was made. When the wrong decision is made the injured worker goes through hell, either because they are working injured at inappropriate work, or they are cut off compensation for failure to co-operate with the Board. The current policy and practice is to ask the treating physician, but the policy does require the Board or employer to abide by that opinion. We often find injured workers being told to return to work when their doctor is telling them they require more time to recover.

Fitness to return to work is such a key concept that the policy must specify how the initial decision is to be made. We recommend that the policy specify that the decision about when the injured worker is fit to return to suitable work should be based on the opinion of the treating physician, or at least on the opinion of a physician who has examined the injured worker and reviewed the current medical information. The treating physician has examined the injured worker and has to the most relevant medical information. If the treating doctor has advised the injured

worker not to start work yet, it is unrealistic to expect the injured worker to go back to work against their doctor's advice. There is no point in the requirement in the policy for the treating physician to discuss return to work with the injured worker unless that discussion is specifically recognized and respected in the policy. Both the Board and the employer have the authority to require the injured worker to attend independent medical examinations if they disagree with the treating doctor's opinion.

Guidelines

Worker and Employer Communication

As noted above, the term "early" should be replaced with reference to the appropriate time i.e. when a decision has been made that the worker is fit to return to suitable work.

The worker is required to return the employer's phone calls within 24 hours and to be available to communicate with the employer during regular business hours. This would only be appropriate after a decision has been issued that the worker is fit to return to suitable work. Until that time there is no need for contact. During the period before the injured worker is fit to return to work, they are supposed to be resting, or on medication, or attending treatment or other activities to aid in there recovery. We assume that the requirement for workers to return the employer's calls with no corresponding requirement for employers to return worker's calls was an oversight.

Treating Health Professional

As noted above, a decision on fitness to return to work by the treating health professional should be the starting point of the return to work discussion. The policy states that the employer should be encouraged to contact the treating health professional, and beyond that, to question the medication they have prescribed. This is a serious encroachment on injured workers' privacy and on their relationship with their treating doctor and should be deleted. It will also discourage physicians from accepting patients who have been injured at work if the WSIB policy is encouraging employers to challenge their medical opinion. The Board has general authority under the legislation to request information from the treating physician, the employer does not. The employer is limited by law to requesting the Functional Abilities Form and the policy should not attempt to expand that. The employer should provide the complete description of proposed suitable work to the injured worker and should not be discussing anything with the doctor behind the back of the injured worker.

The WSIB

As noted elsewhere in these submissions, the vast majority of workers and injured workers are not members of unions and there is a huge imbalance of power between the injured worker and the employer. In addition to that, we know that people with disabilities are the subject of widespread discrimination. Injured workers who cannot perform their old jobs are often treated as a burden and expense for their employer. In these circumstances, the Board must be given greater responsibility to intervene in the return to work process on behalf of injured workers or most injured workers have no hope of enforcing their rights. The research statistics indicate that 50% to 80% of injured workers with permanent impairments are unemployed within a few years after their accident under the current 'hands off' model of the WSIB. Where there is no union or other representative, and especially where there is or is likely to be a permanent impairment, the Board should have a mandate to play an active role on behalf of the worker in getting the injured back to suitable work or into a labour market re-entry program. However, the Board must be sensitive to the existence of the conflict of interest that exists. The Board benefits from deeming an injured worker to have returned to work because it can close the file and pay minimum benefits and this benefit is obtained regardless of whether the injured worker returns to work at all.

Identification of Suitable Work

As noted above, the starting point for everything must be a clear and accountable decision by the Board, based on a recent physician's examination, that the worker is fit to return to suitable work. Obviously a return to work meeting should not take place at the injured worker's hospital bedside the day after an accident. It really cannot take place until there has been a determination of fitness to return to suitable work. Only then is it possible to determine the worker's current abilities for work. Having meetings the employer's premises may not be possible when the worker is represented by a legal clinic, a private lawyer or other non-union representative because some employers refuse to allow non-employees the premises, including lawyers representing their employees.

Offer of Suitable Work

The policy lists the useful ingredients of an offer of suitable work. However, there is no point in doing so unless they are mandatory. As long as they are optional injured workers will not benefit from this policy. They are all reasonable and not onerous and there is no reason why they should not be required. Particularly the requirement to put the offer in writing and on file with the WSIB. It is worth noting that requirements for injured workers are mandatory and not described as things they are "encouraged" to do. If injured workers breach their obligations, their compensation is cut off. If employers do not meet these minimal requirements for an offer of work, the Board should conclude that it is not an acceptable offer.

Attempt to Perform Suitable Work

The idea that an injured worker could come in and try out a modified job and just do the parts they can, and leave the other tasks, is theoretically attractive but it could never happen in virtually every workplace. Can an assembly line worker walk away when the next item is too heavy to move? Can a school caretaker refuse to get down on floor and clean up a classroom when a child has been sick on the floor? Can the technician who is fixing your telephone system lie down and rest he finds he cannot pick up his toolbox? In most cases, once the injured worker is back in

the workplace, there will tremendous pressure to do whatever has to be done, regardless of their medical restrictions. It can be dangerous to others, or to the employer's reputation, or to ones own dignity or future employment to begin to pick and choose what seems safe and what doesn't. That is why it is extremely important to give the injured worker complete written the details of the work being offered and the opportunity to discuss it with their doctor.

Work at Home

If the worker's regular job is not performed at home, this should not be an option. Work at home would not be protected by the Occupational Health and Safety Act. Work at home has been often used by employers as way to convert a claim into a 'no lost time' 'no lost wages' claim in order to conceal the seriousness of the injury from the experience rating program. For example, paying full wages to watch health and safety videos at home has been used by some employers.

Short Term vs. Long Term Suitable Work

We would encourage the distinction to include all cases of likely permanent impairment in the long term category to ensure that these injured workers are protected before they drop out or are pushed out of the workplace. The wording that some criteria "must be met" and some "need to be considered" is unclear. The policy should provide that if there is or is likely to be permanent impairment, or if suitable work is provided on a long term basis, all four criteria of safe, productive, remunerated and sustainable must be met. In addition, as described above under 19-02-03, the determination of what is suitable should also be connected to the injured worker's recovery. In light of the significant number of further injuries that occur when injured workers are forced back to work too early and to inappropriate jobs, suitable work should be required to be rehabilitative when the injured worker has not reached maximum medical recovery or has been off work for a considerable period. As mentioned earlier, we believe that the policy should be organised around the very different concepts of short-term and long-term work.

Ongoing Monitoring and Evaluation

As discussed above, the experience of the Board's 'hands-off' approach to monitoring return to work for the past fifteen years has been unacceptable rates of unemployment and reinjury. Due to the imbalance of power between the workplace parties, the Board must take on this monitoring and evaluation role when there is no union representing the injured worker.

Policy 19-02-05:
The WSIB's Role in Return to Work

Education, Case Management and Dispute Resolution

We have already commented on the difficulty that the 'self reliance' model for returning injured workers to work creates for most injured workers because of the power imbalance that exists between a worker and the employer in a non-unionized workplace. The role of the Board in education, case management and dispute resolution is important as a means to address that. However, it is also important for injured workers to be advised of the right to representation and the options for representation that exist at no charge to them.

We agree with the importance of the educational activities listed, however the policy only specifically requires this where it becomes aware that the parties are not fully engaged in the return to work process and it appears that this is caused by a lack of knowledge. Given the limited role that the Board plays, at this stage it may be too late to put the process back on the right track. We recommend that the policy should specify what every injured worker should know and that the Board will inform all injured workers of these key points. In addition to the information about benefits and co-operation, this should include the roles that that Board can play in case management and dispute resolution.

Mediation

Mediation must be recognized by all parties as part of the return to work process and a resource that is available without penalty. As the return to work phase begins, the Board should send a clear message to injured workers that if they do not think that the work is suitable, whether before they attempt it or while they are attempting it, they can request mediation and they will continue to receive loss of earnings benefits during the process. Mediators should not become decision makers, it is important for the credibility of the process that adjudicators retain that role. For more detail on mediation, see our comments below regarding policy 19-02-07.

Accommodation Funding

The cost of accommodations is a barrier to re-employment and we agree with the provision of funding for accommodations to facilitate return to work. The policy provides that the WSIB will provide funding for this if the employer is not obligated under the Act to re-employ the injured worker. We believe the rationale for the WSIB to cover the cost of accommodation is even stronger in cases where the employer does have a re-employment obligation under the Act. Accommodation and compensation are both necessary consequences of a workplace injury and it makes sense that they would both be covered by the WSIB on the basis of the collective liability principles that are the basis of our workers' compensation system. Proper accommodation facilitates earlier return to work and reduces compensation costs. The Board should provide funding for accommodations for injured workers and the Board should also provide education to injured workers and employers about accommodation through its education and case management functions.

Policy 19-02-06:
Resolving Disputes Regarding Suitability of Offered Work

For this policy to be effective it is important to address the imbalance of power between the workplace parties. Even before injury, the employer has the upper hand, controls the "purse strings", has the greatest decision making power, probably has prior experience with workers' compensation matters and has more resources to access information to navigate the RTW process.

Once injured, the worker finds her or himself in an even more vulnerable position. That is why the Human Rights Code specifically mentions injured workers under the definition of disability[8]. Most of injured workers are non-unionized. Many are immigrant workers who speak little or no English. These injured workers are at a greater disadvantage when there is a dispute in their return to work. We have seen too many cases where injured workers did not accept allegedly "suitable work" that was offered, as they know their work places well, and ended-up losing their jobs and their benefits. Employers will offer "suitable work" that is not real and meaningful. In our experience, when injured workers find the job offered is not suitable, they are found to be uncooperative. The WSIB has made many of these findings. The point is that there should be a way to ensure more protection to non-unionized injured workers in a dispute.

Research tells us that the RTW process is "a socially fragile process" which requires sensitivity to and education of the parties involved, during what is all too often, an extremely challenging phase which has sometimes been described as "a very bumpy road" by injured workers[9]. Research also suggests that there is an increased chance of success when the RTW process is well coordinated. Further, research indicates that early contact needs to be "considerate." IWC feels that this needs to be defined, developed and articulated clearly in the policy since the initial contact between the workplace parties may well set the tone for further and ongoing communication. A sense of mutual trust may be possible if the employer expresses a genuine concern for the well-being of the injured worker rather than a brisk phone call which simply demands the expected RTW date from the worker or from a injured worker's family member.

Does the new policy address these matters?

Injured Workers' Consultants supports the Boards' revised approach to move away from the self-reliance model, which has left a significant number of, injured workers abandoned in the RTW process. Although we agree that this is a positive direction, we do not see a major shift in the new policy

There has been an improvement in the definition of suitable work. The policy defines suitable work as follows:

- Safe
- Productive
- Remunerated, and
- Sustainable

This is an improvement to the current definition. As mentioned earlier, we believe the concepts of rehabilitative and appropriate should be added.

The policy does not address the issue of securing benefits for injured workers if they have a dispute.
We recommend that the policy address this issue by adding a section that will specifically state that there will be continuation of benefits.

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[8] s.5(1), Human Rights Code, R.S.O. 1990, Chapter H. 19

[9] Franche, R.L. Cullen, K., Clarke, J., MacEachen, E., Frank, J. Sinclair, S., 2004. "Workplace-based" return to work interventions: a systemic review of the quantitative and qualitative literature." Report to the Workplace Safety and Insurance Board.

We also recommend that there is specific language for non-English speaking injured workers to ensure that the communication stream does not fail them.

In the workplace party co-operation the policy states the following: "As long the workplace parties are co-operating in all other aspects of their ESRTW obligations, the WSIB does not generally view the refusal of suitable work as an issue of non-co-operation"(Emphasis added). This is an improvement to the existing practice of the Board, but how will the WSIB ensure the decision-makers give justice to this clause?

There is a problem in the policy with the section that indicates that "Workers encouraged to attempt to perform the offered job". It indicates on p. 2 of 5 that "the employer offers the worker a job that the worker does not believe is suitable, the worker is encouraged to attempt to perform those components of the job that are safe" etc. As discussed earlier in this submission, this is a dangerous proposal and is unrealistic. How can a worker do a job that is unsafe but do the safe part of the job? The responsibility of the Board to intervene in these situations on behalf of injured workers should be greater. We recommend that when there is a dispute and the injured worker finds the job is unsuitable:

1. *There should be immediate attempt in following the steps for resolving the dispute on the part of the WCB.*
2. *Immediate contact with the injured worker to ensure that there is recourse for him/her at this stage of the process.*
3. *Request of treating physician's opinion on the suitability and sustainability of the job.*
4. *Immediate request of an ergonomist assessment by a certified ergonomist.*

Policy 19-02-07:
Enforcing Workplace Parties Obligations.

Not only are many injured workers unfamiliar with their rights and obligations, they also encounter further stress from their employers and co-workers. They are often faced with questions from other workplace parties about the legitimacy of their injury, their pain and their need for modified work. One injured worker told us: "I tried my best as have always done…I was one of the hardest, fastest workers. After I got hurt, I couldn't keep up. My supervisor said, 'Work faster!' I tried so hard, but I couldn't. So they fired me. They said I was uncooperative. The Board believed them."

Mediation:

The experience of mediation for non-unionized, non-represented injured workers has proved to be a significant problem for many injured workers who get bullied into signing agreements. The idea behind mediation is that the neutral mediator facilitates a voluntary, mutually agreed upon solution that provides a win/win solution/outcome for both parties. The WCB mediators are often not seen as neutral. They are seen as paid by the Board that has an interest in cutting benefits and reducing costs. They are often assigned to a particular workplace or work site and therefore seen in a relationship with the employer.

One worker described what happened to him:

> "I'd seen it happen to at least 5 or 6 injured workers over the past 8 years. And now it was happening to me. Both the mediator and my boss wanted me to go to a different department for "modified duties." I was neither qualified nor physically capable. I knew that 2-3 months down the road I would be fired for cause. As soon as I signed the agreement I knew I was doomed."

Another worker stated:

> "I walked into the room. There were five people there plus the mediator. There was no one there for me. After fourteen years, I was treated like I was a fraud. I left in tears, completely humiliated. Even now when I remember that mediation, I break down and cry."

Recommendations:

1. Termination of an injured worker's benefits can have a catastrophic effect. Policy should recognize that everyone needs to be patient and that the injured worker is a vulnerable, fragile individual in this process. Injured workers LOE benefits and other entitlements should continue until any disputes are fully adjudicated and/or resolved with the assistance of all the tools at the disposal of the Board.

2. The Board must get involved with various methods of assistance such as obtaining further medical information from the injured workers' attending medical practitioner and consideration of the need for additional time to heal from both physical and if applicable, psychological impairments.

3. The Board should offer of translation services when needed to support the injured worker in clear communication either with the employer or the WSIB.

4. Non-unionized injured workers must be informed of their right to have a representative present with them during the mediation process and of the representation available to them without charge.

5. Mediators should not become decision-makers. This undermines the credibility of the mediation program. They should refer the case back to the claims adjudicator for further investigation and decision making.

6. The Board should employ specialized RTW counselors with training in medical and psychological conditions, the Human Rights Code and workplace accommodation and effective RTW strategies to assist the workplace parties with "their smooth as possible" Return to Work process. They should pay special attention to non-unionized workplaces and should play a proactive role, getting involved constructively before there is a dispute.

7. The policy should acknowledge more fully that some injured workers attempt a RTW too soon, and that if given further time to heal, the likelihood of success is increased. Injured workers with re-occurrences or aggravations should be afforded another opportunity to return to work without loss of benefits, regardless of whether there was a prior termination.

8. The "legitimate reasons" for "non-cooperation" heading in the policy should indicate that the list is not exhaustive and other reasons will be considered.

9. Under the section on indicators of non-co-operation we find this section extremely unclear. We therefore suggest that you separate them and provide two separate sections, one for employers and one for injured workers in order to provide clarity and thereby remove the words "both parties."

10. Under the above provision remove the words "failing to provide an inexpensive accommodation." This flies in the face of the Human Rights Code provisions and therefore should be replaced by "failing to provide accommodation up to the point of undue hardship."

11. For the reasons stated earlier in this submission the concept of "failing to attempt those aspects of the work considered safe" must be removed from the discussion of what to do when unsuitable work is offered. This is unrealistic and potentially dangerous. Policy should be changed to read "If a worker does not feel a job is safe or suitable the Board

must be notified for assistance." The Claims Adjudicator will ascertain if further inquiries are needed to settle the dispute, i.e. ergonomic report, updated medical reports etc.

12. Inclusion of provisions in policy that distinguish between short term and longer term impairments. An injured worker who is unlikely to be able to return to the pre-accident job due to a more serious and potentially permanent impairment must be assisted with even greater care and sensitivity. Early contact in these contexts must take on a different approach and differing timelines will apply and need to be understood by the Board and the employer. Flexibility must be dictated on a case by case basis.

13. The section on notifying the Board should also require the accident employer to provide reasons why the work offered is suitable. The onus should not fall on the injured worker.

14. The entire section on non-co-operation penalties is unfair, inappropriate and completely lacking in due process for injured workers and employers. The provisions are draconian. The application of these penalties would seriously undermine the credibility of the WSIB and would destroy the goodwill and good faith efforts that are necessary by the work place parties in order to improve the return to work process. This section is not workable and only serves as a lightening rod attracting criticism of the draft policies in general.

15. The section on "past or retroactive disputes" where an offered job is found to be suitable is unduly harsh and unfair and inconsistent with the current approach to overpayments. Benefits should continue until the Board has all the information to adjudicate the issue and there should be no "overpayment"of benefits created. The "Retroactive non-co-operation penalties" should be removed. It would be both punitive and cruel to place an "overpayment" burden on an injured worker at what may be one of the worst periods of their lives.

Policy 19-02-08:
Human Rights Legislation and Accommodation in the ERSTW/LMR Process

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Injured workers are pleased that the WSIB has decided to elaborate upon the obligation of the WSIB, the service provider and the employer to provide "reasonable accommodation" to the point of undue hardship.

Injured Workers' Consultants shares the same view as injured workers. Although there has been a requirement under the worker's compensation law, it has been our experience that it has not been applied to the extent that it should have been.

Responsibility for Decision Making

Until now, the Board has not specifically addressed decision making under the Human Rights Code as a necessary part of adjudicating return-to-work issues under the Workplace Safety and Insurance Act. Injured workers who have expressed concern about Human Rights Code violations in connection with return-to-work disputes have been referred to the Human Rights Commission. In our experience, the Human Rights Commission has generally declined to accept complaints from injured workers regarding return to work issues on the basis of section 34 (1)(a) which states:

> 34. (1) Where it appears to the Commission that,
> (a) the complaint is one that could or should be more appropriately dealt with under an Act other than this Act;
> the Commission may, in its discretion, decide to not deal with the complaint. (R.S.O. 1990, c. H.19, s. 34 (1))

In order to ensure that WSIB decision making acknowledges the obligations under the Human Rights Code, this policy should be clarified. Beyond the WSIB 'accepting' that the Code applies to all employers and LMR service providers, and beyond 'expecting' employers to comply with the Code, **the policy should state that the WSIB will not accept a return to work program that does not comply with the Human Rights Code**.

In addition, **when the Human Rights Commission has declined to accept an injured worker's complaint about the return to work process under s. 34 on the basis that it is more appropriately dealt with under the Workplace Safety and Insurance Act, the policy should state that the WSIB must accept responsibility for explicitly deciding whether the return to work process complies with the Human Rights Code as well as the WSI Act**.

We are not suggesting that the Board could or should displace the jurisdiction of the Human Rights Commission for the various remedies available under the Code. However, the Board cannot and should not ignore the Human Rights Code. Given that a return to work program under the WSI Act must comply with the Human Rights Code, and given the unfairness and absurdity of expecting an injured worker to go through both tribunals, the WSIB has a legal and

moral obligation to ensure that it does not approve of a return to work program that does not comply with the Human Rights Code.

The Meaning of "Accommodation" is Not Too Difficult to Learn

Some may say that that the challenge of interpreting and applying the Human Rights Code is too much for the Board's decision makers. As discussed elsewhere in this submission, there is a role to play for specialized return to work counselors with some training in this and other aspects of the process. However, the doctrine of "reasonable accommodation" is not new. It has been around now for at least 20 years, resulting from a Supreme Court decision, the *Central Dairy Case Pool vs. Alberta*. Madam Justice Beverly McLachlan described the "root of reasonable accommodation" in these words:

> "It starts from the premise of each individual's worth and dignity and entitlement to equal treatment and benefit. It operates by requiring that the powerful and the majority adapt their own rules and practices, within the limits of reason and short of undue hardship to permit realization of these ends."

In Central Alberta Dairy Pool decision developed a list of 6 factors that were relevant to what constituted "undue hardship'. They are:

- Financial cost
- Impact on a Collective Agreement
- Problems of employee morale
- Interchangeability of workplaces and facilities
- Size of employee operations
- Safety[10]

While people with disabilities hailed this decision as a victory, there were some limitations in how it was applied in the workplace. For example, employers were required to take reasonable action to eliminate the effects of employment practices or rules that discriminated against individuals or groups on the basis of a prohibited ground, such as race, age, sex, disability but this did not translate into providing actual job accommodation.

The Meiorin Decision (September 1999) defined more clearly the steps that employer must take to ensure that discrimination does not take place. The decision states:

> "Employers designing workplace standards owe an obligation to be aware of both the differences between individuals and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards. By enacting human rights statures and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, in so far as this is reasonably possible. The

[10] Disability and the Duty to Accommodate in the Canadian Workplace, Michael Lynk

> standard itself is required to provide for individual accommodation, if reasonably possible." (par. 68)[11]

The Human Rights Commission developed the Guidelines on Assessing Accommodation in 1989. Since that time, the Guidelines have evolved taking into consideration jurisprudence on accommodation including the most recent case arising out of Quebec, the Mercier case.

In Mercier, the Supreme Court of Canada has recently shed new light on the approach to be taken in understanding disability. The Court made it clear that disability must be interpreted to include its subjective component since discrimination may be based as much on perceptions, myths and stereotypes, as on the existence of actual functional limitations.[12]

The Court chose not to re-invent the definition of disability, opting instead for an equality-based framework. "This includes a socio-political dimension that emphasizes human dignity, resect and the right to equality. Thus a disability may be the result of a physical limitation, an ailment, a perceived limitation or a combination of all these factors. The focus is on the *effects* of the distinction, preference or exclusion experienced by the person and not on proof of physical limitations or the presence of an ailment."

On P. 6 of the Policy and Guidelines on the Duty to Accommodate, the Commission writes, " Accommodation is a fundamental and integral part of the right to equal treatment. The duty to accommodate means that the terms and conditions of the workplace or the function of a job, may have to be changed. The Code recognizes that an employer may have operating rules, policies and procedures that may be necessary for business reasons, or that there may be certain legal requirements, such has health and safety legislation.

Accommodation with dignity is part of a broader principle, namely that our society should be structured and designed for inclusiveness. This principle which is sometimes referred to as integration, emphasizes barrier-free design and equal participation of persons with varying levels of ability…."

The Commission goes on to state, " Those responsible for accommodation should be aware of the standards for accommodation. The following guiding principles should be kept in mind:

- The needs of persons with disabilities must be accommodated in the manner that most respects their dignity, to the point of undue hardship
- There is no set formula for accommodation- each person has unique needs and it is important to consult with the person involved
- Taking responsibility and showing willingness to explore solutions is a key part of treating people respectfully and with dignity
- Voluntary compliance may avoid complaints under the Code as well as save the time and expense needed to defend against them. P. 7

How does the Human Rights Code apply to the WSIB itself as an agency?

[11] A PSAC Guide for Local Representatives, March 2000
[12] Ontario Human Rights Commission, Policy and Guidelines on Disability and the Duty to Accommodate, November 23, 2000

Injured Workers' Consultants hears from injured workers that they do not always receive respect and dignity and acceptance as person with disabilities under the Human Rights Code from the people they are involved with at the board. For example, we are often told that the WSIB has advised an injured worker to lie about having a disability when they are job searching. In many ways they are made to feel like criminals because they are disabled.

The claims adjudicator at the WSIB is the first point of contact for injured workers. If there is a suspicious or adversarial atmosphere from the outset, an injured worker will feel that their human rights have not been respected.

Regarding return to work decisions, the Human Rights Code requires that every injured worker should be treated as an individual when they attempt to return to work. Our experience is that the WSIB is rigid in its thinking as to how quickly a graduated return to work should be completed, or in presuming that every worker with a permanent disability will be able to work a 40 hour week. In particular, return to work decisions by the Board suggest an institutional refusal to accept that some permanently disabled workers will not be capable of returning to full time regular employment. This does not comply with the principles of the Human Rights Code.

Non-Work-Related Disabilities

The WSIB sets the standards for employers to follow on ESRTW programs. As noted above, all accommodations on returning to work should be done on an individual basis, taking into account any non-compensable medical conditions. At the present time, our experience has been that this does not happen when there are both work related and non-work related disabilities. The non-compensable aspect of the claim is usually separated from the compensable injury and the injured worker is told that it is not considered in this claim.

The policy on P. 4 of 19-02-08 notes "The workplace parties and the WSIB must consider any pre-or post injury work-related and injury non-work related disabilities/impairments that a worker may have when

- Identifying employment that is suitable and available
- Selecting suitable employment or business (SEB)options
- Determining entitlement to an LRMR assessment, re-assessment, or plan or
- Conducting a LMR assessment, reassessment or preparing an LMR plan.

The WSIB does not disqualify a worker from receiving ERSTW or LMR services, simply because of a workers' non-work related disabilities makes participation in these services difficult.

We support the Board's effort to ensure that both work and non-work related disabilities must be equally respected in the return to work process. However, the last statement above is not clear enough to ensure that this occurs. It suggests that injured workers may be expected to 'tough it out' if their non-work related disabilities make their return to work difficult. Now, injured workers are often put into very difficult situations that do not take into account their non-compensable conditions. The last statement above could be interpreted contrary to the Code and

lead Board staff to ignore the implications of any non-compensable condition in forcing a worker to ESRTW. The policy should add: "**Non work related disabilities must be equally accommodated with the compensable condition where non-work-related disabilities make participation in ESRTW or LMR programs difficult for the injured worker**." The WSIB should ensure that they set the example for the employer and any service provider that the worker is in contact with. We disagree with those who suggest that accommodating non-compensable disabilities amounts to compensating non-compensable disabilities. This is a question about determining suitable work, not compensation. All employers are already required to accommodate non-compensable disabilities and this provision of the policy is simple a welcome reminder of that.

The WSIB formerly the WCB used to have in-house experts on accommodation of disabled workers. They provided that expertise to employers and WCB staff. Injured Workers' Consultants recommends that this position be re-established in the Board as a resource to employers, WSIB staff and injured workers.

How does this policy impact on Service Providers?

Injured Workers' Consultants is pleased to see that Service Providers are mentioned in this policy. From injured workers, we often hear that their disabilities are not being accommodated while attending a school owned and managed by a service provider. Injured workers are often not provided with the proper equipment or access technology unless they have a representative to advocate for this.

In that case, the representative will request that the WSIB conduct an ergonomic assessment of the facility and the SEB. For many injured workers, it seems that the WSIB has abandoned its' responsibility in this area because it refers the matter back to the Service Provider.

By the time the worker has an ergonomic assessment, his/her compensable condition may have worsened as a result of attempting to engage in unsuitable activities. We are told that Service Providers and teachers push the workers to do more. The implication is that if they don't think about their disability, it will go away.

What happens to the permanently disabled worker who requires access technology if he/she is to return to the labour market? We are told that access equipment like special computers are taken away from them when they finished school, putting that worker at a disadvantage for employment.

This didn't always happen. Any access technology provided for a disabled worker remained the property of the worker. The disabled worker could use that equipment in a new job or use it at home, thereby helping him/her to keep up her skills. For many employers, having an employee who had his/her own access technology relieved them of the burden of providing it initially.

Once again, we re-iterate that the WSIB should have on staff, experts in the area of issues of accommodation who can step in during the retraining periods. They could ensure that Service Providers are more careful in accommodating injured workers.

What does the policy mean for the employer?

The HRC Guidelines to Accommodation and recent Supreme Court decisions have made it very clear just what an employer's responsibilities are when it comes to accommodating a permanently disabled worker.

Our experiences show in fact that many employers plead 'innocent' to their obligations to accommodate unless on a short-term basis, i.e. modified work. There seems to be little commitment to retaining the severely disabled worker and more often than not, we hear pleadings they are unable to accommodate the worker. The worker then loses out on his benefits, pensions and in most cases his/her job.

The policy is clear that each accommodation for a worker whether it is in regards to ESRTW or LMR must be individualized. While one would expect that small workplaces might not have the same understanding of accommodation, recent hearings have shown that large employers such as the City of Brampton were remiss in accommodating their disabled staff.

The fact remains that most employers do not have a good grasp on accommodation in the workplace. They have a rigid return to work plan that cannot be modified resulting in failed return to work attempts. Once again, this highlights the need for an 'in house' specialized adviser at the board to assist in this area.

What does this policy mean for the injured worker?

Although the WSIB has taken great efforts to spell out the obligations of each of the parties, the onus for accommodation still remains with the worker who has suffered a disabling injury. In many cases, the worker is still adjusting to the permanent disability and is not ready to even consider what needs he/she may need in the future.

It is up to the worker to request accommodation. Accommodation does not have to kick in until this request from the worker is received. This is not right given that most individuals are not aware of what type of accommodation is available to them or what in fact is meant by "reasonable accommodation."

For a worker in a unionized setting, there is contract language to help them through this process. Union members are taught about various resources for their members should they suffer a significant injury.

But what about those workers who are in a non-unionized shop? What about workers who are new immigrants? Do these policies really help them?

In order for the worker to obtain relief through the Human Rights Commission, they must access the Internet and complete a form on line. There are no intake workers available for assisting the immigrant community. Recent cutbacks to intake staff have had a detrimental affect on workers who have little literacy skills or those who do not speak English.

Representatives have expressed frustration in dealing with the Commission noting the time it takes to process a claim through the different layers. If a worker has no representation, the chance of having a human rights complaint resolved is negligible.

The rate of unemployment among those suffering a compensable permanent disability is not acceptable. In the final analysis, injured workers with permanent disabilities should have a greater opportunity to stay with the accident employer if they choose. In the draft policies, the Board takes steps to remedy some of the adverse effects of the self-reliance model. The policy should not leave consideration of the Human Rights Code to the self-reliance model. Severely disabled workers deserve all the supports that the WSIB can offer to improve their quality of life and access to services and appropriate benefits.

Policy 19-02-09:
Employers' Co-operation and re-employment Obligations Concurrent Operation

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Our experience with penalties for employers is that penalties have not led to the desired constructive behaviour. Penalties tend to encourage employer litigation against the accusation, generally at the expense of the injured worker. For example, there is no evidence that the penalties under the Board's experience rating programs result in health and safety improvements. However, we frequently see employers hiding injuries and opposing claims to avoid the imposition of an experience rating penalty. We are concerned that the more aggressive the approach the Board takes towards penalties, the more likely it is that employers will litigate the issue which will increase the demands on the injured worker and interfere with the return to work process.

Policy 19-03-02:
LMR Assessments

Methodology Problems:

We raise the following problems of methodology in this review:

1) If the Board wanted a broader overview, why deal with the narrow issue of LMR assessments and not the entire LMR process? It is in fact in the interest of injured workers and particularly the permanently disabled to have a review of the "whole ball of wax", as they depend on the well functioning and interaction of ESRTW, LMR and appropriate compensation.

2) The fact that only ESRTW and a small part of the LMR process has been dealt with adds to the perception that the Board is over-emphasizing the needs of the injured workers who will eventually recover and not those who will not, will not be re-employed and will have problems with the LMR process as a whole and will be permanently unemployed yet deemed to be employed at wages consistent with the LMR goal.

3) Why did the review not deal with the astounding unemployment level after successful completion of LMR programs, estimated by the Deloittes review at 56%? Why is the Board ignoring the plight of those who are failed by ESRTW and LMR processes and who are assumed, for the purpose of benefits, that are fully employed? This is our "constituency", as you are aware.

4) In light of this chronic unemployment, why was the reduction of the assistance in looking for work available before the Harris Government not re-examined? Why are LOE reviews insensitive to ongoing actual unemployment and continue to assume phantom full employment?

5) Why are a significant number of injured workers (12%) unable to complete LMR according to the Deloittes review, and what happens to their benefits and living standards? Do these injured workers fall thorough the cracks?

6) Why was there a literature search and a concern for studies in the ESRTW part of the review, but none done (quantitative and qualitative) for the LMR assessment part?

7) Why was the historical decision by the Harris Government to privatize Board Vocational rehabilitation and its results not compared to the pre-privatization stage?

"Small Tree Comments"

The following are comments based on the LMR Assessment proposal itself, obviously made within the current model for ESRTW and LMR. Without wanting to be demeaning, we called this "small tree" comments, while our later comments on the model itself will on the same vein be called comments about the "forest". Our comments follow numerically:

8) 19-03-02 page 1 - if more than 6 months have elapsed since the injury and the employer has not offered modified work, an LMR assessment should be done. This appears an inflexible time frame, particularly in the case of a permanent injury that may require linger to "settle" and allow a proper evaluation;

9) 19-03-02 page 1 and 2 – there is a strong bias against offering more than one LMR assessment unless rigid restrictions are met. More flexibility is needed here, there are numerous cases where the assessment was wrong, the assessment terminated despite reasonable circumstances and so on. In previous administrations if the worker showed "new willingness to co-operate" a VR program could be resumed. Often non-co-operation is simply due to misunderstandings or genuine confusion over extent of disability. The "one strike and you're out" attitude smacks of a certain penal attitude and is not consistent with a system designed to help vulnerable people who have lost the right to sue in favour of a just compensation system;

10) 19-03-02, page 2 – an LMR assessment will be offered to a worker if the accommodation is not likely to be readily available in the general labour market. This is too restrictive. An injured worker may only need a chair with an armrest, probably a readily available accommodation in the labour market, but who will hire an applicant making that request? An apparently available accommodation can be a huge barrier for a disabled person in finding new employment.

11) 19-03-02 page2 – a fourth criteria should be added to the information gathered by the LMR assessment. That is, whether an LMR plan can help the injured worker "ascend the social scale", consistent with looking for "the job for the worker". This precise terminology comes from old VR policy language and philosophy. If all we look at is restoring mathematical pre-injury earnings we may: hurt the interest of young people (not learners or students) at their lowest potential, hurt immigrant engineers who happen to start as cab drivers, minimum wage workers who were going to progress in time, people trapped in the happenstance of having a contingent job at a point in time. In order to evaluate the future after a permanent injury, we need to look beyond the exact earnings of the time of injury, a time that is subject to too many erratic facts of work life.

12) 19-03-02, page 3 – a ninth factor should be added to the list given to consider whether an LMR assessment is required or not, this would be the injured worker' **age**. The Board has historically looked at age, in combination with disability, as being an important factor whether the injured worker is realistically employable. Older worker's supplements would be allowed at age 55, subject to a younger age if appropriate to the circumstance. There is plenty of research available at the Provincial and Federal levels to indicate how older workers find significant barriers to re-employment.

13) 19-03-02, page 3 – another factor listed in considering whether an LMR assessment is required is the degree or amount of wage loss benefits. A narrow view of LMR makes this suggestion seem logical. However, cold mathematical formulas are something we are weary of, it seems the Board is interested in saving its own costs more than looking after the injured worker's interests first. We believe the policy as a whole should strongly reflect the legislative intent of judging cases according to "individual merit and justice".

14) 19-03-02, page 3 – "the WSIB…may arrange for an external agency to conduct the LMR assessment. The Board, as a public sector institution, should have a preference for public sector institutes or institutions doing LMR assessments, or failing this, for those receiving most public assistance and thus abiding to public standards. These public institutions are more accountable and tend to offer more caring and quality assessments. Without the need to create private profit, sometimes flowing into the United States, more part of each dollar spent by the Board will go to the injured worker. Only in cases where no public institution can do the assessment should a private one be resorted to.

15) We have a lot of questions about LMR programs and realize the policy proposal only deals with assessment. Nonetheless, even in our "small trees" comments, need to raises the need for "sick time" to be allowed for injured workers in LMRPs. We enclose a letter by an injured worker (OB - this is ZL) indicating the following: if she was sick one day (not unusual to the general work force and not to injured worker populations) instead of the program being extended by one day, she would have to do "a double shift" in the program to make up the time. The length of LMR programs should allow for sick time, therefore, just like workers had before their injury.

"Forest Comments"

We realize that the Board has not intended to have a broad critique of the LMR experience in this review, hence the focus only on LMR assessments. However, our position is that it should have done so, as return to work, LMR services and compensation are a "holy trinity" that cannot be separated if the system is to really address the problems of injured workers. There is also a time factor. WSIB privatization was imposed by Board and Government decree in 1998 and there has been, most surprisingly, no real effort to study, reflect and correct, if necessary, this experience. The system as a whole cannot ignore this question and the longer it does, the more complicated the solution will be.

Our position is that the self-reliance model for ESRTW and LMR is unfair for injured workers. It assumes that injured workers and employers are have equal strength, something that the Board and our clinics know well is not true. It is interesting to note that the Human Rights Code does acknowledge that disabled people are disadvantaged, yet nowhere is the power imbalance recognized or reflected in this document. The Board's attitude of not intervening in favour of its most natural and socially weak constituency is a legacy of the Harris' common sense revolution, a "*laissez-faire*" attitude now largely discredited as a model to address social issues.

As we know the vocational rehabilitation department inside the Board since its inception in the 1930's was abruptly terminated by the Harris-Wright administration and its services were privatized. No review has been done as to the benefit or loss that this has created for injured workers, whether the profit motive has diverted WSIB dollar away from injured workers, an whether the old model could still be improved.

Here are some of our recollections from the pre-Harris Vocational Rehabilitation system:

16) the old vocational rehabilitation services (VRS) recognized that its role, de-facto, was to intervene on behalf of the weaker party in the return to work dynamic,

17) it was staffed generally by sensitive and supportive and trained staff who knew injured workers much better than claims adjudicators on the whole,

18) though not involved in claims, they could successfully interact with claims adjudicators to explain return to work and VR dynamics,

19) they could intervene with authority with recalcitrant employers on behalf of injured workers and use the "authority of the state" when necessary,

20) they had good understanding of the necessary social rehabilitation role that is needed to help injured workers in VR or RTW.

In general, we believed that following the Minna-Majesky Task Force the Board had made significant improvements in its VRS, and it was a mistake to get rid of this service and to give it away to the private-profit sector. No doubt there may have been problems, and we often have verbalized them. However, there could have been improvements within the old "help the injured worker" model, instead of a dogmatic assumption that "the private profit sector works best and government does not". Worst of all, as we said, was the assumption that injured workers have too many incentives to collect benefits (found in the Jackson report), and by implication need to be pushed back to

work. Add to this the assumption that employer and injured workers have "power balance" and it spells disaster for the injured worker and, indeed, for the system purporting to help them.

Conclusion: we have made a number of concrete suggestions to the LMR assessment section as drafted. As part of the "big picture" we are disappointed that the philosophy of self-reliance (which may work in isolated situations where workers are organized into unions and desire self-reliance) was not questioned, as injured workers have a "model problem", as the **disadvantaged party.** We are also disappointed that the opportunity to review and question the wisdom of the privatization of vocational rehabilitation services at the Board was not done, as time is of the essence. The philosophy of helping injured workers, the **disadvantaged party** is consistent with **good agency (WCB/WSIB) intervention** on their behalf. The problems of this model should be addressed, surely. We could even create an oasis of self-reliance in exceptional circumstances, but the majority of injured workers, particularly if without a union and/or permanently disabled, require a public VR system that **works for the injured worker, particularly if permanently disabled.**

Respectfully Submitted,

Injured Workers' Consultants
Community Legal Clinic

Summary of Recommendations

Introduction

1. With the draft policies now available, it is particularly important to find a way to get direct input on the policies from injured workers who have had the first-hand experience with the different stages of both recovery and return-to-work.

Fundamentals

Purpose

2. We recommend that the ESRTW policy set out its purpose and related objectives in language which elevates the process to one which seeks to do the maximum possible to support and protect injured workers from the negative consequences of their injury.

3. The statement of purpose needs to include enough language to give some spirit to its intent, so that adjudicators and other readers, can immediately and clearly understand that the activities are to support a dignified and as full a recovery as possible from the impact of the injury.

4. The statement of purpose needs to clarify at the outset that there are two distinct return-to-work situations with the accident employer. One is during recovery and this must be entirely rehabilitative in nature. The other is in instances where there is a permanent impairment with possible long-term medical and economic consequences.

Measures

5. We recommend distinct measures for the two types of return-to-work.

   For short-term rehabilitative return to work, the question should be: Did the modified work enhance the worker's maximal medical recovery?

   For long-term work, the question should be: Did the accident employer maintain suitable employment and advancement opportunities which allowed the worker to earn and grow as he/she likely would have had it not been for the accident?

Simplicity

6. We recommend a revision of the policies to produce a document that is less complex and modifies the adversarial process.

Security

7. We recommend that the sections of the policies that deal with payment make it clearer that benefits will be continued during periods of discussion and/or transition.

Power and Capacity

8. We recommend that the policy include language that recognises that, especially in non-unionised workplaces, the Board must provide extra support and advocacy for injured workers in their relations with the accident employer.

9. We recommend that the policy include language which recognises that small workplaces especially, may not have the capacity to provide sustained, suitable work.

Rehabilitative Return to Work

10. We recommend that throughout the policies, short-term return to work be clearly identified as being physically and psychologically rehabilitative in nature.

Return to Work for the Permanently Impaired

11. We recommend implementing an "LOE sustainability award." for injured workers who have returned to work at no wage loss.

12. We recommend that the policies include a clear direction to carefully consider the advisability of permanent return to work with the accident employer, especially in the cases of new entrants to the workforce (such as young people, new immigrants) to prevent limiting their potential.

Privacy and Dignity

13. All aspects of the policy must be checked against fundamental principals of privacy and dignity.

Take into account the impact of experience rating

14. It is our recommendation that the ESRTW policies include a parallel change in experience rating. Experience rating should only come into play after the Board has issued a decision that a worker has reached maximum medical recovery, or is fit to return to suitable work. (Alternatively, stipulate a fixed, but generally reasonable healing and recovery period such as twelve weeks, before a claim would be experience rated.)

Take into account the impact of deeming

15. Until such time as legislation prohibits deeming on unrealistic and phantom jobs, we recommend an addition to the policy: re-institute the *sustainability award* to protect a worker with permanent impairment, who has returned to work at no loss of wages.

Policy 19-02-02

Return to Work: Key Concepts and Definitions

GUIDELINES

Return to Work Objective

See recommendations 3,4,and 5.

Regarding the statement of "measure" contained in this section see recommendation 6.

Shared Responsibility

16. Reword to give more emphasis to the Board as an active participant.

17. Include wording that signals the understanding that the workers require assistance from the Board in this process, especially if there is no union.

Role of the Workplace Parties

18. Re-organize the format of the section to outline the roles of all parties in the two distinct types of return to work: short-term rehabilitative and long-term where there is permanent impairment.

    More detailed recommendations are provided below in the commentary on policy 19-02-03

Role of the Treating Professional

19. Remove the reference to reassessing a prescription drug.

20. Remove Box 7 of form 3042A: Employer's Progress Report

21. We recommend that the section be simplified to:
    Role of the Treating Professional.
    The treating professional will assist the return to work process by,
    - *considering the workers fitness to work and discussing this with the worker.*
    - *when the worker is able to work, to identify this to the Board on its form, indicating modified work (including modified hours) or regular work.*
    - *when the worker is able to work, to fill in a FAF if it is requested by the employer.*

Role of the WSIB

See recommendations above related to Purpose, Shared Responsibility, and in our specific comments in 19-02-05: The WSIB's Role in Return to Work.

KEY CONCEPTS AND DEFINITIONS

Return to work as a process

22. Replace the term "disability management" with explanatory wording such as:
    " . . . (e.g. workplaces that have established policies and programmes for rehabilitative return to work, retaining and retraining, and hiring of injured workers.)"

Early (timely) return to work

23. Introduce the section with language that promotes understanding about time to heal. Something along the lines of: "While some injuries do not result in lost time, there are others that require time off work. Rest is an important part of the healing process and active treatment also takes time and energy."

24. Slightly reword the concluding paragraph to achieve consistency with understanding about time to heal. Perhaps along these lines (changes in italics:

"Timely return to work emphasises a return to work *when* the worker is *medically (physically and emotionally)* fit to return to some form of suitable work. *If full recovery has not been achieved the suitable work must be rehabilitative. In those cases where the worker needs to be off work due to the nature of the impairment and related treatment and healing,* no offer of work is considered suitable, but the workplace parties are expected to maintain communication."

Policy 19-02-03

Workplace Parties Key Return to Work Activities

Stop emphasizing "Early"

25. The policy should not begin by calling for "early" contact. The policy should specify that discussion of return to work should be initiated when the injured worker has been determined to be fit to return to suitable work.

Responsibility for Deciding Fitness to Return to Work

26. The decision about when the injured worker is fit to return to suitable work should be based on the opinion of the treating physician, or at least on the opinion of a physician who has examined the injured worker and reviewed the current medical information. If the treating doctor has advised the injured worker not to start work yet, they should not go back to work.

Worker and Employer Communication

27. The worker should only be required to return the employer's phone calls within 24 hours and to be available to communicate with the employer during regular business hours after a decision that the worker is fit to return to suitable work. The requirement for workers to return the employer's calls with no corresponding requirement for employers to return worker's calls was an oversight and should be corrected.

Treating Health Professional

28. The employer should neither be encouraged to contact the treating health professional nor to question the medication they have prescribed. The employer should provide the complete description of proposed suitable work to the injured worker and should not be discussing anything with the treating doctor.

The WSIB

29. Where there is no union or other representative, and especially where there is or is likely to be a permanent impairment, the Board should have a mandate to play an active role on behalf of the worker in getting the injured back to suitable work or into a labour market re-entry program.

Identification of Suitable Work

30. A return to work meeting should not take place until there has been a determination of fitness to return to suitable work. Having meetings at the employer's premises may not be possible because some employers refuse to allow non-employees access to the premises, including lawyers representing their employees.

Offer of Suitable Work

31. These ingredients of an offer of suitable work should be mandatory, particularly the requirement to put the offer in writing. The Board should not accept an offer that does not meet these minimal requirements.

Attempt to Perform Suitable Work

32. An injured worker should not be expected to try a modified job and just do the parts they can, leaving the other tasks. Give the injured worker complete written the details of the work being offered and the opportunity to discuss the whole job with their doctor.

Work at Home

33. If the worker's regular job is not performed at home, this should not be an option.

Short Term vs. Long Term Suitable Work

34. In addition to the criteria noted, suitable work should be required to be rehabilitative when the injured worker has not reached maximum medical recovery or has been off work for a considerable period. And the work must be considered appropriate for the person.

Ongoing Monitoring and Evaluation

35. The Board must monitor and evaluate return to work. There must be special attention when there is no union representing the injured worker.

Policy 19-02-05

The WSIB's Role in Return to Work

Education, Case Management and Dispute Resolution

36. Injured workers should be advised of the right to representation and the options for representation that exist at no charge to them.

37. The policy should specify what every injured worker should know and that the Board will inform all injured workers of these key points. In addition to the information about benefits and co-operation, this should include the roles that that Board can play in support and dispute resolution.

Accommodations Funding

38. The Board should provide funding for workplace accommodations for injured workers who are covered by the re-employment obligation. The Board should also provide education to injured workers and employers about accommodation through its education and case management functions.

Policy 19-02-06

Resolving Disputes Regarding Suitability of Offered Work

39. The policy needs to clearly state that a worker should not continue to attempt work that they feel is unsafe for themselves and/or their co-workers.

40. The policy needs to state more clearly that an injured worker can seek assistance, including mediation, from the Board and that benefits will be paid during the process.

41. The policy needs to include a method for identifying communication assistance for non-English speaking injured workers.

42. Once the Board identifies that there are problems with the return to work situation, the policy should outline the action which will be taken, such as:

    - Immediate contact with the injured worker to ensure that there is recourse for him/her at this stage of the process.

    - Request of treating physician's opinion on the suitability and sustainability of the job.

    - Immediate request of an ergonomist assessment by a certified ergonomist.

    - Consideration of the workplace environment issues.

    - Consideration of psychological issues.

Policy 19-02-07

Enforcing Workplace Parties Obligations.

43. Policy should recognize that everyone needs to be patient in the return to work process and that the injured worker is a vulnerable, fragile individual in this process. Injured workers LOE benefits and other entitlements should continue until any disputes are fully adjudicated/resolved with the assistance of all the tools at the disposal of the Board.

44. The Board must get involved with various methods of assistance such as obtaining further medical information from the injured workers' attending medical practitioner and consideration of the need for additional time to heal from both physical and if applicable, psychological impairments.

45. The Board should offer of translation services when needed for clear communication and support for injured workers, either with the employer or the WSIB.

46. Non-unionized injured workers must be informed of their right to have a representative present with them during the mediation process and of the representation available to them without charge.

47. Mediators should not become decision-makers. This undermines the credibility of the mediation program. They should refer the case back to the claims adjudicator for further investigation and decision making.

48. The Board should employ specialized RTW counselors with training in medical and psychological conditions, the Human Rights Code and workplace accommodation and effective RTW strategies to assist the workplace parties with "their smooth as possible" Return to Work process. They should pay special attention to non-unionized workplaces and should play a proactive role, getting involved constructively before there is a dispute.

49. The policy should more fully acknowledge that some injured workers attempt a RTW too soon, and that if given further time to heal, the likelihood of success is increased. Injured workers with re-occurrences or aggravations should be afforded another opportunity to return to work without loss of benefits, regardless of whether there was a prior termination.

50. The "legitimate reasons" under the non-cooperation heading in the policy should indicate that the list is not exhaustive and other reasons will be considered.

51. Under the section on Indicators of non-co-operation we find this section extremely unclear. We therefore suggest that you separate them and provide two separate sections, one for employers and one for injured workers in order to provide clarity and thereby remove the words "both parties."

52. Under the above provision, remove the words "failing to provide an inexpensive accommodation." This flies in the face of the Human Rights Code provisions and therefore should be replaced by "failing to provide accommodation up to the point of undue hardship."

53. For the reasons stated earlier in this submission, the concept of "failing to attempt those aspects of the work considered safe" must be removed from the discussion of what to do when unsuitable work is offered. This is unrealistic and potentially dangerous. Policy should be changed to read "If a worker does not feel a job is safe or suitable the Board must be notified for assistance." The Claims Adjudicator will ascertain if further inquiries are needed to settle the dispute, i.e. ergonomic report, updated medical reports etc.

54. Inclusion of provisions in policy that distinguish more clearly between short term and longer term impairments. An injured worker who is unlikely to be able to return to the pre-accident job due to a more serious and potentially permanent impairment must be assisted with even greater care and sensitivity. Early contact in these contexts must take on a different approach and differing timelines will apply and need to be understood by the Board and the employer. Flexibility must be dictated on a case by case basis.

55. The section on notifying the Board should also require the accident employer to provide reasons why the work offered is suitable. The onus should not fall on the injured worker.

56. The section on non-co-operation penalties is unfair, inappropriate and completely lacking in due process for injured workers and employers. The provisions are draconian. The application of these penalties would seriously undermine the credibility of the WSIB and would destroy the goodwill and good faith efforts that are necessary by the work place parties in order to improve the return to work process. This section is not workable and only serves as a lightening rod attracting criticism of the draft policies in general.

57. The section on "past or retroactive disputes" where offered job is found to be suitable is unduly harsh and unfair and inconsistent with the current approach to overpayments. Benefits should continue until the Board has all the information to adjudicate the issue and there should be no retroactive adjudication of benefits. The "Retroactive non-co-operation penalties" should be removed. It would be both punitive and cruel to place an "overpayment" burden on an Injured Worker at what may be one of the worst periods of their lives.

Policy 19-02-08

Human Rights Legislation and Accommodation in the ERSTW/LMR Process

58. The policy should state that the WSIB will not accept a return to work program that does not comply with the Human Rights Code.

59. When the Commission has declined to accept a complaint under s. 34 on the basis that it is more appropriately dealt with under the Workplace Safety and Insurance Act, the WSIB must accept responsibility for ruling on whether the return to work program complies with the Human Rights Code as well as the WSI Act.

60. The policy should be clarified to confirm that non-work-related disabilities must be equally accommodated with the compensable condition where non-work-related disabilities make participation in ESRTW or LMR programs difficult for the injured worker.

61. The WSIB should employ in-house experts on accommodation of disabled workers to provide that expertise as a resource to employers, WSIB staff and injured workers before a dispute arises.

62. Any access technology provided for a disabled worker should remain the property of the worker. The worker could use that equipment in a new job or use it at home, thereby helping him/her to keep up her skills.

63. It should not be left up to the worker to request accommodation. The Board should intervene in return to work to ensure that accommodation takes place.

Policy 19-03-02

LMR Assessments

Methodology Problems:

64. If the Board wanted a broader overview, why deal with the narrow issue of LMR assessments and not the entire LMR process? It is in fact in the interest of injured workers and particularly the permanently disabled to have a review of the "whole ball of wax", as they depend on the well functioning and interaction of ESRTW, LMR and appropriate compensation.

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The LMR Assessment proposal

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76. 19-03-02, page 3 – a ninth factor should be added to the list given to consider whether an LMR assessment is required or not, this would be the injured worker' age. The Board has historically looked at age, in combination with disability, as being an important factor whether the injured worker is realistically employable. Older worker's supplements would be allowed at age 55, subject to a younger age if appropriate to the circumstance. There is plenty of research available at the Provincial and Federal levels to indicate how older workers find significant barriers to re-employment.

77. 19-03-02, page 3 – another factor listed in considering whether an LMR assessment is required is the degree or amount of wage loss benefits. A narrow view of LMR makes this suggestion seem logical. However, cold mathematical formulas are something we are weary of, it seems the Board is interested in saving its own costs more than looking after the injured worker's interests first. We believe the policy as a whole should strongly reflect the legislative intent of judging cases according to "individual merit and justice".

78. 19-03-02, page 3 – "the WSIB…may arrange for an external agency to conduct the LMR assessment. The Board, as a public sector institution, should have a preference for public sector institutes or institutions doing LMR assessments, or failing this, for those receiving most public assistance and thus abiding to public standards. These public institutions are more accountable and tend to offer more caring and quality assessments. Without the need to create private profit, sometimes flowing into the United States, more part of each dollar spent by the Board will go to the injured worker. Only in cases where no public institution can do the assessment should a private one be resorted to.

79. We have a lot of questions about LMR programs and realize the policy proposal only deals with assessment. Nonetheless, even in our "small trees" comments, we need to raise the need for "sick time" to be allowed for injured workers in LMRPs. We enclose a letter by an injured worker. indicating the following: if she was sick one day (not unusual to the general work force and not unusual to injured worker populations) instead of the program being extended by one day, she would have to do "a double shift" in the program to make up the time. The length of LMR programs should allow for sick time, therefore, just like workers had before their injury.

Recollections from the pre-Harris Vocational Rehabilitation system:

80. the old vocational rehabilitation services (VRS) recognized that its role, de-facto, was to intervene on behalf of the weaker party in the return to work dynamic,

81. it was staffed generally by sensitive and supportive and trained staff who knew injured workers much better than claims adjudicators on the whole,

82. though not involved in claims, they could successfully interact with claims adjudicators to explain return to work and VR dynamics,

83. they could intervene with authority with recalcitrant employers on behalf of injured workers and use the "authority of the law" when necessary,

84. they had good understanding of the necessary social rehabilitation role that is needed to help injured workers in VR or RTW.