The Challenges Being Paid Loss of Earnings Benefits by WSIB When Injured Workers Are Performing Modified Duties, Then Laid-off Because of a Shortage of Work, Including COVID-19 Temp Layoffs

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Many years ago the WSIB introduced a Work Disruption Policy, in fact two (short term and permanent) that applies whenever an injured worker is laid-off. The policy is an effective tool for the WSIB, and employers, in denying Loss of Earnings benefits to injured workers who are laid-off on the basis that the workers loss of earnings is not related to the work injury, but an employment situation.

The unfairness is obvious because in spite of a layoff for a shortage of work, the injured worker often times cannot perform the pre-injury duties without accommodation. How many new employers will accommodate an injured worker from the Hall, when they have enough challenges accommodating their own injured workers?

WSIB Recurrence Team Adjudicates Layoff Claims

Whenever an injured worker is laid-off and seeks LOE benefits from WSIB, claims are adjudicated by the WSIB Recurrence Team (REO). More often than not, they rule the worker can find work in the general labour market, in spite of physical limitations related to the work injury. Or if they were doing "take-off's" they can find employment as Estimators. When the COVID pandemic struck, we had many injured workers on modified duties, or a gradual return to work who sought LOE benefits from WSIB, but were told their loss of earnings is not related to their injury, but the pandemic.

The union has objected to the denial of LOE benefits on the basis that many COVID decisions were contrary to the law and policy that guides all decision making regarding a workers entitlement to LOE benefits after a work disruption.

Furthermore, the Ontario Government did not suspend the provisions of the Workplace Safety and Insurance Act, or the Board's operational policies during the COVID-19 State of Emergency.

However, senior WSIB management decided that injured workers who are performing a modified job will not be paid LOE benefits because of a COVID-19 temp layoff. This edict was posted on the WSIB website. Yet in all the hoopla surrounding COVID, WSIB failed to consider that swaths of the electrical industry were deemed essential, and we still had members working.

Worker Falls under Exemption of Temporary Work Disruption Policy – OPM 15-06-02

Upon further investigation, the union discovered that the WSIB website, under the COVID-19, stated the Work Disruption Policy is still applicable. In other words, the WSIB is obligated to follow its policy in determining whether the injured worker will be paid full LOE benefits whenever there is layoff.

Obviously, each claim is unique, but it's important to consider an injured workers work/functional limitations and the physical demands of the pre-injury job to determine whether they fall under the general exception found in the Temporary Work Disruption Policy (OPM 15-06-02). This is an important part of the analysis because injured workers are usually limited in mitigating their loss of earnings and obtaining employment through the hiring hall because of work injury limitations. In many instances, a members loss of earnings is reconnected to the compensable injury and remains a barrier in obtaining work as an electrician, and/or earning income with a new employer. The Policy states:

> The WSIB generally maintains the loss of earnings (LOE) benefits the worker was receiving at the start of a temporary work disruption. Workers are entitled to additional LOE benefits when evidence indicates:
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> - the worker would seek new employment in the general labour market to attempt to restore his/her loss of earnings during the temporary work disruption (i.e., if he/she was not injured), and
> - the work-related injury/disease impacts the worker's ability to earn income through new employment.
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> **OPM 15-06-02 Entitlement Following Temporary Work Disruptions also states:**
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> The work-related injury/disease impacts the worker's ability to earn income through new employment. To make this determination, the decision-maker may consider factors such as the following:
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> - Is the worker involved in WSIB approved active health care, which requires frequent absences for treatment of the work-related injury/disease?
> - Was the worker on a graduated return to work plan?
> - Was the worker performing suitable work that does not exist in the general labour market (i.e., similar work not performed at other companies)?

Worker Meets Unable to Work Threshold – OPM 19-05-02

The WSIB also defines "unable to work" in Policy 19-05-02:

> A worker is considered unable to work, if, because of the work-related injury/disease, he or she:
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> - Works less than regular hours, and/or
> - Requires accommodation/modified work that pays, or normally pays, less than his or her regular pay.

Collective Bargaining Agreement (CBA) - Union Hiring Hall – 50/50 Name Hire

Often times WSIB will probe where on the out-of-work list an injured worker sits to support the decision that there is no work available

through the union. However, the injured workers legal obligation is to mitigate their loss of earnings by seeking work, not whether work is immediately available through the hiring hall.

Leaving aside most injured workers cannot perform the full scope of pre-injury duties because of injury limitations, it is unrealistic for an injured worker to be dispatched to another contractor because a new employer expects a fully functional electrician, nor are they obligated to accommodate a new hire.

In addition, the WSIB does not understand the 50/50 name hire provisions under Section 7, of the Principal Agreement, which is another path to employment, which injured workers would typically be unable to avail themselves unless healthy. Section 700(a) states:

> The contractor agrees to hire and employ only members of the IBEW on all electrical work. When hiring through the Local Union office, the Contractor shall be entitled to name hire up to fifty (50) percent of the IBEW members, including foreman.

LU 353 Members Do Not Have Seniority or Service under CBA

When it comes to layoffs, the WSIB does not understand that our Contractors have a broad latitude to downsize their workforce without regard to a members length of service, because there is no seniority clause in the CBA.

An equally important consideration is accident employers have the discretion to maintain the employment of injured workers who are in modified jobs or in the re-employment phase of a claim when downsizing the workforce without the encumbrances typically associated with seniority or bumping rights found in many other non-construction collective agreements.

Case Law, Decision No. 2392/17

In Tribunal Decision No. 2392/17, an apprentice suffered a back injury and was laid-off by a large IBEW contractor. The key issue before the Tribunal was the concept of an injured workers employability after a layoff. The Panel focused on the fact the member was still in treatment, and one of the few decisions that discusses the union hiring hall and whether another contractor would conceivably hired the injured worker:

> [11] The Panel finds that the REC report viewed the worker as being partially disabled from performing the full duties of an apprentice electrician for approximately eight weeks from the date of assessment, June 23, 2014. We note that the worker reported to his local Hiring Hall as ready to return to full duties on August 13, 2014, within the eight week period anticipated in the REC report. The Panel infers from that report that the worker was not capable of seeking employment through his local Hiring Hall as a fully functional worker during the eight weeks of the anticipated recovery and physical therapy recommended in the REC report. The Panel finds therefore that, while the worker may have been capable of performing the material handling job he performed pre-injury with the accommodations allowed by the accident employer, the worker was not capable of presenting himself to his Hiring Hall as fully able to work without restrictions. Consequently, in our opinion, the worker was not capable, during the period from May 30 to August 13, 2014, of performing the full duties of an apprentice electrician.
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> [12] In her submissions on behalf of the employer, Ms. McCullough argued that there was no significant accommodation of the worker's duties following the workplace injury, and the worker was able to continue doing his pre-layoff job during the period in issue. Hence there was no justification for providing the worker with LOE benefits when his employment was terminated. However, in the Panel's opinion, that submission fails to consider the criteria for determining entitlement after a general layoff found in Board policy.
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> [13] Policy applicable to an injured worker who is subsequently the object of a "general" layoff is found in Document No. 15-06-01 of the Board's Operational Policy Manual. That policy document contains the following stipulations:
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> > The WSIB may provide a worker who is unable to continue working due to a work disruption, and whose employability is affected by his/her work-related impairment/disability and associated clinical restrictions, with [Insurance Plan benefits]. Indicators that a worker's employability is clearly affected include, for example, that the worker:
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> > - is in the early phase of recovery and
> > - is receiving WSIB-approved active health care treatment on a frequent basis i.e. physiotherapy three times a week
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> In practical terms, these workers could not be expected to conduct a job search, and the likelihood of another employer hiring them with these clinical restrictions is low. [emphasis added]
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> [14] In the view of the Panel, the facts of the present case fall squarely within the Board's policy. In our opinion, when the worker was laid off on May 30, 2013, he was receiving medical treatment for his injured back and was in the "early phase of recovery" from that injury. He was also receiving active health care treatment, including physiotherapy, for a period of eight weeks pursuant to a recommendation by a Board authorized REC facility. The report from that facility was quite clear in indicating that the worker required further treatment as well as extensive accommodation in future employment over an eight-week period. Those restrictions included limited lifting, no prolonged sitting/standing/walking, 10 minute breaks every hour and work pacing. In our opinion, had the worker presented himself to his Hiring Hall as requiring employment with those restrictions, it is highly unlikely that any employer would have been prepared to employ him, even on a short-term basis. This is particularly so since, in the worker's employment field, short-term contracts are not unusual. In our view, the worker's situation, from May 30, 2013 to August 13, 2014, falls squarely within the parameters of the following statement from the Board policy:
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> In practical terms, these workers could not be expected to conduct a job search, and the likelihood of another employer hiring them with these clinical restrictions is low.

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