Early & Safe Return to Work is a Legal Requirement Under the Law, But Members Need to Understand Some Basic Concepts Regarding their Rights & Obligations After They Are Injured

By: Gary Majesky, *WSIB Consultant & Executive Board Member*

A frequent controversy is whether an injured worker can return to work immediately after an injury. In most instances members are able to perform modified duties the day after an injury. However, some members cannot, not cleared by the treating health professional to return to work on modified duties, even though the employer is offering taxi service to/from work, modified duties in the office, and more frequently, work-at-home.

In spite of these aggressive return to work tactics, there are many instances when workers are not fit and totally disabled. Recently, a large contractor told an injured member who was not cleared to return to work that "your doctor doesn't know what he's talking about." As a general principle, I always err on the side of the treating health professional, since they went to medical school, assessed and treated the injured worker. I also advise members they should follow the advice of your doctor because you have a legal obligation to cooperate in health care, which means follow the doctors' directions.

Law and Policy

It is codified in both the Workplace Safety and Insurance Act, and WSIB policy that the workplace parties must cooperate in an Early and Safety Return to Work (ESRTW). Furthermore, it is expected that an employer will cooperate in bringing an injured worker back to work. It is also expected that an injured worker will attempt and try the modified work, and if there are problems, the parties are obliged to continue to search for alternate modified duties. Failing a successful return to work in which the workplace parties have demonstrated and exhausted all options at finding suitable and productive work, an injured worker's claim for LOE benefits paid by WSIB is more credible.

In my experience, employers act as though they are the WSIB and demand an injured worker return to work. All employers are motivated to prevent a lost time claim, and presume a worker is able to perform some form of suitable work.

Work-at-Home Analysis/Objection

Pre-Pandemic, it was easier to rebut work-at-home scenario's, but COVID-19 has changed the employment landscape. Today it will be more difficult to rebuff modified duties at home reading blueprints, as-builds, etc. Again, this turns on a workers capacity to function i.e., pain, medication side effects, cognition, mentation, etc.

Prior to COVID-19, I challenged work-at-home arrangements, but the dynamic has changed since the Pandemic struck because 95% of WSIB employees are now working remotely from home, as is the Workplace Safety and Insurance Appeals Tribunal. Ditto for banks, insurance companies and many governments employees.

When this issue arose in the past I adopted the following rationale when the WSIB and employers peddled at-home concocted modified work. The union relied on a decision from a past Director of the WSIB Construction Sector, regarding Work-at-Home. He stated:

> The work must be safe, productive, consistent with the IW's functional abilities, and to the extent possible, restores their pre-injury earnings.
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> When considering if an offer of work is safe, WSIB staff would review whether the work poses a health or safety risk to the worker (e.g., should not cause re-injury or a new injury), to co-workers, or to third parties. Staff must also consider whether the work is performed at a worksite that is covered by either the *Occupational Health and Safety Act* (OHSA) or the *Canada Labour Code*, and the worker has the functional ability to travel safety to and from the proposed worksite. A worker's permanent home is not covered under the OHSA or CLC.
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> We also discussed the definition of suitability in terms of whether the work is 'productive'. Productive work is work that the worker has or is able to acquire the necessary skills to perform, and whose tasks provide an objective benefit to the employer's business.
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> In terms of an injured worker reviewing safety manuals (either at home or work), this would not be considered 'productive' under the definition of suitable work as it does not provide an objective benefit to the employer's business. I explained that while reviewing the manuals may help to enhance the worker's knowledge of health and safety, it does not in itself permit the IW to acquire new skills, generate revenue or increase business efficiency.

Case Law, Early & Safe Return to Work

In reviewing the legal authorities, there is settled jurisprudence where a finding that modified work offered by an employer is suitable has potentially significant and far-reaching consequences for a worker's entitlement to benefits. Generally, when a worker who refuses suitable work **LOE** benefits are denied or reduced (see *Decision 2189/14*). In *Decision 759/12*, a Tribunal Vice-Chair ruled:

> Even if the work offered by the employer had not been suitable, the worker would not have been entitled to **LOE** benefits. The worker failed to co-operate in ESRTW. Non-co-operation can lead to a reduction or suspension of benefits. The ramifications of non-co-operation had been explained to the worker in a letter from the Board. Co-operation in ESRTW is more than seeking and following medical advice and treatment. Communication

is a key to successful ESRTW. In this case, the worker failed in this responsibility on numerous occasions. He did not remain in contact with the employer despite repeated attempts by the employer to reach him, nor did he contact the employer after receiving letters from the Board and being advised to do so by his nurse case manager.

Workers Reliance on Treating Family MD in ESRTW

In *Decision No. 1601/05*, Vice-Chair McCutcheon, now Chair of the Workplace Safety and Insurance Appeals Tribunal addressed the issue of a workers desire to obtain the family physician's opinion regarding his fitness to return to work because of significant pain. The initial ER physician had cleared the worker for modified duties, but the worker wanted to be assessed by his Family MD. The Vice-Chair ruled:

> In summary, after initial treatment at the hospital, the worker continued to experience significant pain and wanted to see his family physician before returning to work. He communicated this to his employer. I find this was entirely reasonable, given the serious nature of the accident. The worker then saw his family physician, who recommended two to four weeks off work. On April 14, 2003, the worker returned to modified duties, less than two weeks after the accident. In a case such as this, the worker's time off from work gave him time to recover from the initial severe pain he experienced following the accident. I find that the worker did not fail to cooperate with ESRTW or health care, and acted reasonably in following his doctor's recommendations. The ARO correctly decided that the worker was entitled to benefits for the period in question.

Another common controversy that arises is when a worker is advised by the doctor to remain off work for 1-2 weeks after an injury. In response, WSIB Adjudicators focus on the functional abilities outlined on page 2 of the Form 8 or Functional Abilities Form to override the treating health professionals' medical opinion to remain off work. WSIB then concludes the modified work is suitable and within the medical/ functional limitations that were documented. In challenging these decisions I refer to *Decision No. 2222/05* whenever a member's claim for Loss of Earnings benefits is denied:

> Cooperating in ESRTW does not mean that the worker has to attempt to return to modified work before he is medically capable of doing so. For that reason the WSIA and the consequent Board policy provide that a worker is entitled to LOE benefits during that phase if he cooperates in health care measures. A worker can be able to lift certain weights, sit and stand for some time and still not be medically capable of working even at light duties. Such was the case here. The worker cooperated in ESRTW efforts by following the recommendations of his family doctor who assessed him regularly during the period in question and documented his situation. See also *Decision Nos. 1601/05* and *2024/10*.

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You need to put in a 11 digit Account Number **(Card number XXXXXXX followed by the last 4 digits of your Social Insurance Number (XXXX).**

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