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Ontario Workers' Compensation Report

The Proposed New WSIB Early and Safe Return to Work Regime: Navigating the Waters

Ryan J. Conlin

Introduction

After many years of discussion and consultation it appears that the WSIB is finally close to implementing the controversial reforms to the Early and Safe Return to Work policies. It is fair to say that the proposed reforms have been controversial in the employer community. The WSIB issued a first round of draft ESRTW policies in 2005, which were severely criticized by employer representatives. The Board issued a second version of the draft policies in 2006, which addressed some (but not all) of the concerns raised by employers. The draft policies continue to contain a number of elements, which are troubling to employers. More than 55 employer representatives made submissions to the WSIB that objected to both the specific elements of the proposed ESRTW policies and the general policy direction taken by the Board.

It should be noted that although representatives of organized labour and injured workers took issue with some of the details of the draft ESRTW polices (particularly some of the changes made in response to employer criticism of the first

draft policies), the vast majority of these groups are supportive of the general policy approach being taken by the Board. It is clear that labour and worker representatives believe that the ESRTW policy reforms will enhance the rights of workers.

Although the WSIB is continuing to review the most recent submissions from both employers and employee groups, we do not expect that the WSIB will make any major changes to draft ESRTW policies and that the 2006 version of the draft policies will be fairly close to what is ultimately adopted by the Board. We expect that the changes to the ESRTW policies will take effect some time in 2008. These changes will have a significant impact to employers in every situation where a worker who has been granted entitlement for a WSIB is given an offer of modified work.

This paper will review the most significant proposed changes to WSIB policy and will set some practical guidance about the steps employers can take to prepare themselves for the new ESRTW regime. The WSIB's proposed non-compliance penalties and how they interact with breaches of the section 41 re-employment obligation will also be considered.

No Changes to the *Workplace Safety and Insurance Act*

In light of the fairly sweeping nature of the proposed ESRTW policy reforms, it may come as a surprise to many that the government of Ontario is not amending the ESRTW provision of the Workplace Safety and Insurance Act (see section 40 of the WSIA). The WSIB has been heavily criticized by employer groups for attempting to use Board policy to impose ESRTW obligations which are beyond the scope of the employer's section 40 ESRTW obligations.

In my view, there is some legal credibility to the concerns of these Employer groups and I expect that there will be Court challenges to the aspects of the policies which appear to exceed the Board's jurisdiction under section 40 of the WSIA. However, I wish to be clear that even if some aspects of the policies do not survive Court challenges, employers must prepare themselves to comply with a significantly enhanced compliance regime.

Significant Proposed ESRTW Policy Reforms

(i) Expansive New Definition of "Suitable Work"

The most significant policy change for employers is the expanded definition of "suitable work" which is set out in Policy 19-02-02. The policy defines "suitable work" as:

> "Suitable work means 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."

This critical policy change dramatically expands the criteria for the Board to consider when it assesses whether an offer of modified work to a worker is "suitable". As a practical matter, it will be much easier for a worker to challenge the suitability of an offer of modified work if these policy reforms are adopted.

(ii) New Criteria for Assessing Whether the Work is Safe

The WSIB considers work to be "safe" when it:

- Doesn't posed an increased health or safety risk to the worker or the worker's co-workers (i.e. doesn't cause re-injury);
- Is performed at a worksite covered by OH&S legislation;

- The worker has the functional ability to travel to and from the worksite safely.

The first requirement that the modified work offered should not pose an increased risk to the worker and his co-workers is not controversial and is consistent with the Board's current approach. However, it is not entirely clear why the Board has not indicated that the work shouldn't pose an increased risk to any third party.

The second requirement that safe work be performed at a worksite covered by OH&S legislation effectively limits situations where employers can use "work at home" arrangements as part of the ESRTW process. The WSIB will only accept "work at home" arrangements where the "work at home" proposal is acceptable to the worker and is only being proposed as a short-term solution. As a practical matter, the Board will be most inclined to accept "work at home" arrangements where the worker's functional ability to travel is restricted and where the work is objectively productive (which is easier to establish in cases where working remotely is a business norm).

The third requirement is a rather surprising addition to the ESRTW regime. For the first time, the WSIB will be assessing whether a worker is able to travel to the worksite safely as part of assessing whether an offer of modified work is suitable. This is one of the issues where the Board may be vulnerable to a Court challenge

However, until a Court rules otherwise, employers should be prepared for workers raising the argument that they are unable to travel safely. There is no question that an inability to travel is an issue which will arise many claims. As a practical matter, employers should be prepared to make transportation arrangements for injured workers if there is any "air of reality" to the employee's claim that they cannot get to work safely.

(iii) Controversial Criteria for Assessing Whether the Work Is "Productive"

Despite heavy criticism from the employer community, the Board will also be assessing whether any offer of modified work is "productive" as part of the process of determining whether the work is suitable. The criteria the WSIB will use to determine whether the work is productive includes:

- Whether the work forms part of the employer's regular business operation;
- Whether the work allows the worker to acquire new job skills;
- Whether the work generates revenue for the employer (aside from reduced WSIB costs);
- Whether the work increases business efficiency.

From a policy standpoint, it appears that the WSIB is trying to eliminate "make work projects" for injured workers whose sole purpose is to reduce WSIB costs. The Board has severely criticized for this aspect of the draft policy. From a legal standpoint, the word "productive" does not appear in section 40 of the WSIA and I am of the view that this aspect of the policy is vulnerable to a successful Court challenge.

However, even if the WSIB is able to establish it has the legal authority to consider this issue, it is difficult to see how the workers' compensation system in Ontario would benefit from the Board trying to assess whether modified work is "productive". It is hard to understand how the WSIB believes it is in any position to assess whether modified work provides an objective benefit to an employer's business.

The Policy leaves considerable room for Adjudicators to make fairly arbitrary decisions about whether there is a business need for the work. There is no question that many employers go to extraordinary lengths to find modified work for employees and that some of the modified work may be of marginal economic value to the employer. However, the entire WSIB system benefits from this practice as it Board does not pay the worker benefits and the impact of the claim to the employer's experience rating is reduced.

The New Activist Role of the WSIB: How ESRTW Disputes will Be Adjudicated

(i) The New ESRTW Dispute Resolution Process

Proposed draft Policy 19-02-05 sets out the process for how the Board will handle cases where the parties cannot agree whether an offer of modified work is suitable. The proposed policy details how the WSIB will take a much more active role in determining whether an offer of modified work is suitable where there is a dispute between a worker and the employer.

The revised draft policy indicates that the parties are required to take the following steps where there is a dispute about whether an offer of modified work is suitable:

- The worker notifies the employer that the offer of modified work is not suitable.
- The employer considers the reasons and, through dialogue with the worker, considers further accommodations.
- In the event that an agreement cannot be reached, both parties notify the WSIB and provide it all information relevant to the dispute.

Prior to making a decision, the WSIB will strongly suggest that the parties participate in a voluntary mediation with a WSIB mediator. Although mediation is not mandatory, it has been my experience that many of my clients have had very positive experiences with WSIB mediators and are often successful in arriving at a mediated settlement. The practical benefit of mediation has been that the Board has historically not had a great deal of patience for workers who have breached the terms of Board mediated settlement agreements.

In the event that mediation is not used or is unsuccessful, the WSIB is required by policy to make a decision about whether the work is suitable within 60 days. The employer will be required to provide the Board with any and all information which would establish that the offer of modified work is suitable. Employers should not hesitate to contact the Adjudicator directly to seek information about any specific concerns about the Employer's offer. Contacting the adjudicator gives the employer an opportunity to provide further information, which may alleviate concerns of the Adjudicator.

(ii) Failure of the Worker to Accept an Offer of Suitable Work is not Non Co-operation

As a matter of policy, the WSIB has determined that a refusal by a worker to accept an offer of suitable modified work will result in an adjustment to loss of earnings (LOE) benefits, but will not expose the worker to non co-operation penalties. As we discuss below, employers are exposed to potentially draconian penalties for failing to offer an employee suitable modified work.

The policy decision by the Board not to impose non co-operation penalties on workers who fail to accept offers of suitable work is counter-intuitive. It also lends

credence to the concern of some employers that the Board's ESRTW reforms are inherently one sided. It is both regrettable and surprising that the Board has failed to recognize the inherent unfairness in imposing non co-operation penalties exclusively on employers in the context of ESRTW.

However, there is no question that the fact that workers will have their LOE benefits adjusted (i.e. most likely cut off) for failing to co-operate with the ESRTW process does provide a strong financial incentive to accept offers of modified work. Although it does not appear likely, I remain hopeful that the Board will recognize the absurdity of the policy position it has taken and make it possible to impose non co-operation penalties on workers in this context.

Draconian Employer Non Co-Operation Penalties

(i) Employer Non Co-operation Penalties

Proposed Policy 19-02-06 sets out harsh non co-operation penalties for employers which fail to comply with their ESRTW obligations. Under the new Policy, the WSIB will impose a non co-operation penalty when the Employer had knowledge of the ESRTW obligation, had the ability to carry it out and failed to do so. The Policy explicitly gives the Board the power to impose the penalty retroactively to the date the accident was reported.

The policy gives the Board the discretion to impose the following non co-operation penalties:

- The first 10 days of breach- 50% of LOE benefits;
- On-going penalty after 10 days of breach- 100% LOE and LMR costs for up to 12 months;
- 50% penalty applies in cases of retroactive penalties.

As a practical matter, this means that the Board could impose literally hundreds of thousands of dollars in non co-operation penalties against an Employer in serious cases. However, it is important to appreciate that the non co-operation penalties will likely only be imposed in cases where an Employer has refused to obey a directive from the Board, has blatantly refused to co-operate in providing the Board with information or attempted to misrepresent a material fact.

The Board will generally only impose significant penalties in serious cases and only after verbally warning a party that it is at risk of a finding of non co-operation. However, employers must appreciate that the Board takes issues of non co-operation seriously and any suggestion of a potential non co-operation penalty must be taken seriously.

(ii) Relationship of ESRTW Penalties with the Section 41 Re-Employment Penalty

Aside from the proposed ESRTW penalties proposed above, the Board has the power under section 41 of the Act to impose a re-employment penalty against prescribed employers for failing to re-employ a worker that is able to perform the essential duties of their position within a prescribed time period (the earlier of two years from the date of the accident or one year from the date the worker can return to the essential duties of their pre-injury employment).

The Board has made it clear that it has the power to impose both penalties against an employer if the breaches arise out of different acts or omissions. For example, an employer could face both penalties if it failed to co-operate with the process of

offering the injured modified work and subsequently terminated the worker after he was fit to return to normal duties.

However, if the penalty arises out of the same act or omission, the Board will only impose one penalty. The Board's Policy is to impose the penalty that would most likely result in a positive return to work outcome for the worker. As practical matter, the Board will likely impose the penalty which is the most financially punitive on the employer.

Human Rights Policy

The Board has developed a policy (Policy 19-02-07) which specifically addresses an employer's obligations under the Human Rights Code. It is not controversial that an employer must always consider a worker's legal right to accommodation under the Human Rights Code concurrently with any WSIA ESRTW or re-employment rights. Some employers have made the costly mistake of ignoring the Human Rights Code after the worker's re-employment under the WSIA have expired.

The Board's policy rightly recognizes that it has no authority to enforce the Human Rights Code. The Board has suggested that the purpose of this policy is "…informing and educating the workplace parties about such responsibilities and encouraging their fulfillment." Some may consider it to be laudable that the Board is encouraging employers to consider the "big picture" when addressing the ESRTW issues with employees.

However, it my view that the Board's proposal to include this education goal as a "policy" will only serve to foster confusion about the Board's role in human rights matters. It is regrettable that the Board has sought to classify this "educational" initiative as matter of "policy". WSIB Policy should be confined to dealing with matters for which the Board has jurisdiction. The attempt to create a Human Rights Policy is doing more harm than good by creating an element of uncertainty about the legal effect of the Policy.

As a practical matter, this policy approach may serve to alert workers that they may have a potential claim against the Employer under the Human Rights Code. In light of the recent changes to the Human Rights Code that allow complainants direct access to a swift hearing, employers must ensure that Human Rights Code obligations are considered concurrently with WSIB obligations.

Conclusion

There is no question that the ESRTW reforms are going to have a significant impact on employers. Employers must now be prepared for the WSIB to take an activist role in ESRTW disputes. The reforms underscore the critical importance of documentation at every stage of the ESRTW process. Effective documentation will be the primary method by which employers will convince the WSIB that it has ESRTW obligations.

As discussed above, the WSIB has not formally adopted the draft ESRTW proposals, but I expect that the policies, which were most recently proposed, will not change significantly. We will be issuing a detailed electronic bulletin about the ESRTW reforms once the WSIB Board of Directors formally adopts them.

For questions about this article, please contact Ryan Conlin:
rconlin@sbhlawyers.com (705) 727-0808

Or any OH&S issue, Ryan, Landon or Nadia:
lyoung@sbhlawyers.com (416) 862-1616
npazzano@sbhlawyers.com (416) 862-1616

There's An OH&S Inspector At The Door!

How to Respond to OH&S Accident Investigations, Search Warrants and Routine Inspections

Presenters: Ryan J. Conlin & Landon P. Young

A safety related inspection or accident investigation can result in prosecution, high fines and fine surcharges. In the age of unprecedented enforcement of OH&S laws, it has become more complicated to strike the right balance between cooperating with the inspector and protecting your rights post-accident. This session will help you (a) act decisively and appropriately when there's a knock on your door and (b) develop an Accident Response Plan.

You Will Learn:

- How to deal with the difficult or heavy-handed MOL inspector
- What powers inspectors have during routine inspections and new search warrant powers for accident investigations
- The balance between cooperation and self-incrimination
- Strategies for responding to requests for statements from supervisors, managers, officers and directors
- The difference between confidential company accident reports and reports required by law
- How to shield third-party consultants' reports or internal accident reports from disclosure
- The importance of post-accident steps
- How to develop a proper Accident Response Plan

The Program Will Cover:

Successfully Dealing With the Inspector: Routine Inspections and Investigations

- Working to avoid orders, stop work orders
- Working with the inspector to "get the order right" and ensure adequate compliance time
- Managing the balance between cultivating a relationship and co-operative stance, versus self-incrimination
- Appeals without repercussions
- Officially induced error: can the inspector erroneously approve an unsafe situation

You've Had a Serious Accident. There's An Inspector at the Door! The Balance Has Shifted

- Anatomy of a Ministry of Labour accident investigation - what to expect
- Powers of the inspector upon investigation: are they different from routine inspections?
- What a warrant can authorize the inspector and others to do
- The Ontario experience with search warrants
- Why change the law? Past problems with Ministry of Labour investigations

Making the Best of A Bad Situation: Initial Handling of the Accident Investigation

- Statutory obligation to preserve scene, cooperate
- Notification requirements and accident reports-statutory obligations
- Obstruction charges
- Establishing positive and informed point of contact for Ministry of Labour investigator
- Importance of point of contact maintaining privileged and confidential files and materials

Your Accident Report and Third Party Reports

- Ministry of Labour orders for expert advice
- Initiating your own investigation - key steps
- What if the Ministry of Labour asks for your internal report?
- Protecting confidentiality and privilege respecting your internal accident report and expert reports
- Getting expert advice about causation and corrective steps
- Successful strategies for putting the best of your report and expert advice to Ministry of Labour
- Reports to the joint health and safety committee
- Solicitor client privilege and protection of confidential reports

Statements From Supervisors and Senior Management

- Is there a right to remain silent given the obligation to cooperate?
- Practical strategies for providing information but not signed statement
- Importance of cooperative stance for supervisors and senior management
- Can a search warrant be used to require a supervisor or senior manager to put equipment in motion and provide incriminating information?

Searches With Warrant and Without Warrant

- What to do if the Ministry of Labour arrives with a warrant
- Seizure of company policies, procedures, training records
- Handling attempts to seize privileged and confidential reports and files, internal investigation, expert reports
- Searches without warrant: can you refuse to co-operate or refuse entry?

- Strategies to protect rights while providing information and documents
- Preserving right to make arguments respecting search and seizure violations at trial

Developing a Proper Accident Response Strategy

- Incorporating key post accident steps into your accident response strategy
- Distributing a written Accident Response Plan to supervisors and managers
- Key contacts within Accident Response Plan
- Precedent Accident Response Plan

Register Here:

There's an OH&S Inspector at the Door! – April 1st – Vaughan

There's an OH&S Inspector at the Door! – April 25th – Thunder Bay

There's an OH&S Inspector at the Dorr! – May 15th - Barrie

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STRINGER BRISBIN HUMPHREY

110 Yonge Street, Suite 1100, Toronto, ON M5C 1T4
T: 416-862-1616 F: 416-363-7358

65 Cedar Pointe Drive, Unit 806A, Barrie, ON L4N 5R7
T: 705-727-0808 F: 705-727-0323

E: sbhevent@sbhlawyers.com I: www.sbhlawyers.com