Understanding the Law Regarding the WSIB Construction Re-Employment Provisions After Workers Submit an Allowable Claim

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

Many members are under the impression that if they suffer a work related injury and performed modified duties they are automatically protected by the re-employment provisions of the *Workplace Safety and Insurance Act*, and Ontario Regulation 35/08, Re-employment in the Construction Sector. Unfortunately, they are mistaken.

If a member suffers a work injury and performs modified duties, which is referred to as an Early and Safe Return to Work (ESRTW), and then transition back to regular duties, the re-employment provisions have not been triggered, nor apply. However, if an injured worker is performing modified duties and are laid-off, then the union pursues re-employment and makes submissions the workers falls under the exemptions under the WSIB Work Disruption Policy.

In my experience most members do not miss time after a work injury and the worker and employer are compliant with their legal obligation to cooperate in an Early and Safe Return to Work (ESRTW). This means an employer offers suitable modified work, and the worker attempts to perform modified duties.

Re-employment Does Not Apply

If a member was injured, performed modified duties and then cleared for regular duties and afterwards is laid-off, then they are not covered by the WSIB Re-employment provisions.

Does the Worker Meet the Unable to Work Threshold – OPM 19-05-02

A common situation that I encounter is a members' WSIB claim is allowed, they did not lose time, performed modified duties, then transitioned back to regular duties. In these situations the re-employment provisions ***have not*** been triggered.

Conversely, if a member lost time from work after an injury and WSIB paid LOE benefits, this would trigger the re-employment provisions. However, members often times confuse missing time from work where the employer paid them as being analogous to WSIB recognizing lost time. It is not.

It should come as no surprise that employers know how to side-step any ongoing WSIB liability, including re-employment, when a member has been injured in their employ.

Does Injured Worker Meet the Unable to Work Threshold in OPM 19-05-02

I realize most members have their own definition of unable to work but WSIB Policy defines "unable to work" which is a condition precedent for the Re-employment obligation to apply in an injured workers claim. More importantly, performing modified duties does not trigger the statutory re-employment provisions found in section 41, of the *Workplace Safety and Insurance Act*, and Ontario Regulation 35/08, Re-employment in the Ontario Construction Sector, and Operational Policy Manual 19-05-02.

WSIB Policy defines "unable to work" in determining whether an injured worker has actionable re-employment rights pursuant section 41 (8)(10)(11) of the *WSIA* as follows:

Unable to work

A worker is considered unable to work, if, because of the work-related injury/disease, he or she:

- Works less than regular hours, and/or
- Requires accommodation/modified work that pays, or normally pays, less than his or her regular pay.

OPM 19-05-02 - Re-employment Obligation

Construction employers are required to offer to re-employ their injured construction workers who have been *unable to work* due to a work-related injury/disease. A construction employer's obligation to re-employ begins when it is notified that an injured construction worker is medically able to perform:

- the essential duties of his or her pre-injury job
- suitable construction work, or
- suitable non-construction work

If an injured worker is cleared for regular duties some employers will lay-off the injured worker once they are cleared for regular duties. However, smart employers will continue to employ the injured worker to verify they can perform the pre-injury job without suffering a recurrence.

One for the Record Books, 10-years Representing a Member

Some members have quick interaction with the union. Not so in my universe particularly when members never recover from a work injury and there is ongoing WSIB interaction and appeals. Although the duration of each claim varies my involvement spans months, years, even decades. Recently, a member that I have represented for over 10-years said to me after receiving his 2nd Tribunal decision “you’re not waiving the white flag.” The Tribunal Vice-Chair issued a favourable ruling granting partial LOE benefits based on the members ability to earn minimum wage, at part-time hours, but concluded the WSIB failed to rule on an issue, consequently she did not have jurisdiction to deal with an issue the union had consistently raised. The WSIB is masterful when it comes to administrative fragmentation which frustrates workers who are forced to play adjudicative ping-pong. After 30-years, I know how to stay out of the sand traps and keep a members case in play, but you have to stay sharp because the thoroughness of the WSIB inquiry process and information gathering has deteriorated over the years which has impacted the quality of decisions that are released. In my opinion, this was no accident but engineered.

Gary Majesky
WSIB Consultant
Direct Line (416) 510-5251
gary_wsib@ibew353.org

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