



## Tribunal Rules In Members Favour that He was Entitled to Benefits After Not Returning to Modified Duties in the Pre-Fab Shop Even Though the Contractor Offered Modified Work

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



Over the past 25-years I have witnessed a lot of changes at the WSIB, and sadly, the trend line is not positive. At one time, the Board had investigators on staff who were dispatched to gather outstanding information, and statements from witnesses that were invaluable. The Board also had ergonomists and work site analysts, typically health professionals who visited workplaces to evaluate whether the modified work was suitable, and if not, what changes were necessary. These support services are long gone and in its place are Return to Work Specialists (RTWS), who visit workplaces and coordinate return-to-work interventions. No offence to the Board, the current RTW process is lacking, deliberately so. The following case, *Decision No. 358/22*, discusses important legal concepts regarding an Early and Safe Return to Work (ESRTW).

### Member Ruptured Anterior Cruciate Ligament

On November 29, 2019 a member was employed as a foreman working for a large electrical contractor when he pushed a transformer in place using his left leg and felt a pop in his left knee.

His knee injury claim was allowed, but surgery to repair an ACL rupture was delayed until June 26, 2020 because of COVID. He was paid full LOE benefits from June 26, 2020 to September 8, 2020, inclusive.

### RTWS Concluded Suitable Work Was Offered

The Board referred the file to a Return to Work Specialist (RTWS) and a teleconference meeting occurred between the workplace parties on September 8, 2020. The RTWS determined that the essential duties of the worker's pre-injury job exceeded the worker's physical limitations, however, the RTWS concluded that the employer offered alternate work in the Pre-Fab shop that did not require heavy lifting or prolonged standing, walking or stair climbing. The RTWS confirmed the modified work provided by the employer was suitable for the worker's restrictions but the worker declined the alternate work to focus on strengthening his leg.

Under section 43(1) of the *Workplace Safety and Insurance Act*, a worker who has a loss of earnings as a result of a compensable injury is entitled to LOE benefits. *Decision No. 2474/00*, held that under section 43(1), a causal relationship between the injury and wage loss is a condition precedent to the payment of LOE benefits. A refusal of suitable work is not necessarily an act of non-cooperation, but it may lead to a conclusion that the worker's loss of earnings does not result from the injury.

### Members Evidence and Testimony

The worker testified and his attention was drawn to a number of FAF's from the physiotherapist and he indicated that he never saw the completed FAF forms from the physiotherapist. The worker indicated that the physiotherapist never discussed returning to work or modified duties with him. According to the worker, the physiotherapist would fill out the forms and send them in and he never saw them. The worker acknowledged a Return to Work meeting between the parties on September 8, 2020. The worker indicated that the meeting was over the telephone and not an in-person meeting. The worker also indicated that just prior to the Return to Work meeting, he was at the office of Dr. Yee, his orthopedic surgeon, for another assessment. The worker testified that Dr. Yee conducted a physical examination of his left knee, as he always did. The worker testified there was a discussion with Dr. Yee about his return to work and provided him with a note in that regard. Dr. Yee stated that within a couple of months, he would reassess the worker again. He indicated that Dr. Yee always reminded him that it would take up to six months for him to recover before he would be able to return to work and that it would take up to a full year for a complete recovery. The worker testified that Dr. Yee gave him the note on September 8, 2020, indicating two months off before the next assessment. According to the worker, when he was seen again two months later by Dr. Yee, he convinced the doctor that he wanted to return to work as the doctor still wanted him off.

According to the worker, Dr. Yee advised him that if WSIB needed further information or detail about his knee condition they should call him. The worker testified that he advised the Case Manager to contact Dr. Yee if they needed further information regarding his recovery and the timing of his return to work. The worker testified that there was no communication between the physiotherapist, and the surgeon, Dr. Yee.

### Submissions from Mr. Majesky

Mr. Majesky submitted that it is the worker's position that notwithstanding the RTWS opinion, the modified work offered on September 8, 2020 was not suitable. He submitted that it is the worker's position that (a) it was not sedentary and (b) a lot of the Pre-Fab work mirrored the worker's pre-accident electrical work. Mr. Majesky submitted that the worker was never cleared by his orthopedic surgeon to commence modified duties and that is why



the worker is requesting LOE benefits. Mr. Majesky noted that for the first years of his employment with the accident employer, the worker was in a position of responsibility as a foreman.

Mr. Majesky submitted that the worker brings experience, responsibility and value to the employer. Mr. Majesky noted that despite the worker being injured in November 2019 during the pandemic, he continued to go to work taking Tylenol #3 medication, 2 tablets in the morning and 2 tablets in the afternoon. This he submitted speaks to the worker's work ethic as a stoic worker and speaks positively regarding his cooperation in the early and safe return to work pre-operatively.

In essence, Mr. Majesky submitted that the orthopedic surgeon is the gatekeeper in terms of the worker's return to work, both modified and regular duties. He also noted that the Board did not seek a medical opinion from other sources or liaise with the orthopedic surgeon in arriving at its decision. Nor was there an opportunity for the RTWS to visualize the shop, materials to be used, and the duties that the worker would actually perform.

#### Discussion and the decision

For the reasons that follow, the Panel is satisfied that the worker does have entitlement to LOE benefits from September 9, 2020 to October 19, 2020. While the law [WSIA] emphasizes an early return to work, the return to work must be suitable and safe, an overly hasty return to work may not always be the best long-term solution for the workplace parties. In the Panel's view, the modified job offered in the telephone meeting of September 8, 2020 was not clearly delineated. The Panel notes that the job offered was not provided in writing, and there was no onsite visit to support the telephone meeting so as to ensure that the job offered was well understood by the parties. The worker testified under oath, that the type of job duties to be performed in the Pre-Fab shop were not detailed in order to support the suitability of the job offered. In addition, the Panel noted that the worker's orthopedic surgeon did not authorize the worker to return to work until he was reassessed within two months of that date.

In conclusion, the Panel is satisfied that the worker co-operated in his health recovery program by having reconstructive surgery for a completely torn ACL. He participated in treatment and consulted regularly with Dr. G. Yee, his orthopedic surgeon. The worker also remained in contact with his employer during his absence from work. In summary, the Panel is satisfied that the worker co-operated in his early and safe return to work and therefore entitled to LOE benefits from September 9, 2020 to October 19, 2020.

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