



Legal Implications When Injured Workers Are Disciplined or Terminated

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



I frequently receive inquiries from injured workers whether an accident employer can terminate them for cause. Some members are under the false impression that an accident employer cannot terminate an injured worker. If you believe that, please recalibrate your thinking, because they can terminate an injured worker for cause, and if an injured worker loses their job due to culpable misconduct, this can and will impact an injured workers ability to collect Loss of Earnings (LOE) benefits under the *Workplace Safety and Insurance Act*. It's that simple.

There is also the added dynamic in which employers' ramp up discipline for myriad infractions, including safety, to build a progressive discipline case, then ultimately rely on a culminating incident to justify a termination. In my experience, a layoff is always preferable, because a termination will limit a workers ability to collect loss of earnings benefits from workers compensation.

Another emerging problem is when injured workers request a "medical layoff" in the belief this is a clean way to sever the employment relationship. However, a worker requested medical layoff will impact an injured workers ability to collect workers compensation benefits, as several members working in Alberta have discovered. So be careful, and read the fine print on "medical layoff" forms because it clearly states this may impact your ability to collect workers compensation benefits.

In essence, when an injured worker is terminated for cause, this is considered a non-compensable "intervening event" unrelated to the compensable injury, therefore, LOE benefits cannot and will not be paid pursuant to section 41 of the *Workplace Safety and Insurance Act* ("the WSIA").

Case Law Regarding Terminations and Entitlement to Benefits

The following Tribunal case summaries highlight the inherent challenge facing decision makers when adjudicating appeals where injured workers are disciplined and terminated by an accident employer:

- **Decision No 1601/08** in which the injured worker's employment was terminated due to misconduct related to a complaint against him of sexual harassment. The Vice-Chair found that

the employment was not terminated solely due to misconduct, but rather that the compensable back condition had also been a factor in the termination of his employment, and the worker was awarded LOE benefits subsequent to his termination.

- **Decision No 2540/08** which concluded that the worker's termination was due to an employment situation which was not related to the compensable injury and over which the Tribunal had no jurisdiction. The worker was not entitled to LOE benefits because his loss of earnings did not result from the compensable injury.
- **Decision No. 2035/00** which found that when workers are dismissed from suitable modified work at no wage loss for just cause, the workers must be deemed to have taken themselves out of the workplace through their own actions, and a loss resulting from such actions will not be compensable in the absence of other relevant circumstances. Such a loss cannot be said to be a result of a compensable workplace accident. In that case, the worker was dismissed for just cause, having repeatedly violated the employer's rules concerning break time and leaving work early. The worker was not entitled to further benefits or services.
- **Decision No. 2093/08** which concerned a worker who had returned to modified work but had his employment subsequently terminated. The Vice-Chair agreed with *Decision No. 2035/00* in that workers who are not experiencing a wage loss and are fired for just cause are deemed to have taken themselves out of the workplace through their own actions, and a loss resulting from such actions is not compensable.
- **Decision No. 655/08** which found that an injured worker who was performing modified work had brought about the termination of his employment by walking off the job, and because of personality conflicts with management and co-workers, rather than because of his injury. The worker was not entitled to further LOE benefits.

A common theme in these decisions is that where an employers' reasons for terminating an injured workers employment are not related to the work injury, the worker will usually not be entitled to LOE benefits for the period subsequent to the termination. In particular, where there has been a determination that the termination was for



just cause, the worker will usually not be entitled to further LOE benefits, except for medical treatment e.g., injury related surgery.

In **Decision 2520/08**, a case where I was the representative, a Local 353 lineman was terminated when he went AWOL and failed to contact his employer for 1-week. Although we won the appeal, the employer filed a reconsideration of that decision, and another Vice-chair disagreed with the earlier ruling but did not overturn the decision for technical reasons. However, the Vice-chair did review the relevant provisions that governs the payment of LOE benefits in section 43:

43 (1) A worker who has a loss of earnings as a result of the injury is entitled to payments under this section beginning when the loss of earnings begins. The payments continue until the earliest of,

- (a) the day on which the worker's loss of earnings ceases;
- (b) the day on which the worker reaches 65 years of age, if the worker was less than 63 years of age on the date of the injury;
- (c) two years after the date of the injury, if the worker was 63 years of age or older on the date of the injury;
- (d) the day the worker is no longer impaired as a result of the injury.

Section 43 states, a worker is entitled to payments under that section when he/she has a *loss of earnings as a result of the injury* (emphasis added). The focus of the analysis therefore in any case involving a claim for LOE benefits is whether the worker has a loss of earnings as a result of the compensable injury. The reconsideration Vice-Chair concluded:

When an injured worker is terminated from employment, the question arises as to whether the ensuing loss of earning is a result of the injury or some other reasons... In my view, it

is beyond the scope of the Tribunal's legislative authority to import common law wrongful dismissal principles under section 43 of the WSIA, which is only interested in deciding whether a worker's loss of earnings is the result of the injury. The Tribunal is a specialized body dealing with workplace safety and insurance law matters, it is not a specialized body mandated to decide whether a worker has been terminated for cause or not... As noted by Decision No. 567/09, the key question in determining whether the worker has a loss of earnings "arising from" the injury is whether the compensable injury played a role in the termination of the worker's employment.

To summarize, members must be mindful and stay off the discipline radar because you leave yourself exposed to legal complications with WSIB. Obviously, the union will grieve unjust discipline that doesn't rise to a just cause standard, particularly members who are targeted for zealous enforcement of the rules or differential treatment that is suggestive of *anti-injured worker animus*. As many injured workers can attest, their workplace is at times politically charged and interactions with management like the dance of the scorpions. But understand this important point, the WSIB is not the court of competent jurisdiction to adjudicate labour relations issues (grievances), particularly when it involves an injured worker. That remains the domain of the grievance procedure and labour board.

As the Holiday Season approaches, I want to thank-you for your continued support and wish you, your family and loved ones, a safe and enjoyable holiday.

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Pension Gifts

The following pensioners are invited to the South Unit Membership meeting at the Union Office, 1377 Lawrence Avenue East, Toronto on Thursday, December 11, 2014 at 7:00 p.m. to receive their pension gifts:

Michael Lawrence and Emanuel Lamendola.