



WSIB Report
by Gary Majesky
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Obligation to Cooperate –

The Monkey and the Organ Grinder I'm shaking that bush boss!

Paul Newman, Cool Hand Luke

This month, I want to discuss an important legal obligation that injured workers must follow. The subject is "cooperation" and includes cooperating in health care, Early and Safe Return to Work (ESRTW), and remaining in communication with the WSIB and your accident employer when injured.

Generally, our members are a responsible group who fulfill their cooperation obligations. However, let's talk about what happens in a familiar situation when an injured worker and a treating health care professional believe the patient is totally disabled and cannot work. Many times, this seems like a good reason for the member to remain incommunicado with the WSIB and accident employer.

Many members have witnessed the zealous efforts of an accident employer rushing injured workers back to work, even stuffing Return to Work papers in a workers pocket en route to the hospital. This behavior is driven by an accident employer's desire to prevent a lost time claim.

Let's look at two situations that resulted in appeals to better understand the obligation, penalties, and consequences of a non-cooperation breach.

Example #1 – A member with a well-documented back injury was in the process of being retrained. His orthopaedic surgeon did not think the member could attend school as he was in queue for back surgery in 2 months. On the surface, this looked like a straight forward case where the member was totally disabled.

However, the WSIB was calling the member to see if he would attend school, as they took the position he was not totally disabled. That is a fairly common difference of opinion. Fortified by the surgeon's declaration that he was unfit and could not attend school, the member would not return phone calls and other entreaties, adopting the bunker mentality. You could almost hear

his thoughts "*Why don't you mooks leave me alone and quit harassing me. Go speak to Mr. Majesky.*"

What most people don't realize is that failing to cooperate, which includes remaining in contact with the accident employer and WSIB (e.g., returning phone calls, attending meetings), is considered a serious breach with very harsh financial penalties. But there is also a process that the WSIB must follow if a worker is going to be hit with a non-cooperation breach. Simply, failing to cooperate can result in forfeiture of your Loss of Earnings benefits, which in some instances, cannot be restored retroactively.

The authority for reducing benefits for non-cooperation is found in WSIB OPM Document No. 22-01-03. That policy document states:

If the WSIB determines that a worker is not co-operating with the obligation(s) the decision-maker notifies the worker of the obligation to co-operate

- Finding of non-cooperation, and
- Consequences of this finding (i.e., the reduction and/or suspension of benefits).
- Notice is given verbally (if possible), and in writing in every case.

The WSIB may reduce or suspend a worker's benefits if after notifying the worker of the obligation(s), the worker

- Fails to co-operate with the obligation(s), and
- Does not have a legitimate reason for not co-operating.

This policy document stipulates that a verbal warning be given (if possible), but not mandatory. Next, all cooperation breaches **must** be communicated in writing to give the injured worker an opportunity to correct his/her behaviour and become compliant. Typically, Case Managers know how to run a cooperation breach and touch all the legal bases. Sometimes, they'll document all the violations of failing to call back, respond to letters, or attend meetings, and then drop the hammer and suspend members' Loss of Earnings benefits without adhering to the warning protections built into cooperation policy.

In example #1, described above, the member who won his appeal was

not provided with the appropriate warnings, and the Appeals Resolution Officer upheld the worker's objection granting the appeal. But her obiter remarks were instructive, because she did lay out chapter and verse that notwithstanding the technical win, the member had failed to cooperate by remaining in contact with the WSIB. Even the members' status of being totally disabled did not inoculate him from the requirement to remain in contact with the WSIB. The accident employer in this appeal cited each and every failure to cooperate, in support of denying the appeal. Had the WSIB followed their policy and provided a verbal and written warning to cooperate, the worker would have lost the appeal.

Example #2, a worker was being retrained and there were alleged difficulties in returning phone calls promptly, or fulfilling undertakings to perform certain tasks within a specified time. In preparing the appeal, it was evident that a lot of work had been invested in cataloguing delay and cooperation breaches.

Central to the WSIBs argument of non-cooperation was the members failure to return calls promptly, either that day, and in many instances a day or two later. Singled out for criticism was the tendency to leave messages after hours. In this tit-for-tat realm of cooperation, the WSIB and their Service Providers are well trained in documenting cooperation problems where a worker is slow respond.

While you can be successful in overturning a cooperation sanction, particularly if the built-in warning protections under policy were not followed, members need to be cautious and act responsibly. The fact you have legal representation through my office does not relieve an injured worker from cooperating by remaining in contact with the WSIB, and that includes your accident employer, even if your doctor says you are not fit or cleared for return to work.

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ATTENTION ARMED FORCES VETERANS

Local 353 is currently updating our Honour Roll of Members who served in The Armed Forces. We would ask that any member who served, please send your service record to the hall so that your name can be added to the list of Veterans.

Fraternally,

Steven Martin