

## WSIB Imposes Sweeping New Re-Employment Obligations In The Construction Industry

### Ryan J. Conlin

For the past two decades Ontario employers have been subject to the sweeping obligations set out in Section 41 of the *Workplace Safety and Insurance Act*. Employers who terminate workers who have received WSIB benefits within the so-called "re-employment window" are subject to severe financial penalties imposed by the WSIB unless they can establish that the termination was not related to the WSIB claim. The WSIB's sweeping re-employment obligations make it very difficult for employers to terminate workers during the re-employment window, unless a worker engages in particularly egregious conduct.

Historically, many employers in the construction industry paid very little attention to the WSIB re-employment obligations. Many construction industry employers weren't subject to the re-employment obligation because they did not meet the minimum legal threshold of 20 employees for the provisions to apply. Further, the old re-employment Regulation was fairly vague with respect to dealing with some of the unique complications of the construction industry.

As of September 1, 2008 the WSIB has enacted sweeping changes to the re-employment obligation in the construction industry which will impose far reaching obligations on employers who are required to re-employ injured construction workers.

### Training Opportunity

## WSIB Early and Safe Return to Work in the Construction Industry

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The regulation will apply to any employer whose predominate business activity is classified within Schedule 1, Class G-Construction. Unlike the previous Regulation, there is no requirement that the employer must employ 20 or more workers in order for the re-employment obligation to apply. This means that these sweeping obligations will apply to every employer in the construction industry, including many employers who have never been subject to the WSIB re-employment provisions.

It should also be noted that unlike employers outside the construction industry, there is no requirement that the worker must have worked for the employer for one year prior to the injury for the WSIB re-employment obligation to apply. The re-employment obligation applies when a construction worker has been unable to work as a result of a work related injury. The WSIB defines unable to work in the following circumstances:

- Absent from work
- Works less than their regular hours, and/or
- Requires accommodated or modified work that pays, or normally pays less than his or her regular pay

The re-employment obligation begins when a construction worker is notified by the WSIB that an injured construction worker who has been unable to work is medically able to perform the essential duties of his or her pre-injury job or other suitable construction or non-construction work.

The employer must offer to re-employ the injured worker in the first job that becomes available and is consistent with the workers functional abilities. The employer's re-

employment obligation continues until the earliest:

- 2 years from the date of the injury
- 1 year after the employer receives notice from the Board that the worker can perform the essential duties of their pre-injury job
- the date on which the worker declines an offer from the employer to re-employ the worker, or
- the date on which the worker reaches 65 years of age

Employers should be aware that the duration of the re-employment obligation is unaffected by workers who are employed on a temporary basis (i.e. a fixed term contract with a fixed end date). This theoretically means that an employer could hire an employee on a two-week contract and be subject to a 2-year re-employment obligation. It seems absurd that the WSIB would impose a re-employment obligation on an employer of up to 2 years when the fixed term contract and the position was only supposed to last for a short duration.

## **Obligation to Provide "Suitable Work"**

The WSIB considers suitable work to be post-injury work that is safe, productive, consistent with the worker's functional abilities and that, when possible, restores the worker's pre-injury earnings. In order to assess whether the worker is safe the WSIB will consider whether the work being offered poses a health and safety risk to the worker or any other party. Further the Board will consider whether the worker has the functional ability to travel safely to and from the proposed work site. WSIB policy indicates that workers and

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employers are encouraged to resolve expense issues relating to travel to work whenever possible. It remains to be seen whether the WSIB expects employers to cover travel expenses for workers who are unable to drive their own motor vehicle or access their usual mode of public transit.

WSIB policy also requires the Board to assess whether the form of modified work assigned to the worker is "productive". Board policy dictates that it is required to assess whether the tasks offered to the worker provide an objective benefit to the employer's business. It appears that the WSIB is trying to prevent employers from assigning modified work that has no business purpose in order to avoid experience rating costs. It is expected that only work that has no possible benefit to an employer's business will be challenged by the WSIB.

The WSIB expects employers to take comprehensive measures to accommodate restrictions of injured workers. These measures can include reduced hours, reduced productivity requirements and/or the provision of assistive devices, that result in work becoming available that is consistent with the worker's functional abilities. Employers are expected to engage in meaningful assessment of whether any potential accommodation could result in suitable work becoming available.

WSIB policy distinguishes between construction employers who have control over a workplace (i.e. a general contractor) and those that don't have physical control of the facility. An employer is deemed to have "control" over the workplace if it has the authority to order or implement non-permanent physical changes to any structure on the workplace that may require accommodation (i.e. building a temporary ramp).

Where employers don't have "control" of the workplace duty to accommodate is somewhat narrower. The WSIB does not expect employers who do not have control over the workplace to be able to make physical changes to any structure on the site.

The employer is required to offer the injured worker the first job that becomes available that is most similar in nature and earnings to the worker's pre-accident job, and that is consistent with the worker's functional abilities. Workers are required to accept work within their trade or, in some cases outside of their trade, which is available or becomes available at the original job site or at a comparable job site.

The new provisions make it clear that employers are required to look beyond work available at the project where the worker was injured, and must look at work across the company that the worker might be able to do. The employer must continue to offer the injured worker the most similar work as it becomes available.

It is a matter of Board policy that employers are not required to create jobs that do not exist. However, it is important to appreciate the distinction between creating a job for a worker and accommodating a worker's physical restrictions. The Board expects employers to make the necessary modifications to allow workers to perform modified duties.

## **Re-Employment Penalties**

The WSIB can assess an employer that breaches the re-employment obligation with a penalty amount of up to the worker's previous actual net average earnings. The WSIB may also issue re-employment payments or loss of earnings benefits to the worker. Prior to the

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imposition of a penalty, the WSIB has indicated that it will give the employer a reasonable opportunity to comply. This usually means that the employer will be told to re-employ the worker or face a re-employment penalty.

It is important to appreciate that failing to offer work, when required to do so, is a breach of the re-employment obligation. Therefore if the WSIB determines that the employer has suitable work available and has declined to offer it, the employer will face a re-employment penalty. As a practical matter, this expands and broadens the WSIB's approach to re-employment, which has historically been confined to situations where an employee has been terminated. This means that employers can expect the WSIB to carefully review their operations to determine if there is any suitable work available.

## **Practical Impact of New Obligations for Construction Employers**

In light of these onerous new obligations, construction employers must implement a comprehensive re-employment policy and strategy. This means that the company is now going to be required to think outside the box and look beyond a single project or trade sufficient to comply with WSIB obligations. Employers should carefully document attempts to find suitable work for workers at all locations. All interactions with workers with respect to potential offers of modified work should be carefully documented.

It is important to appreciate that records of these interactions could become significant

in the event that the employer becomes involved in any kind of re-employment related litigation. It is not uncommon for WSIB appeals related to re-employment to be heard after the initial decision was made. Often such appeals are decided on the basis of the strength of the written record of the events which took place at the time. Therefore, it is of critical importance that the employer preserve documents in order to be in a position to appeal unfavourable decisions or to respond to appeals that come from workers.

There is no question, particularly for smaller contractors, that these new obligations appear to be very daunting. Employers who are struggling to deal with challenges posed by the re-employment obligation should seek professional assistance immediately. It is often too late to assist an employer after an inopportune decision has been made with respect to re-employment related issues. It is much easier to get it right the first time and ensure that the position the employer has taken is legally compliant with the WSIB's new regulation.

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## WSIB Early and Safe Return to Work in the Construction Industry

**Presenter: Ryan J. Conlin**

Effective September 1, 2008 the legal landscape for early and safe return to work in the construction sector will be changed dramatically by the enactment of a new Regulation under the *Workplace Safety and Insurance Act*. Unlike in the past, every employer in the construction industry will now face sweeping WSIB return to work obligations and potentially costly penalties for non-compliance.

### **This session will review:**

- How the new regulations imposes return to work obligations to all construction employers regardless of size and to all construction employees regardless of length of service
- The new return to work obligations on employers
- The new duration of the re-employment obligation for injured construction workers
- How employers can be obliged to provide suitable work to employees at other projects
- The WSIB's new "service delivery model"
- How the new system will work at unionized and non-unionized projects
- The presumption of breach of the re-employment obligation if a worker is terminated within six months of injury
- Compliance strategies for smaller contractors

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