Policy

At a construction worker's request, or on its own initiative, the WSIB ensures that construction employers have fully complied with their obligation to offer to re-employ their construction workers who, as a result of a work-related injury/disease, have been unable to work.

The WSIB is committed to assisting small construction employers, i.e., those that employ 20 or fewer workers, in meeting their re-employment responsibilities.

If a construction employer terminates an injured construction worker's employment within 6 months of having re-employed him or her, the WSIB presumes that a breach of the re-employment obligation has occurred. Employers can rebut the presumption by showing that the termination of the worker's employment was not caused in any part by

- the work-related injury or disease
- treatment for the work-related injury or disease, or
- the claim for benefits.

There are a number of other instances—generally involving a failure by the employer to offer appropriate work when it is required to do so—whereby the WSIB may find an employer in breach of its obligation to re-employ.

If the WSIB determines that a breach of the re-employment obligation has occurred, it may penalize the employer by

- levying a re-employment penalty on the employer, and/or
- issuing re-employment payments/loss of earnings benefits to the worker.

NOTE

This policy should be read in conjunction with 19-05-02, Re-employment Obligation in the Construction Industry—Threshold, Duration, and Specific Employer Requirements. Policy 19-05-02 also contains definitions for key terms that appear in this policy.

Guidelines

Determining compliance

At the worker's request, or on its own initiative, the WSIB determines whether an employer has met its re-employment obligation. To do so, the WSIB decision-maker first considers whether

- the worker has met the "unable to work" threshold
- the worker is medically able to return to work and the employer was notified of his or her level of fitness, and
- the re-employment obligation is still in effect.

The WSIB decision-maker then considers whether the employer

- offered employment consistent with the worker's ability to return to the pre-injury job, suitable construction work, or suitable work other than in construction, in accordance with the employer's ongoing responsibility to offer the most similar work (in nature and earnings) to the pre-injury job when it becomes available
- was willing to accommodate the work or workplace to the needs of the worker
- provided written notice of the particulars of the way in which the employer intends to accommodate the work or the workplace to the needs of the worker, after a request from the worker or the WSIB
- re-employed the worker and then terminated the worker's employment within six months after the date on which the worker was re-employed (for specifics, see "Terminations and presumptions," below), and
- re-employed the worker for the duration of the re-employment obligation.

When determining whether a re-employment breach has occurred, relevant facts include but are not limited to whether

- another worker is performing work in the worker's trade and classification at a collective agreement workplace who was hired, assigned, or transferred on or after the date on which the worker was injured, or a vacancy exists with respect to such work (only relevant to a union worker who is fit to perform the essential duties of his or her pre-injury job)
- another worker is performing work in the worker's trade at the pre-injury workplace who was hired, assigned, or transferred on or after the date on which the worker was injured, or a vacancy exists with respect to such work (only relevant to a non-union worker who is fit to perform the essential duties of his or her pre-injury job)
- a vacancy exists for a job that is or could be made suitable for the worker, and
- the employer has investigated, with or without the assistance of the WSIB, how to fulfill its obligation to accommodate the work or the workplace to the extent of undue hardship.

If the worker and the employer disagree about the suitability of offered work, the WSIB will

- assist the workplace parties to reach consensus on the issue,
- offer mediation, or

- make a determination as to whether the offered work is suitable or not.

For the definition of suitable work, see 19-05-02, Re-employment Obligation in the Construction Industry—Threshold, Duration and Specific Employer Requirements.

Small construction employers

The WSIB recognizes that small construction employers, i.e., those that employ 20 workers or less, may not have the same knowledge, capability, resources, and/or experience as larger construction employers respecting their re-employment obligations. As a result, small construction employers may require increased assistance and intervention from the WSIB in order to meet their re-employment responsibilities. The WSIB is therefore sensitive to the needs of small construction employers in the re-employment process, particularly with respect to providing education and case management assistance.

Terminations and presumptions

Was the worker terminated?

A termination will generally be found to exist in all cases where, on a balance of probabilities, the evidence indicates an intention on the part of the employer to sever the employment relationship.

Employment relationship severed—relevant factors

If there is a work cessation, the WSIB determines whether there was an intention on the part of the employer to sever the employment relationship by considering the following factors

- the length of time the worker was employed by the employer
- the length of, and reason for, the work cessation
- any contractual arrangements between the parties
- the worker's pattern of employment and the employment patterns of co-workers
- the expressed views and behaviour of the parties, and
- the extent to which aspects of the employment relationship are maintained (e.g., maintenance of employee benefits by the employer).

Employment relationship not severed

Generally, the WSIB finds that the following types of work cessation do not break the employment relationship

- strikes and lock-outs
- sabbaticals, sick leaves, parental leaves, leaves of absence, and vacations
- work-related injuries resulting in time off work or resulting in the worker working for another employer on a temporary basis
- lay-offs of less than three months if the worker returns to work for the employer through an employer's offer of re-employment at the time of lay-off, or a union hall's hiring process, or
- lay-offs of more than three months if the worker returns to the employer through an offer of re-employment at the time of lay-off, or a union hall hiring process, and
  - a date of recall was stipulated, and the recall occurs
  - the employer continued to pay the worker
  - the employer continued to make benefit payments for the worker pursuant to the provisions of a retirement, pension, or employee insurance plan, or
  - the employee received, or was entitled to, supplementary employment insurance benefits.

Worker severs the employment relationship

In cases where a re-employment obligation exists, but the worker voluntarily quits his or her job, the WSIB will consider the reasons for the worker's resignation to ascertain whether the employer's re-employment obligation continues.

Terminations within 6 months of re-employment—presumption of a re-employment breach

Definition

Comparable employment—Construction project work in the worker's trade that is being performed at a construction project that is similar in nature to the construction project where the worker was injured. For the definition of "construction project," see 19-05-02, Re-employment Obligation in the Construction Industry—Threshold, Duration and Specific Employer Responsibilities.

In addition, comparable employment means employment that is similar in nature and earnings to the pre-injury job, as well as **safe** (see definition in 19-05-02, Re-employment Obligation in the Construction Industry—Threshold, Duration and Specific Employer Requirements). To determine whether the offered work is comparable to the pre-injury job, the WSIB decision-maker considers the following factors

- duties to be performed
- skills, qualifications, and experience required
- degree of physical and mental effort
- level of responsibility and supervision of other employees
- rights and privileges associated with the position
- wages and employee benefits (must be of a dollar value that meets or exceeds 90% of the worker's pre-injury net average earnings)
- working conditions, hours of work, and right to work overtime
- incentives such as room and board, company vehicle, or isolation pay
- geographic location of the alternative worksite
- opportunities for advancement and promotion, and
- whether the jobs are covered by the same collective agreement.

NOTE

The term "employee benefits" includes but is not limited to vacation, health care, life insurance, and pension benefits.

As well, for the employment to be considered "comparable," its location must be within a reasonable distance of the worker's home, bearing in mind

- the mode(s) of travel available to the worker
- travel norms for construction workers in the worker's trade who work for the accident employer, and
- the amount of travel that was required before the injury.

NOTE

The definition of "comparable employment" applies to both union and non-union workplaces.

Presumption

The WSIB presumes that the employer has not fulfilled the re-employment obligation if a worker is terminated:

1. Within six months of being re-employed, other than at a construction project.
2. Within six months of being re-employed at a construction project and before his or her work on the construction project is completed; or
3. When his or her work on a construction project is complete and the employer does not re-employ the worker at a construction project within 6 months after the date on which the worker was re-employed although
    - the worker is able to perform the essential duties of his or her pre-injury employment, and the pre-injury employment, or employment that is **comparable** to it (see definition above), is or becomes available at the construction project, or at another construction project, or

- suitable work is or becomes available at the construction project, or at another construction project.

The presumption does not change the obligation on the WSIB to conduct the investigations and inquiries necessary to make informed decisions. If evidence acquired during these inquiries is enough, on a balance of probabilities, to show that the termination or failure to re-employ was unrelated to the injury, the presumption has been rebutted and the employer is found not to be in breach of its re-employment obligation. However, if evidence acquired during these inquiries is not sufficient to dispel doubt about the reasons for the termination or failure to re-employ, the decision-maker presumes that a breach occurred.

Workers who are terminated within 6 months of re-employment have 3 months to ask the WSIB to investigate non-compliance. If the request is made after 3 months, the WSIB is not required to investigate, but may choose to do so.

When a worker is terminated *before* being re-employed, or *more than 6 months after* being re-employed, the presumption does not apply. For more information on these cases, see "Termination before re-employment or more than 6 months after re-employment," below.

Rebutting the presumption

Employers can rebut the presumption by showing that the termination or failure to continue to re-employ within 6 months of re-employment was not caused in any part by

- the work-related injury or disease (and related absences from work)
- treatment for the work-related injury or disease, or
- the claim for benefits.

Relevant evidence which may be provided by the employer includes but is not limited to

- the terms of the collective agreement
- pre-existing, written company policy
- established company practices, and/or
- records demonstrating that an escalating discipline regime, culminating in termination, was applied to the worker for reasons unrelated to the work injury/disease.

If an employer successfully rebuts the presumption, no re-employment penalty is assessed against it, and the worker is not entitled to re-employment payments. However, the worker may continue to experience a work-related loss of earnings which entitles him or her to further loss of earnings (LOE) benefits, see 18-03-02, Payment of LOE Benefits and 15-06-01, Entitlement Following Work Disruptions: General.

Termination before re-employment or more than 6 months after re-employment

In cases where a termination occurs before a worker is re-employed, or more than 6 months after re-employment, (and the re-employment obligation is still in effect), WSIB decision-makers confirm that the reasons for the termination (as demonstrated by the evidence) are

- not related to the work-related injury/disease or the claim for benefits, and
- consistent with generally accepted employment practices in the construction industry.

If the evidence does not show acceptable reasons for the termination, a breach of the re-employment obligation has likely occurred (see “Consequences of a re-employment breach,” below).

Failure to offer available work

Because a re-employment breach can occur if an employer fails to offer available work when it is required to do so, a termination of the worker’s employment is not necessary for the WSIB to conclude that a re-employment breach has occurred.

Consequences of a re-employment breach

If the WSIB determines that an employer has breached its re-employment obligation

- notice is provided to the employer
- a re-employment penalty may be levied on the employer, and
- re-employment payments/LOE benefits may be issued to the worker.

For more information, see 19-05-04, Re-employment Penalties and Payments—Construction Industry.

Appeal time limit

A worker or employer has 30 days to indicate to the WSIB his or her intention to object to a re-employment decision. For more information on objecting to a WSIB decision, see Appeal System Practice & Procedures.

Application date

This policy applies to all injuries on or after September 1, 2008.

Document history

New document.

References

Legislative authority

Workplace Safety and Insurance Act, 1997, as amended

Sections 2(1), 23, 40, 41(1)(8)(11)(12)(13), 43, 120

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