

# Injured Workers' Consultants

*Representing injured workers free of charge since 1969*

## **WSIB/WCB Consultation on Early and Safe Return to Work Policies (2007)**

**Submissions of Injured Workers' Consultants Community Legal Clinic**

*February 2007*

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*“... a meaningful appraisal of the ultimate cost savings of ESRTW strategy needs to take into account the full range of costs, including those borne by workers and employers and other social institutions, and those associated with the unintended social dislocations noted in this study.”<sup>1</sup>*

*“...early return to work was treated like immediate. This is too soon. When I was injured my doctor said that I need three months off work with therapy to heal. I had to go back to work in ten days, before I was healed. My condition became chronic because of this. Now I can never heal.”<sup>2</sup>*

#### **Introduction**

In the first part of our submissions, we briefly revisit and challenge the assumptions that underlie the current model of return to work as demonstrated in the draft Early and Safe Return to Work (“ESRTW”) policies.

In the second part of our submissions, we mainly restrict our comments to the changes from the 2005 draft ESRTW policies to the current draft policies. For more general comments on those aspects of the draft policies which are unchanged, please see our submissions dated February 13, 2006 on the 2005 draft ESRTW policies.

An important question to ask at the outset is “What is the purpose of these policies?” The previous draft ESRTW policies included an overarching statement of purpose. The ESRTW policies should state, as their main objective, the aim to restore the worker with care and dignity to the position he or she would have been in but for the accident. Thus the ESRTW policies have to protect and assist with maximum medical recovery. Policies cannot leave the door open for the worsening of workers’ physical and mental health. Too often, an injury that could have been temporary becomes permanent through inappropriate return to work measures. The ESRTW policies must also protect and assist with maximum restoration of earnings, including restoring the potential to improve socio-economic status. Policies cannot legitimate employment which limits workers’ ability to advance or even forces them to live in poverty. The policies would be

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<sup>1</sup> Joan M. Eakin, Judy Clarke and Ellen MacEachen, “Return to Work in Small Workplaces: Sociological Perspective on Workplace Experience with Ontario’s ‘Early and Safe’ Strategy”, *Report on Research Funded by the Research Advisory Council of the Ontario Workplace Safety and Insurance Board* (November 2002) at p. 44.

<sup>2</sup> Basil B., injured worker.

strengthened by a broadly stated purpose that captures these principles.

As we review the draft ESRTW policies, we take note of recently completed research on homeless and underhoused people in Toronto which indicates that of the people surveyed: “57% had WSIB claims in the past and this injury was part of the disabling process.”<sup>3</sup> The Board’s policy and process must do no harm.

## **I. Challenging Assumptions About Active Recovery at Work**

The notion of Early and Safe Return to Work (ESRTW) was introduced into the legislation in 1997. Prior to this, throughout the 1990s, the notion of self-reliance was increasingly introduced with responsibility for return to work being transferred from the WSIB/WCB to the workplace parties.

Thankfully, the WSIB/WCB now seems to be acknowledging that the ‘self-reliance’ philosophy in return to work has failed to protect the interests of workers and employers. However, the WSIB/WCB draft ESRTW policies continue to assume that a return to work as soon as possible is in the best interests of workers and employers.

The WSIB/WCB states that “research” supports that the best recovery occurs in the workplace. We are not aware of any qualitative research providing evidence that the earliest possible return to work is the most beneficial outcome. We are aware of research indicating that initial return to work is not a measure of long-term success in return to work,<sup>4</sup> that the majority of people pushed back to work immediately would have successfully returned to stable employment in any case,<sup>5</sup> and that rates of re-injury are higher in an unreasonably early return to work.<sup>6</sup>

### **Research on the Success/Failure of ESRTW**

Returning to work prematurely or returning to inappropriate work may aggravate the original injury and / or may lead to further injuries. Research shows that returning to work after injury may be the most dangerous employment activity in Ontario. The numbers are very disturbing. Every year the WCB/WSIB allows more than 8,000 lost time claims by workers who returned to work after a previous compensable injury and got injured again.<sup>7</sup>

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<sup>3</sup> Barriers to Disability Benefits for Homeless and Underhoused People, Street Health Community Nursing Foundation, funded by the Wellesley Central Health Corporation.

<sup>4</sup> Butler, Johnson and Balwin, “Managing Work Disability: Why First Return to Work is Not a Measure of Success”, Industrial and Labour Relations Review, Vol. 48, No. 3 (April 1995).

<sup>5</sup> Johnson and Baldwin, “Returns to Work by Ontario Workers With Permanent Disabilities” (1993).

<sup>6</sup> Study of 12-Month Qualifying FEL Recipients: Employment, Occupation and Income Transitions, Research and Evaluation Branch, Ontario Workers' Compensation Board, July 1994

<sup>7</sup> Until 2002, the WCB/WSIB Monthly Monitor reported the number of lost time claims that were reopening a prior claim. The Monitor explained “Reopening of a claim is largely due to a recurrence of a disability after returning to work.” Since the numbers before 1995 included no-lost-time claims, we looked at the years from 1995 until 2001, when the WSIB stopped reporting these numbers. The WCB / WSIB received 116,933 lost time claims for reopening files during this seven year period. The Board allowed 61,543 of these lost time reopened claims, or an average of 8,792 lost time claims reopened every year. By comparison, over the same period the number of lost time claims that the Board allowed for new injuries averaged 103,447 per year.

Early return to work does not necessarily result in sustainable employment. A 1995 study by Butler, Johnson and Baldwin looked at Ontario WCB data of 11,000 injured workers with permanent partial disabilities from injuries between 1974 and 1987 and was the first to analyze work absences that occur after the first return to work. They found that the rate of successful returns to employment, measured by first return to work, is 85%, but the rate of success evaluated over a longer time period is only 50%. **A most striking statistic in this research is the re-injury rate: “Almost 60% of those who returned to work had one or more subsequent injury related work absences.”**<sup>8</sup>

Despite the introduction of a legislated re-employment obligation for injuries occurring since 1990, statistics suggest that fewer workers are successfully returning to work. For the first few years of the ESRTW paradigm, the WSIB/WCB published data regarding the employment status and income of injured workers eligible for wage loss benefits under the new system. The “Study of 12-Month Qualifying FEL Recipients: Employment, Occupation and Income Transitions, Research and Evaluation Branch, Ontario Workers' Compensation Board, July 1994” is the last such data published by the WSIB/WCB. **The WSIB/WCB reported that 77.7% of these injured workers were unemployed at R1**, i.e. two years after their initial determination of wage loss or approximately three years post injury. Employment of these injured workers increased from 16.2% employed at approximately one year post-injury (i.e. D1) to 22.3% employed at about three years post injury (i.e. R1). **However, as in the Johnson, Butler and Baldwin study noted above, a most striking statistic was that about 32% of the injured workers who had been employed at the one year mark (i.e. D1) had become unemployed by the three year post-injury point (i.e. R1).** About one third of the workers who had returned early to work were not able to sustain it.

### **Experience of the Failure of ESRTW**

Despite evidence to the contrary, the WSIB/WCB continues to maintain that forcing workers back to work as soon as possible has been positive for workers and employers in practice. In its Best Approaches Guide, it is stated of the switch to no lost time claims that:

“The result has largely been positive. Rather than spending extended periods of time at home and becoming de-conditioned, many workers have had the opportunity to gradually reintegrate into the workplace, even though starting with very limited functional abilities and/or limited hours upon their initial return to work . . .”.

This statement is not borne out in our experience or on the evidence. While early return to work in perfect circumstances may have advantages for both workers and employers, in the real world the focus on a return to work as soon as possible has had devastating effects on the physical and psychological health of injured workers. In our experience, the “as-soon-as-possible approach” leads to a worsening of conditions, frustration, deteriorating labour relations and attendant depression. These observations have been borne out in more comprehensive studies of the experience of injured workers in the return to work process. In 2003, researchers studied the experiences of over 300 workers in southern Ontario in the return to work process. The

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<sup>8</sup> Butler, Johnson and Baldwin 1995, supra, at p. 467.

researchers concluded that the compensation system and return-to-work process is perceived as problematic and unsatisfactory by a large proportion of injured workers in southern Ontario. Their research suggested that financial strain, stigmatization, lack of support and social isolation - combined with persistent pain and functional limitations - result in stress, depression, anger and despair among injured workers.<sup>9</sup>

### Why is ESRTW Failing?

How do we make sense of claims that ‘research demonstrates that the best recovery occurs in the workplace’ or that ‘research shows that healing happens at work’ in light of the experience and evidence of the abject failure of early and safe return to work for Ontario workers?

Quite simply, the research supporting the therapeutic benefit of a return to modified duties before full recovery used highly specialized return to work programs including conditions such as intervention only after the acute stage of injury, multidisciplinary rehabilitation teams, unionized workplaces and the final return to work decision being made by the treating physician.<sup>10</sup> In essence, research shows that return to work before full recovery can be beneficial *if* part of a carefully designed and implemented multidisciplinary therapeutic program. Research may also show that playing outside in the winter can be part of a healthy lifestyle for a child. But sending a worker back to work “early” without the appropriate therapeutic return to work program is like sending a child outside to play in the winter without a coat and mittens. It makes no sense. **It is the program - and not the fact that the return to work is “early” - that is therapeutic and assists in return to work.**

Not surprisingly then, research is revealing that - without a wide variety of supports in the workplace – early and “safe” return to work will fail. Such research addresses the complexity of the return to work process and the various physical and psychological risks facing workers in reality.<sup>11</sup>

<sup>9</sup> Kirsh, Bonnie, and McKee, Pat (2003), "The needs and experiences of injured workers: a participatory research study." *Work* 21(3):221-231.

<sup>10</sup> Loisel, P. et al, “From Evidence to Community Practice in Work Rehabilitation: The Quebec Experience”, *The Clinical Journal of Pain* 19: 105-112 (2003). The conditions in place during the Loisel study included the following:

- during the acute stage (4 weeks post-injury) health care was left to the worker’s primary care physician;
- intervention began only at the subacute or chronic stage (6 to 49 weeks after injury);
- employers were willing participants;
- workplaces were unionized;
- workplaces included multidisciplinary rehabilitation teams including a GP with skills in musculoskeletal disorders and the rehabilitation process, an occupational therapist, a kinesiologist, a psychologist, an ergonomist, a team co-ordinator and a back pain specialist when needed. The team met every week to review every case and operated on a consensus decision-making model. The team was independent from the employer and the WCB;
- the family doctor made the final decision about return to work.

<sup>11</sup> See, e.g., Eakin et al, supra note 1; Larsson, A. & Gard, G. (2003), “How Can the Rehabilitative Planning Process at the Workplace Be Improved?: A Qualitative Study from Employers’ Perspective, *Journal of Occupational Rehabilitation*, 13, 169-182; Institute for Work & Health, Fact Sheet: Return to Work, 2004.

But this is not new in the literature. In their 1995 study of Ontario injured workers, Butler, Johnson and Baldwin concluded: “The single most important implication of this study for the management of disability is that, except in the most severe cases, the direct physical effects of injuries do not completely determine whether or not an injured worker returns to stable employment. Instead, patterns of post-injury employment are determined by a set of influences that include workers’ characteristics and workplace accommodations that offset the limiting effects of impairments.”<sup>12</sup>

In 1998, the Institute for Work & Health published “Effective Disability Management & Return to Work Practices,” a document geared to employers. It states:

“The Workplace Climate and Policies are Key  
**A workplace may appear to have comprehensive and efficient return to work procedures in place, but if the program operates in an adversarial context, these efforts are unlikely to fulfill their main aim of getting injured workers back on the job in a safe and timely way.** Adversarial circumstances may include situations in which injured workers are treated with suspicion as to the legitimacy of their claims, or when workers believe that the priority of management is to maximize profits with little regard for the worker well-being. The role of the worker’s trust and buy-in to the process (as well as that of his/her supervisors and co-workers) cannot be underestimated. Disability management programs must be built on the principle of employee advocacy, with the idea that what is good for the employee will ultimately benefit the company.”<sup>13</sup>

More recent reviews of qualitative research on return to work reiterate these themes. In a systemic review of qualitative research on return to work after injury, researchers from the Institute for Work & Health stated “This review found that return to work extends beyond concerns about managing physical function to the complexities related to beliefs, roles, and perceptions of many players. Good will and trust are overarching conditions that are central to successful return-to-work arrangements. . . .”<sup>14</sup>

**Despite this wealth of information and research about necessary elements for a successful return to work, the proposed ESRTW policies once again only account for the role of a worker’s physical capabilities in the return to work process. There is virtually no consideration for the many other psychosocial factors and conditions without which return to work will likely fail. Even more crucially, an early return to work without these conditions in place is dangerous for workers. It places them at risk for re-injury and chronic injury, mental health problems, poverty and addiction to painkillers.**<sup>15</sup>

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<sup>12</sup> Butler, Johnson and Baldwin 1995, *supra*, at p. 466.

<sup>13</sup> Institute for Work & Health, “Background Paper: Effective Disability Management and Return to Work Practices”. April 28 – 29, 1998. Toronto, Ontario, p. 6.

<sup>14</sup> MacEachern, E., Clark, J., Franche, R.L, Irvin, E., “Systemic review of the qualitative literature on return to work after injury” [2006] *Scand. J. Work. Environ. Health*, 32, 257-269.

<sup>15</sup> Ellen MacEachern, Agneiska Kosny, Sue Ferrier, Lori Chambers, “The ‘hurt versus harm’ approach in return to work: a social reconceptualisation using injured worker experience”, *Presenting Work Disability: A Symposium to Promote Concerted Action*, Montreal, October 23, 2006.

The WSIB/WCB must ensure that harm is avoided in the fragile return to work process. The ESRTW policies should state that return to work must be therapeutic. Return to work must assist workers in their recovery (physical and psychological) and re-integration in the workplace. In order for a return to work before full recovery to be therapeutic, workers must be comfortable with the return to work program. Otherwise, there is a significant risk of re-injury and new psychological injury. In order to guide the workplace parties in developing an early return to work program that can be part of the recovery process, the policies should set out the components that all research shows are part of a successful program: during the acute stage (4 weeks post-injury) health care is left to the worker's primary care physician; intervention begins only at the subacute or chronic stage (6 to 49 weeks after injury); employers are willing participants; workplaces are unionized; workplaces use multidisciplinary rehabilitation teams including a GP with skills in musculoskeletal disorders and the rehabilitation process, an occupational therapist, a kinesiologist, a psychologist, an ergonomist, a team co-ordinator and a back pain specialist when needed; the rehabilitation teams operate on a consensus decision-making model, independent from the employer and the WCB; and the primary care physician makes the final decision about return to work.<sup>16</sup>

In addition, the ESRTW policies have to recognize that an early return to work without the carefully designed rehabilitation processes suggested in the literature, as well as goodwill between the parties, is not likely to be safe or successful. Therefore, the ESRTW policies should state that, where a workplace does not have the essential components for a successful early return to work program such as a carefully designed multidisciplinary therapeutic return to work program – or where the WSIB/WCB observes “red flags” like hostility or suspicion between the parties – a return to work is less likely to succeed and may cause further injury. In such cases, the ESRTW policies should require the WSIB/WCB to intervene to provide, where possible, the missing components for the return to work program and more closely monitor the ESRTW process with a view to avoiding aggravations and re-injuries.

### **Problem of Experience Rating Financial Incentives**

A main motivating factor for many employers in the ESRTW process is the impact on their experience ratings. This focus is legitimated in the Best Approaches Guide on “Recognizing Time to Heal – Assessing Timely and Safe Return to Work”, which states that:

**“ . . . No Lost Time claims have minimal impact on an employer's experience rating, and are, therefore, desirable from an employer's point of view . . .**

A number of factors over the last two decades have led to a philosophy in support of “no lost time” claims. These include: . . .

c) employer incentive programs . . .”

Reducing experience rating costs should not be a relevant or acceptable goal in returning injured workers to the workplace. Experience ratings lead employers to pressure injured workers back to work before they are ready, often starting immediately. Research is clear that goodwill and a genuine commitment to the worker's health and safety are essential components of successful

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<sup>16</sup> E.g. see Loisel, P. et al, “From Evidence to Community Practice in Work Rehabilitation: The Quebec Experience”, The Clinical Journal of Pain (2003) above.

return to work. A rehabilitative return to work can only be accomplished if both parties are motivated by a genuine desire to maintain healthy, productive working relationships - rather than by fear, profit and distrust.

*. . .the supervisor finally agreed to send me for medical attention and called a taxi, but first he gave me some papers to give to my doctor and also told me: “You have to come to work tomorrow. You hear me? You be here tomorrow. You are scheduled to work at 7 a.m.. Take these papers to your doctor. I just listened. I felt too dizzy and confused to say anything and I took the papers and I gave them to the doctor at the hospital. . . [the next day] . . .the taxi came and I went to work . . .I was taken to a room and there were three people from the company there talking to me. Talking and talking. The three people were the production manager, the shipping supervisor, and the health and safety representative. I said that I needed to go home to recover. I said how poorly I felt. They said: No, no, Halima, you can’t do that. You need to come to work everyday  
(Injured worker with head and shoulder injury from failed equipment landing on her head 2005. Company in surcharge situation).*

As indicated in our previous submissions, the ESRTW policies require a parallel change in experience rating. Experience rating should only come into play after the Board has issued a decision that a worker has reached maximum medical recovery, or at the very least, the experience rating should be suspended for 12 weeks after an injury, which is the general length of time to capture most short-term claims. Without the pressure of experience rating rebates and surcharges, employers may offer suitable work based on goodwill, which is an important component of successful return to work.<sup>17</sup>

## **II. Specific Comments on the 2006 ESRTW Draft Policies**

### **Timing of Early and Safe Return to Work**

The removal of the concept of an early as *timely* return to work is problematic. By focusing on an “immediate” return to work process and “active recovery in the workplace”, the draft policies take a step backwards from the 2005 ESRTW draft policies. The interpretation of an “early” return to work as a return to work at the safe and appropriate time is authorized by the legislation and should be reinstated to the ESRTW policies.

First, the WSIB/WCB seems to have accepted the position of some employer representatives that the WSIA does not allow the interpretation of an “early and safe” return to work as a timely return to work. “Early” is not defined in the WSIA. However, “early” is qualified in the WSIA by the requirement that any return to work be *safe*. The WSIA only refers to “early *and safe*” return to work, never solely to the timing of the return to work. The WSIA requires that an early return to work is always also a safe return to work; therefore, concepts of an appropriate and safe return to work are explicit in the legislation. The ESRTW policies cannot disassociate the

<sup>17</sup> see, e.g., Ellen MacEachen et al, “The Process of Return to Work After Injury: Finding of a Systematic Review for Qualitative Studies, IWH Working Paper #299 at pp. 14-16.

concepts of “early and safe” and treat “early” as an independent factor. Indeed, some employers would like the WSIA to be interpreted as if the legislation required an “immediate” return to work. Such a suggestion is illogical on its face because an *immediate* return to work by definition does not account for safety. If the legislators intended that return to work be immediate, they could have said so. The WSIA requires that safety is always the lens through which to adjudicate how early a worker can return to work. The use of the term “timely” therefore clarified the need to respect the legislative intention of “early and safe” return to work as a single concept.

An “early” return to work must be interpreted in the legislative framework by the concurrent requirement of safety. So far, the WSIB/WCB return to work policy and procedures have failed to acknowledge the key medical concept of the acute stage of recovery after injury. The current discourse of return to work is premised on “reverse logic.” Reverse logic supposes that, since longer periods of time off work are correlated with poor outcomes such as increased mental health problems, chronic disability and decreased return to work, the *quickest possible* return to work is the most beneficial and health promoting.<sup>18</sup> Researchers have identified this “reverse logic” as a problem in the discourse around return to work.<sup>19</sup> There is simply no evidence that the fastest return to work is safe or beneficial. There *is* research supporting concepts of acute and sub-acute phases of injury.<sup>20</sup> This research demonstrates that, in the acute phase of a back injury for example, it is best to intervene as little as possible in the first few weeks in order to “let nature get on with the job of healing”.<sup>21</sup> In the famed Sherbrooke model of return to work, a central principle is intervention at the subacute stage of back pain, at least four weeks post-injury.<sup>22</sup> Quite simply, a safe return to work must allow sufficient time to heal. Appropriate timing is crucial to the safety of return to work.

### Role of the WSIB/WCB

We appreciate the attempt to recognize and “be sensitive to” the unique situation of small businesses in the return to work process. However, workers in small businesses equally face challenges in returning to work after being injured. As noted by Eakin et al,

“In small workplaces, since alternative jobs are often not available, accommodation often takes the form of working fewer hours, or getting assistance from other workers. This form of modified work, however, increases the workload of the non-injured (especially in small workplaces) and compounds possibilities for resentment. In other words, the system of modified work sets the structural conditions for the perception of inequality, which can drive moral wedges between workers and their fellow workers . . .”<sup>23</sup>

<sup>18</sup> Ellen MacEachen, Agneiska Kosny, Sue Ferrier, Lori Chambers, “The ‘hurt versus harm’ approach in return to work: a social reconceptualisation using injured worker experience”, Presenting Work Disability: A Symposium to Promote Concerted Action, Montreal, October 23, 2006.

<sup>19</sup> Ibid.

<sup>20</sup> Institute for Work & Health, “Report to the Ontario Workers’ Compensation Board of the Evaluation of the Community Clinic Program in the Rehabilitation of Workers with Soft Tissue Injury” (July 1995).

<sup>21</sup> Ibid at p. 27.

<sup>22</sup> Loisel, P. et al, “From Evidence to Community Practice in Work Rehabilitation: The Quebec Experience”, *The Clinical Journal of Pain* 19: 105-112 (2003) at p. 107.

<sup>23</sup> Joan M. Eakin, Judy Clarke and Ellen MacEachen, “Return to Work in Small Workplaces: Sociological Perspective on Workplace Experience with Ontario’s ‘Early and Safe’ Strategy”, *Report on Research Funded by the*

We appreciate that small businesses may require increased assistance from the WSIB/WCB in the return to work process (19-02-03, p. 2). However, WSIB/WCB assistance and intervention with small businesses will only be positive if it also recognizes the unique barriers facing workers in small workplaces.

There is already a “protection gap” whereby employers receive additional WSIB support unavailable to injured workers, such as employer account managers and customer service representatives. The WSIB should not create any more disparities by giving increased consideration and sensitivity to employers without also responding to the needs of injured workers.

### **Sustainability of Work**

We are concerned about the removal of the “remunerated” and “sustainable” requirements from the definition of suitable work. The removal of “sustainability” from the definition of suitable work means that work that is not sustainable may be considered suitable by the WSIB/WCB. The guidelines now found at p. 11 of draft policy 19-02-02 are discretionary. They only require the WSIB/WCB to “consider” whether the work the worker is currently performing is sustainable. If the work is not sustainable, the WSIB/WCB “will discuss with the workplace parties whether to provide a labour market re-entry (LMR) assessment”. Sustainability of accommodated or modified work has to be a mandatory criterion. Otherwise, workers are left in the precarious situation of being at the mercy of the employer to continue to employ them in the modified position. If the job is no longer available, they will be hard-pressed to find a new employer willing to supply similar accommodations.

**In order to facilitate an efficient return to suitable sustainable work, the ESRTW policies should require the employer to state in writing whether the modified position is temporary or permanent.** This commitment should be required at the time of the worker’s maximum medical recovery (MMR). If the modified job is only temporary, then the WSIB must consider a Labour Market Re-entry Assessment. In our experience, once an LMR Plan is about to be proposed to the injured worker, it is not unusual for the WSIB to telephone the employer to advise of the cost of LMR program for the claim because the worker was not returned to the accident employer. That is followed by an immediate reversal by the employer where a hasty modified job is invented to offer the injured worker. The worker is pulled out of the LMR stream and often returned to inappropriate work. If an employer did not provide sustainable modified work and makes an offer of modified work after a referral to LMR, the injured worker should have the choice of continuing with the LMR process and the injured worker should be advised that if he chooses to try the modified work and it is not suitable, he can return to the LMR process.

In addition, as outlined in our previous submissions, the return to the concept of a sustainability award/benefit would be of assistance. With the sustainability LOE award, a worker could accept

an offer of modified work with confidence of some protection if the modified work is no longer available.

### **Elimination of Long-Term vs. Short-Term Return to Work**

We are concerned about the removal of the distinction between short-term and long-term work. Our particular concern is that there is now no time period at which the Board needs to consider the sustainability of the return to work. The policy on “sustained return to work” provides no guidelines to the workplace parties or Board decision-makers about when sustainability of work is considered. This could lead to situations where workers are engaged in unsustainable work for an extended period of time. In addition to being psychologically harmful, extended employment in unsustainable “dead-end” jobs can undermine workers’ employability in the general labour market. If employers are unable to offer suitable and sustainable work, the Board should offer LMR services in an expedient fashion. The distinction between short-term and long-term work was useful for this reason and should be restored.

### **Psychosocial Safety**

The proposed interpretation of “safe” work in the draft policies is unreasonably narrow. The new policies clarify the need for suitable work to be consistent with workers’ “physical/functional” limitations or restrictions (19-02-02, p. 3). However, the policies ignore the fact that “safety” is not properly defined solely in terms of physical safety. A safe return to work is safe both in terms of physical and social security. The Board has already recognized the impact of psychological barriers in return to work. In its Best Approaches Guide on “Recognizing Time to Heal – Assessing Timely and Safe Return to Work”, there is discussion of psychological barriers such as those arising where workers feel that the employer did not take every precaution to reduce risk of injuries, or where the accident was traumatic for the worker. These factors need to be incorporated into the definition of suitable work in the ESRTW policies.

In addition, a particular psychosocial challenge is where an injured worker’s return to work disadvantages other workers or supervisors. As noted by researchers:

“ . . . our study suggests that ‘safety’ might be framed in broader terms to incorporate its psychosocial dimensions. **‘Safe’ RTW should include both physical and social security, and would be alert to the ways in which modified work and early return can be hazardous in psychosocial terms. In some contrast to the belief that early return to work is of psychological benefit to workers and might hasten recovery, our findings reveal the possibility of less salubrious outcomes, such as alienation between injured workers and their co-workers and employers.**”<sup>24</sup>

The Institute for Work & Health states that:

“3. *RTW planners ensure that the plan supports the returning worker without disadvantaging co-workers and supervisors.*

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<sup>24</sup> Eakin et al, supra note 3 at p. 45.

Return to work planning is more than matching the injured worker's physical restrictions to a job accommodation. Planning must acknowledge RTW as a 'socially fragile process' where co-workers and supervisors may be thrust into new relationships and routines (4, 8, 22). The qualitative component of the IWH review (9)(21) indicated that if others are disadvantaged by the RTW plan, this can lead to resentment towards the returning worker, rather than cooperation with the RTW process."<sup>25</sup>

If psychosocial factors such as displacement or disadvantaging of other people in the workplace are not considered, workers face psychological hazards. Return to work in such an environment is not safe. The definition of "safe" work has to include psychological and psychosocial safety.

### **Recognition of Vocational Suitability and Comparability**

In addition to recognizing the suitability of work in terms of psychosocial safety, vocational suitability and personal characteristics must be part of the definition of suitable work.

Although the 2005 draft ESRTW policies also failed to address vocational suitability, they did include some recognition that comparability of work needs to address vocational characteristics. As in the current *Operational Policy Manual* Document 19-04-05, the 2005 draft policies set out factors to consider in determining whether work is comparable in nature and earnings to the pre-injury job.<sup>26</sup> In addition, the Best Approaches Guide on "Recognizing Time to Heal – Assessing Timely and Safe Return to Work," details the importance of vocational and psychological capacity to ensure that the job offered by the employer is suitable in that it is within the worker's physical and/or psychological and vocational capacity to perform.<sup>27</sup>

Workers often face offers of modified work which are completely unsuitable in light of their vocational abilities and previous positions. It can be humiliating and psychologically harmful for workers to be forced to work in positions which are inappropriate for their vocational characteristics. For example, a male truck driver may be given light work in a female-dominated office where he feels socially and physically ill at ease. Such social aspects of modified work can lead to the success or failure of a modified work arrangement.<sup>28</sup> As stated by the Institute for Work & Health based on the most current research in the field:

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<sup>25</sup> Institute for Work & Health, "Seven 'Principles' for Successful Return to Work", Toronto (October 2006), [http://www.iwh.on.ca/products/other\\_pap.php](http://www.iwh.on.ca/products/other_pap.php).

<sup>26</sup> These factors included the duties to be performed, skills, qualifications and experience required, level of responsibility and supervision of other workers, rights and privileges associated with the position, working conditions, hours of work, right to work overtime, and opportunities for advancement and promotion (19-02-02, p. 4)

<sup>27</sup> The Best Approaches Guide states that "The decision-maker must be convinced on a balance of probabilities that: a) the job or duties offered by the employer is/are suitable in that they are within the worker's physical and/or psychological and vocational capacity to perform and will not pose a safety risk to worker or others or impede the worker's recovery".

<sup>28</sup> Larsson, A. & Gard, G. (2003), "How Can the Rehabilitative Planning Process at the Workplace Be Improved?: A Qualitative Study from Employers' Perspective, *Journal of Occupational Rehabilitation*, 13, 169-182.

“An awkward fit of the worker with a modified work environment can contribute to breakdown of the RTW process (7,8,17), and should be avoided. In a recently published guide for employers (28), the Montreal Public Health Department states that where possible, it’s ideal to return a worker to their own work area where the environment, people and practices are familiar.”<sup>29</sup>

We recommend that the factors outlined in the 2005 draft policies (and the existing ESRTW policies) relating to the comparability of modified work be restored. In addition, the definition of suitable in the ESRTW policies should clarify that work must be suitable for workers’ vocational and personal characteristics.

### **Therapeutic Return to Work**

The definition of “suitable” work has to include the criterion that return to work before the worker reaches maximum medical recovery must be therapeutic. The concept of a therapeutic return to work makes it clear that the central focus of an early and safe return to work is the recovery of the injured worker. If a return to modified work will genuinely assist in the worker’s recovery, it can be encouraged. However, as outlined above, research shows that return to work before full recovery requires a thorough and individualized rehabilitation program and must be approached with considerable caution due to the likelihood of further injury.

### **Mediation**

The current draft ESRTW policies state that:

“If the WSIB has been unsuccessful in negotiating a return to work, and the return to work dispute between the workplace parties persists, the WSIB **may** offer mediation services . . .” (emphasis added) (19-02-03, p. 3).

The *Workplace Safety & Insurance Act*, 1997 (“WSIA”), states that:

40 . . .

- (6) The employer or the worker shall notify the Board of any difficulty or dispute concerning their co-operation with each other in the worker’s early and safe return to work.
- (7) The Board **shall attempt to resolve the dispute through mediation** and, if mediation is not successful, shall decide the matter within 60 days after receiving the notice or within such longer period as the Board may determine.

The proposed policy conflicts with the Board’s statutory obligations to offer mediation in all disputes around early and safe return to work. The “may” which has been added to the current draft policies must be removed.

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<sup>29</sup> Institute for Work & Health, Toronto (October 2006), [http://www.iwh.on.ca/products/other\\_pap.php](http://www.iwh.on.ca/products/other_pap.php) at p. 2.

There are good reasons why mediation must be offered by the Board around all disputes in the ESRTW process. Injured workers, especially those who are non-unionized, have significantly less power and fewer resources than employers. While the Board is supposed to provide mediation services every time a dispute arises, in practice conflicts are not addressed until it is too late to resolve them. Researchers have commented that, while the Board has mediation services available, “In practice, however, it appears, at least in our data, that this may only happen when conflict is full-blown and largely intractable.”<sup>30</sup>

Secondly, we disagree with the policy that mediation is voluntary and has to be agreed to by both parties (19-02-03, p. 3). The WSIA states that the Board **shall** attempt to resolve disputes by mediation and, if mediation is unsuccessful, will decide the matter. **The WSIA requires that mediation occur, not merely that it be offered. Mediation must be conducted before the Board issues a decision in a dispute around early and safe return to work.** Mandatory mediation has been employed in a number of other legal contexts, such as in civil litigation and some family law disputes. In the return to work process, mandatory mediation makes sense because of the significant power imbalance between workers and employers. Mediation is often the only power available to workers, and employers should not have the ability to remove themselves from this process without any valid reasons.

Finally, the policy on mediation needs to specify that mediation is a resource available to all parties without penalty. It must be clear that, if workers have concerns about the return to work process including suitability of the offered work, they can request mediation and will receive loss of earnings benefits during the mediation process. The employer should not be penalized either through any experience rating adjustments.

#### Definition of ‘Work’

The current draft policies repeatedly use the language of “tasks” in relation to the nature of suitable and available work. Draft Policy 19-02-02, pp. 2-3, states that the “general type of work *tasks* that can be expected to provide an objective benefit to the employer’s business include, but are not limited to, *tasks* that form . . .”. Similarly, later in the policy the term “work” is defined as including “combining of *tasks*/duties which together constitute a temporary or permanent job . . .” (p. 7). The language of “tasks” is suggestive of the type of make-work jobs which the ESRTW policies should discourage. The policies should simply use the statutory language of “work”, as was used in the 2005 draft policies.

#### **Employers' Obligations to Accommodate and *Human Rights Code* Obligations**

We must re-iterate that there are no legitimate grounds to impose a reduced obligation to accommodate on employers who are not subject to re-employment obligations (Policy 19-02-07, pp. 4-5, 19-02-02, pp. 7-8). All employers are subject to obligations under the *Human Rights Code* to accommodate to the point of undue hardship. The current draft policies state that employers not subject to re-employment obligations only have to accommodate by making “reasonable efforts” rather than accommodating to the point of undue hardship. These policies do not accurately describe employers’ legal obligations to accommodate.

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<sup>30</sup> Eakin et al, supra note 1 at p. 47.

## **Post-Injury Non-Work-Related Accidents**

The current draft policies take a significant step backwards in recognizing the obligations on the Board and employers to accommodate injured workers in their return to work. The policies suggest that post-accident non-work-related injuries do not have to be accommodated in selecting SEB options, determining LMR entitlement or preparing an LMR plan. Draft policy 19-02-07 states that “the WSIB **may** provide accommodation support [regarding post-injury non-work related disabilities/impairments]” (p. 4). The requirement to accommodate disabilities in provisions of services and employment is not discretionary. Wage loss benefits may be adjusted in appropriate cases where, but for the post-injury non-work-related disability, the worker could have returned to the pre-injury job or suitable work. However, the *Human Rights Code* requires that post-accident disabilities *must* be accommodated in the provision of LMR services and the determination of SEB options, whether work-related or not.

## **Role of Treating Health Professional**

We must repeat that it is unacceptable to require physicians to re-assess the use of prescription medications in order for workers to return to work more quickly (19-02-02, p. 5). The WSIB/WCB cannot expect a worker’s medical care to be compromised in order to facilitate a quicker return to work. Encouraging physicians to increase or decrease medications in order to facilitate a quicker return to work can have devastating effects. Researchers at the Institute for Work & Health have noted that hurt can become harm where workers with severe pain attempt compliance with RTW plans, use excessive pain medication and may get addicted and re-injured.<sup>31</sup>

While we welcome the suggestion that health professionals be provided with information about the cognitive demands of a proposed job, the employer should not contact a worker’s physician directly (19-02-02, p. 5). Employers should provide full job descriptions including physical and cognitive requirements to workers, who can show these to their physicians. The only exception to the rule that there should not be contact between the employer and the health professional is where the worker specifically requests such contact and is present during the actual contact.

## **Resolving Disputes About Suitable Work**

We appreciate that the current draft policies remove the possibility of benefit-related debts in the case of disputes over suitable work. In addition, we continue to agree with the position that a refusal of suitable should not engage co-operation policies.

We strongly disagree with some aspects of the policy on resolving disputes over suitable work. The 2005 draft policies set out a number of specific criteria before retroactive benefits could be considered. We were already very concerned about any provision for collective of retroactive

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<sup>31</sup> Ellen MacEachen, Agneiska Kosny, Sue Ferrier, Lori Chambers, “The ‘hurt versus harm’ approach in return to work: a social reconceptualisation using injured worker experience”, Presenting Work Disability: A Symposium to Promote Concerted Action, Montreal, October 23, 2006.

benefits where workers were simply trying to avoid performing work they considered unsuitable and/or unsafe. The current draft policy, however, is much more worrisome. The current draft policy 19-02-05, pp. 2-3, states that wage loss benefits are “generally” adjusted as of the date of the worker’s next shift, but also suggests that benefits can be collected retroactively where “return to work arrangements were unreasonably hindered by one workplace party or the other (e.g. a worker was in a position to accept a job on the day it was offered and his or her concerns about suitability proved not to be reasonable)”. This policy essentially means that retroactive penalties can be assessed whenever a worker refuses work the Board later assesses to be suitable. This is ridiculous. It penalizes workers for asserting their legal right to refuse unsafe work.

**The provisions on resolving disputes around suitable work also need to introduce provisions mirroring the notice provisions in draft policy 19-02-06. Workers’ benefits should not be reduced or terminated based on refusal of suitable work until written notice is provided in all cases. It is illogical and unfair to provide fewer procedural protections for a disagreement about the suitability of a job than for non-cooperation.**

### Co-operation Obligations

The proposed Policy 19-02-02 requires workers and employers to respond to written or telephone contacts from the Board or the other party within a reasonable time. This is a reasonable and fair requirement. However, the draft policy also requires workers and employers to be available to communicate with the Board and each other during regular work hours. This requirement is unnecessary. Workers may need to be at medical appointments or may need to rest or exercise during work hours. It is sufficient to require workers to respond to contact within a reasonable time.

We appreciate the addition to draft policy 19-02-02 that, "The frequency and method of communication between the employer and the worker will depend to some degree on the nature of the work-related injury/disease and on the nature of the employer's business" (p. 6). This is a good addition and takes some steps towards recognizing that the nature of contact may need to vary where, for example, the worker's injury is severe and there is no reasonable prospect of an imminent return to work.

However, this section of the draft policies should also include the necessity for contact by the employer to be considerate. The Institute for Work & Health has outlined that a successful return to work requires "early and considerate contact" with ill/injured workers.<sup>32</sup> Contact

<sup>32</sup> Institute for Work & Health, “Seven Principles for Successful Return to Work”, Toronto (October 2006), [http://www.iwh.on.ca/products/other\\_pap.php](http://www.iwh.on.ca/products/other_pap.php):

**“Principle 5** *The employer makes an early and considerate contact with injured/ill workers.*

#### **Principle 5 Background**

The Franche et al systematic review (9,10) states that ‘early’ contact is a core component of most disability management programs, and thus associated with better RTW results. Contact ‘within the first week or two’ should be seen as a guideline only, as the actual time-frame may vary depending on the worker’s specific situation. Ideally the contact is made by the immediate supervisor as this helps the worker to feel connected to his/her workplace and colleagues. Pransky(21)

should signify that the employer cares about the worker's well-being and should not involve issues around injury causation or blame.<sup>33</sup> In addition, the draft policies should specify that, in some cases, contact will not be appropriate because the work is engaged in rehabilitation and requires time to heal.

### **Legitimate Reasons for Non-Cooperation**

Proposed Policy 19-02-06 sets out legitimate reasons for workers' non-cooperation (p. 2). The current draft policy removes the recognition that post-accident, non-work-related injuries, diseases or conditions can be legitimate reasons for non-cooperation. This is unreasonable. Obviously, a worker who becomes unable to continue with the return to work process because of a new injury is not failing to co-operate. While it may be appropriate to adjust wage loss benefits where the worker would otherwise have been able to return to work, it is unfair to label that "non-cooperation".

In addition, proposed policy 19-02-06 stated that, even if a worker has a legitimate reason for not cooperating, "his or her wage loss benefits may be adjusted if the employer has offered suitable work and the subsequent wage loss is no longer **solely** related to the work-related injury/disease" (p. 2). Obviously, if an inability to work is only related to non-work-related disabilities or other factors, wage loss benefits can be adjusted until that is no longer the case. However, it is wrong that the wage loss has to be solely related to the work-related injury/disease. It is a well-recognized principle of tort and workers' compensation law that only a significant contribution to loss is required for compensation to be mandated.

### **Ensuring Workplace Parties' Co-operation Obligations (19-02-06)**

Please refer to our previous submissions around the danger of punitive approaches to ESRTW and the need to remove or limit the improper motives created by the experience rating scheme. Not only are many injured workers unfamiliar with their rights and obligations, they also encounter further stress from their employers and co-workers. They are often faced with questions from other workplace parties about the legitimacy of their injury, their pain and their need for modified work. One injured worker told us: "I tried my best as have always done...I was one of the hardest, fastest workers. After I got hurt, I couldn't keep up. My supervisor said, 'Work faster!' I tried so hard, but I couldn't. So they fired me. They said I was uncooperative. The Board believed them."

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maintains that the contact should signify that the employer cares about the worker's well-being, and should not involve issues such as discussing injury causation or blame. Also, if the worker feels that the contact is a reflection of the employer's concern about finances and not about his/her health this can poison the RTW process. Finally, the worker's general perception about their workplace and its concern for workers (3,7,8,12,24,27) will influence how he/she responds to employer contact. The qualitative component of the systematic review (21) indicates that in general, early contact is most successful when it builds on a workplace environment characterized by a shared sense of goodwill and confidence (4,8,16,21,24)."

<sup>33</sup> Pransky, F. Challenges in Return to Work Research: From concepts to outcomes. 2005. Plenary presented at the Institute for Work & Health, Toronto. 4-15-0005.

We appreciate the extension of time before the imposition of penalties, but a further extension is needed. To allow time for parties to receive WSIB/WCB correspondence and modify their actions if necessary, no penalty should be levied until at least 10 days after the written notice is mailed.

### **III. Conclusions**

IWC appreciates that the WSIB/WCB is attempting to move away from the model of complete self-reliance evident in the current early and safe return to work policies.

However, we are very concerned that the revised ESRTW policies still do not acknowledge the body of research that challenges the simplistic assumption that the earliest return to work is the best outcome. ‘Pop psychology’ concepts like ‘hurt versus harm’ are proving dangerous for injured workers. Workers subject to the ESRTW process are experiencing re-injury, chronic injury, poverty, and mental health problems.<sup>34</sup>

Return to work before full recovery may be one component of a multidisciplinary therapeutic return to work program for injured workers. However, most Ontario workers don’t live in an ideal world with welcoming, harassment-free workplaces, full union support, ample medical and rehabilitation resources, and employer counselling and support. Where adverse conditions exist in workplaces - such as resentment, skepticism, lack of goodwill or inadequate resources or knowledge – the burden of the failure of ESRTW cannot continue to fall on workers.

Research shows that without a detailed rehabilitation plan involving appropriate workplace modifications and the support of a multidisciplinary team of experts guiding the process, return to work can be extremely dangerous. The WSIB/WCB is responsible for the well being of the injured worker from the time of injury throughout the return to work process. WSIB/WCB statistics confirm that a very significant proportion of lost time claims every year result from inappropriate return to work activities, making this group of injured workers in significant need of greater protection. Injured workers have questioned the WSIB/WCB’s ability to achieve its vision of eliminating all workplace injuries. But far too many workplace injuries take place during the return to work process, under the ‘watch’ of the WSIB/WCB. The safety of the injured worker must be a higher priority in the return to work process than it has been to date. The dignity of injured workers is being undermined. This is the antithesis of the historic bargain in which injured workers gave up their right to sue in exchange for fair and dignified compensation.

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<sup>34</sup> Ellen MacEachen, Agneiska Kosny, Sue Ferrier, Lori Chambers, “The ‘hurt versus harm’ approach in return to work: a social reconceptualisation using injured worker experience”, Presenting Work Disability: A Symposium to Promote Concerted Action, Montreal, October 23, 2006.