

WSIB Interim Work Reintegration Policy Consultation

Submissions of Injured Workers' Consultants Community Legal Clinic

February 15, 2011

Introduction

Injured Workers' Consultants is a community legal clinic assisting injured workers free of charge since 1969. With over forty years of experience serving injured workers, we have seen many changes to vocational rehabilitation over the years. We recognize how central this topic is to the success of the workers' compensation system as a whole and its fundamental goal of rehabilitating workers and placing them, to the extent possible, back in the position they would have been in but for the workplace injury.

We are greatly concerned with many elements of the new Work Reintegration policies. We feel that although the Board has taken a small step forward with some aspects of the program, such as increased choice and better quality education, it has also taken several giant steps back. Deeming and Experience Rating are at the forefront of our concern. As we are sure you are aware, injured workers have been calling for an end to deeming and experience rating, the two most detrimental elements of the compensation system, for years. In 2007, the Ontario Legislature passed Bill 187 with the explicit purpose of ending deeming. It is most concerning to see that rather than eliminating deeming and experience rating, these new interim policies manage to expand both.

In this submission, we will start by documenting our overarching concerns with the new policies as a whole and the new WR program in general. This will be followed by a more detailed discussion of each of the policies. We realize that many policies have been revised with the new work reintegration program, but we have limited our comments to only the work reintegration policies themselves.

Call for Public Review following Inadequate Consultation

The Board chose to reveal the new policies only days before they were set to take effect, leaving no time for public consultation. This is a departure from the traditional method of undertaking public consultation prior to the policy coming into force. Considering this lack of initial consultation, and considering the significance of these policies, we request a public review of the policies' implementation in the near future.

Prior Consultation limited

Although the Board has undertaken some limited consultations, we were not provided with any opportunity to comment on the policies themselves in that process. We realize that the team that drafted the policies worked very hard and may not take kindly to the notion that the consultation was limited. There was the KPMG Value for Money Audit, the Board's internal review of LMR, and the Work Reintegration Engagement of External Stakeholders Report completed before the policy was released. Yet not the kind of open consultation, like the Minna-Majesky Task Force, or the recently developed Funding Review, where our community is informed about a review and its terms of reference, public hearings are held, and there is an opportunity to respond to the findings at the end, before policy implementation.

Hiring a private firm, like KPMG, with a “management bias” and looking at “value for money” for its client, the WSIB, rather than value for money for injured workers, is not an “independent” review by any means. Instead of inviting people for comments, people had to “find” KPMG. Few injured workers spoke to its reviewer, and many more injured workers’ would have if they had only known. KPMG’s suggestion that benefits should be reduced in order to get injured workers back to work (after Bill 99 had already done so for the same spurious reason) sums up its feelings for one of the most disadvantaged groups of Ontario. It was not difficult to agree that the old LMR system was broken. KPMG’s solutions, however, did not reflect what injured workers have demanded for years: return to work should not be the only basket of eggs, and should not mean less rehabilitation and more “deeming” of injured workers to non-existing jobs. KPMG did not listen.

Few people remember that it was the 1997 KPMG report that gave then Chair Glen Wright the green light to privatize LMR services. In 2009, like a shifting wind, it recommended the opposite. One would have expected some contrition, or self-criticism, from an organisation that had been part of the problem, so to speak. We encourage the Board to take the new recommendations with a healthy scepticism. History tells us that KPMG or other private firms tend to tell the Board what it wants to hear. We urge a swift return to public inquiries being done by the public sector, as we do not trust KPMG to have the injured workers interests at heart. Ultimately, a privatized inquiry processes does not help a public workers’ compensation system.

The work reintegration policies, already in effect, contain several new points that were not debated or responded to by the workplace parties or members of the public. These include measures that increase deeming, like the “relocation” policy, and the buyout of workers age 55 or older which are new and very controversial. The Board should have consulted on these policy changes before they were implemented. As experience shows, “interim policies” have a way of becoming de-facto permanent. The danger is that time pressures end up meaning real consultation never happens. We urge that at least, there will be a robust public review of the system within a year of the implementation.

While Judy Geary, Slavica Todorovic and their hard-working team review our submissions, please be aware of our general point of view. The injured worker community has 4 key demands: full cost of living adjustments, but this year, the Government only granted a paltry 0.5%; no “deeming”, which the new WR policy expands, and the twisting of Bill 187’s amendment of “determining” back into deeming; no experience rating, but we see it also expanded; and universal coverage, which has not received any attention recently, and is not even mentioned in the Arthurs’ Funding Review. Since 2009 and the renewed concern about the “unfunded liability”, injured workers have been losing ground. Injured workers, in general, are in a very difficult position.

Having said this, we have spent a lot of time reviewing your interim policies on work reintegration. We have done so independently and via many consultations with injured

workers. Despite our dispirited feelings about what is happening to injured workers, we hope our critique will be read fairly and will find you willing to listen and implement the changes we are proposing. We are particularly interested in receiving a fuller picture of what is happening on the ground, and want to discuss the idea and method of a public review process once enough information is collected.

WSIB Needs a Comprehensive Plan for Workers who went through failed LMR programs

The one thing that everyone has agreed to is that the outgoing labour market re-entry program was, to speak bluntly, a failure. The program's many flaws have been recounted in the KPMG audit report, in *Toronto Star* articles, and in the stories of many of the injured workers we serve. They won't be repeated here. The Board has acknowledged these flaws and the need for reform in its background documents on the new WR program. By the Board's own statistics, less than one quarter of workers (23%) were employed following LMR.¹ The KPMG value for money audit report reported that only 50% of workers were employed at 18 months post LMR closure.² That means that half of workers after LMR were not employed.

Given that the WSIB has acknowledged the failure of the LMR program, it is incumbent on the Board to make provisions for those workers who went through poor quality retraining and were then deemed to be earnings wages at unattainable (unavailable) jobs. This is particularly important for those workers who received training in non-accredited programs. If these workers were inadequately prepared to compete for suitable jobs, then these jobs were not actually available, as the legislation dictates. These workers are still entitled to loss of earnings benefits, and perhaps new work reintegration plans.

We suggest that all injured workers who went through LMR via an unaccredited educational program be contacted to determine if they are employed in suitable work with earnings restored to the expected level. If not, they are entitled to LOE for the full amount of their wage loss and the offer of a new LMR (WT) plan.

UFL Concerns Obscuring the Proper Goal of Vocational Rehabilitation

With recent events, including the release of the Auditor General's report, the Arthurs Funding Review, and the passage of Bill 135, it is obvious that the Board is concerned with its unfunded liability and has become preoccupied with reducing costs at every level and at every opportunity. Unfortunately, we can see this preoccupation with cost reduction has extended to the new work reintegration program. Cost savings have been built into the program in a variety of ways – through the expansion of deeming with deemed relocations, and more deemed wage increases; through arbitrary and harmful

¹ From "Work Reintegration Program: Questions and Answers" on the WSIB website (since removed).

² KPMG. WSIB Labour Market Re-entry (LMR) Program Value for Money Audit Report, December 3, 2009, pg.23

time limits on retraining and other aspects of work transition; cost saving “choices” for those over age 55 (which is actually a major cut in entitlement); and even by paring down travel expenses. Furthermore, the WR model has been designed to keep as many workers as possible at work with the accident employer and out of retraining. This will be a good solution for many workers; however it will be a harmful solution for many others. It is not appropriate to have such focus on the accident employer.

We fear that this heightened concern with costs has obscured the true purpose of reforming labour market re-entry: to get injured workers back to safe and sustainable employment. In reading our suggestions for amendments that follow, we ask that this goal be kept in mind: returning workers to safe and sustainable employment, and when that’s not possible, providing benefits.

Disconnect between Stated WR Objectives and the Policies

We are concerned that many of the good objectives of the new WR model have not been translated into the policies. The program overview and presentations on the new model from Judy Geary have highlighted more worker input, choice, and pathways in retraining and improved quality programs – which sound great. The policies, however, are now more general, shorter, and are, in some instances (such as program time limits), highly restrictive. The 5 interim policies have replaced 13 policies, deleted 17 other policies and revised another 3.

We are fearful that although in theory, there will be more options and better choices for injured workers, this will not necessarily occur in practice. We know from experience that decision makers at the claims level are not inclined to exercise broad discretion and frequently interpret Board policy very narrowly and prioritize cost considerations over worker interests. As such, you will see that many of our comments and proposed amendments seek to instill more detail and clarity.

Policy 19-02-01 Work Reintegration Principles, Concepts and Definitions

The document begins with a list of “General guiding principles” that purportedly underpin the legislation and policy. We strongly support the emphasis on maintaining workers’ dignity and productivity in return to work. We are equally supportive of the final principle listed, that workers should be offered high quality and practical programs, and that workers must be provided with meaningful input and choice in program selection.

Include Adequate Time to Heal

The continued focus on “early” return to work and “active recovery in the workplace” is detrimental and misguided. A return to work must also be safe, and we know that focusing on getting injured workers back to work too quickly often comes at the cost of

safety. The perils of returning to work too early have been well documented.³ Research has shown that forcing workers back to work too soon increases the likelihood of re-injury, and can lead to further problems such as chronic illness, mental health problems, and addiction to prescription drugs.⁴ Workers need adequate time to heal. Returning to work too early hinders rehabilitation and recovery. We recommend adding language to provide for clear time to heal and safety in return to work.

Recognizing the Employment Situation of persons with Disabilities

Any successful return to work program will need to recognize and address the difficulties that injured workers, as persons with disabilities, often face in securing and maintaining employment.⁵ There is no such recognition in these guiding principles. It is important to include the clear recognition that employers are reluctant to hire and/or maintain the employment of injured workers.

Respect for Treating Doctor Opinions

One of the “specific working principles” listed in the policy focuses on integration of effort and co-operation of the parties, treating health professional, and the WSIB. Treating health professionals are the most familiar with the workers they treat and all aspects of their health, and thus are in the best position to determine whether a worker is fit and ready to work and what his/her restrictions should be. The treating doctor is not just another party who must cooperate; the treating doctor’s opinion needs to be the final word on return to work, and this should be outlined in the policy. This comment applies equally to the “Health Recovery Support” portion of the policy.

Additionally, utmost care must be taken not to breach the doctor-patient relationship and confidentiality. To do otherwise could be injurious to the patient.

Stay at Work Process

The concept of a “stay at work process” is, in theory, a good idea for many injured workers. It is not clear, though what the Board’s involvement will be in this process (that is, what services and assistance will be offered to the parties), or how this involvement will be triggered. This should be clarified. The current wording of the policy suggests that the stay at work process operates independent of the Board and solely with the goal of returning the worker to the pre-injury job or wage; this is simply not useful. There is

³ See for example: Eakin, Joan, Clarke, Judy & MacEachen, Ellen (2002). Return to work in small workplaces: Sociological perspective on workplace experience with Ontario’s “early and safe” strategy.” *Institute of Work & Health*, 1-12, or MacEachen et al, *Infra*.

⁴ MacEachen, Ellen, Ferrier, Sue, Kosny, Agnieszka and Chambers, Lori (2007). A deliberation on “hurt versus harm” logic in early return-to-work policy. *Policy and Practice in Health and Safety*, (05)2, 75-96

⁵ Heath, Bonita. (April 28, 2010). "Benefits versus Rights: A False Dichotomy in the Political Economy of Disability?" Paper presented at the International conference on income redistribution. Reassessing the Nordic Welfare Model, Asker Norway.

nothing in the policies to protect the injured worker from an injurious situation of an employer seeking to avoid a surcharge under experience rating, and the Board turning a blind eye due to its own desire to reduce costs. Strong protection needs to be included.

The same comments apply to the section on “Stay at work cases”. There is no indication in the policy of how or when the Board’s “review” of these cases will be triggered.

We also have grave concerns with the cooperation requirements and penalties, which will discuss in further detail in our review of Policy 19-02-02.

Need for a More Holistic Approach in Determining Suitability

The policy continues to use functional abilities (or functional capacity) as the measure of suitability. This approach is simply narrow. We recommend looking beyond just functional capacity and examining whether the job is suitable for the whole person. This would take into account factors such as pain and psychological barriers, which may require further accommodations. A recent study of the health of compensation claimants highlighted the negative mental health consequences they frequently experience.⁶ Mental health and pain can significantly affect a worker’s ability to sustain a job, even if it is functionally suitable.

A more holistic approach will also look beyond the worker to the broader workplace. Workplace culture and the work environment can be determinative of return to work success, even when a job, viewed narrowly, appears suited to a worker’s functional abilities. The importance of workplace factors has been recognized in research from the Institute of Work & Health:

Return to work planning is more than just matching the injured worker’s physical restrictions to a job accommodation. Planning must acknowledge return to work as a ‘socially fragile process’ where co-workers and supervisors may be thrust into new relationships and routines. If others are disadvantaged by the RTW plan, this can lead to resentment towards the returning worker, rather than cooperation with the RTW process.⁷

The paper goes on to cite to examples of situations where disadvantage to others can create resentment: where co-workers have to take over some of the injured worker’s work and then perceive the injured worker as having an easier job; and supervisors who are required to fulfill production quotas despite having to accommodate an injured worker.⁸ Suitability needs to be viewed broadly to address all of these factors.

We are also concerned about the note included in the policy stating that ‘work’ can include combining tasks to make new jobs. This may tempt employers create (make believe) jobs, many of which, will inevitably take lighter tasks away from co-workers.

⁶ Lippel, Katherine. (2007). Workers describe the effect of the workers’ compensation process on their health: A Quebec study. *International Journal of Law and Psychiatry*, 30, 427-443.

⁷ Institute for Work & Health (March 2007) Seven ‘Principles’ for Successful Return to Work. *Institute for Work & Health*.

⁸ *Ibid.*

This carries the risk of creating toxic workplaces, as identified in the research cited above. This also carries the additional risk of injury to co-workers, who now have heavier jobs.

Remove Time Limits

The time limits noted in the policy could be problematic for workers who are still healing, who are in treatment, or awaiting surgery. The policy notes that the Board meets with the parties no later than 12 weeks after the injury if return to work has been unsuccessful, and WT assessments must be provided 6-9 months and absolutely no later than 12 months. We fear that with these time limits, workers could be forced into work plans before their conditions have stabilized and the full extent of their impairments is known. The worker's condition should be the guiding factor, not the timing.

Add Sustainability to the Hierarchy

Sustainability need to be included in the return to work hierarchy. A job with the accident employer that restores a worker's earnings but is not be sustainable in the long term will not be the best option. This should be recognized in the hierarchy.

Attach Accommodation Assistance to the Worker, when Possible

Accommodation assistance is listed as one of the available RTW support services, if an employer qualifies. We suggest that whenever possible, these services should attach to the worker rather than the employer. This could provide the worker with a bit more flexibility (choice) to seek and/or change employers. For instance, if the Board pays for specialized computer equipment for a vision impaired worker, the worker should be able to take that equipment with her if she switches to a new company.

Definitions Required

These terms appear in the policy and require definitions: cooperation, case management, intensive services, and comparable worksite. We will revisit cooperation in our discussion of Policy 19-02-02.

Revised Definitions Required

Suitable work: we suggest removing restoration of pre-injury earnings from this definition. Restoration of earnings is a completely separate factor and should be addressed as such. We further suggest amending the definition to include sustainability and recognition of the broader workplace factors that can affect suitability, as previously discussed.

Productive work is also included in this definition, which we applaud. We do, however, recommend defining productive work. What circumstances are necessary for work to be considered productive? Take for example, the worker who was given the job of feeding

papers a few at a time into a shredder, a job strongly suspected of being simply a make-work position arranged to protect the employer's experience rating. Is this considered productive work?

“Sustainable work in the labour market” is defined as work that has average or good employment prospects in the general labour market. This is too general and fails to recognize the unique needs of persons with disabilities and the struggles they face in the labour market. Instead, the work should be sustainable for the worker.

“Available as it relates to the labour market”: As it now reads, this definition continues deeming which we cannot condone. In fact, this definition actually expands deeming by now allowing a worker to be deemed employed as long as a job is available somewhere in Ontario. We strongly suggest that available be defined as an actual job offer.

Defining available as an actual offer of employment is consistent with Professor Paul Weiler's recommendation:

The Workers' Compensation Board should be empowered to determine whether the disabled worker is capable of doing suitable work, whether that work is available to him, and whether he had refused to take such a job. If the response to these questions is positive, the Board will *deem* that the worker had earned the income payable in this job for purposes of calculating the actual wages loss from his injury. Such a judgment by the Board would require a tangible indication that suitable work was in fact available to this worker, presumably through evidence that the employer, the Board, or some other agency had made a specific job offer to him.⁹

According to Prof. Weiler, then, the Board would have the ability to deem a worker only when there is proof that a job was in fact available to the worker.

Employable: We suggest expanding this list to include more personal characteristics that are known and recognized to affect competitive employability. We recommend that this list include the factors identified by the Federal Court of appeal in *Villani*.¹⁰

Policy 19-02-02 Responsibilities of the Workplace Parties in the RTW Process

Need to Recognize the Power Imbalance between the Parties

One of the main flaws with the new Work Reintegration program in general is that it prioritizes reemployment with the injury employer without any recognition of the power imbalance that exists between the workplace parties. The Board recognized concerns with the power imbalance between workers and employers, particularly in non-unionized and small workplaces in its last consultation on return to work policy in 2007.¹¹ It is

⁹ Paul C. Weiler (November 1980) *Reshaping Workers' Compensation for Ontario*. A report submitted to Robert G. Elgie, MD, Minister of Labour.

¹⁰ *Villani v. Canada (Attorney General)* (C.A.), 2001 FCA 248, [2002] 1 F.C. 130

¹¹ WSIB Benefits and Revenue Policy Branch (August, 2007). Early and Safe Return to Work Policy Consultation Report – Second Round, pg.2.

disappointing to see that this concept continues to be left out of the policy. We strongly suggest that this policy explicitly recognize the disadvantaged position of workers in the return to work process.

Return to work specialists need to be able to recognize and address situations of coercion and abuse. This necessitates having the ability to depart from the return to work hierarchy when it is apparent that return to work with the injury employer is not in a worker's best interests. As a community legal clinic, we frequently assist the most vulnerable injured workers, including new immigrants, those in contingent or part time work, and those who work for non-union, small employers. We have seen many instances where employers, motivated by experience rating and their desire to get rid of injured workers whom they perceive as less productive and therefore less cost effective, have created intolerable work conditions to try to force the injured to quit, offer work designed to be refused, or who have simply fired workers, apparently for reasons not related to their injuries (often after creating paper trails of alleged disciplinary infractions).

We recognize that the Board may intend to address these situations in training, but this is not enough. Vulnerable workers need to be recognized in the policy. In addition to expressly recognizing the special circumstances of vulnerable workers, and permission to depart from the hierarchy when returning to the injury employer is not in the worker's best interests, we recommend the inclusion of a presumption of validity of injured worker complaints in return to work. Considering the power imbalance between the parties, how difficult it can be to get coworkers to speak against the employer, and the risks that a worker assumes in making such complaints, this presumption is warranted. We further recommend adding a statement in the policy that the Board will be attentive to situations of bad faith in return to work by employers who are looking to avoid reemployment and experience rating penalties.

We do support the interim policy's provision addressing situations where a worker has been pressured into resigning. The policy states that when it appears this has happened, the employment obligation continues. This is a good first step. We would like to add that extra care must be taken in examining these cases. It will be difficult for workers to come forward, particularly vulnerable workers, and it may also be difficult to find coworkers who are willing to corroborate a worker's story.

The policy also needs to take the additional step of recognizing situations where there is a quit/fired dynamic. In our experience, in many cases where there is an apparent problem with return to work, the worker is coming late or leaving early due to pain or treatment appointments, or is unable meet production requirements, or stops coming to work because she is simply unable to continue. During progressive discipline these workers may react emotionally to pressures to do the job like everyone else when the employer knows they are injured. The result may be that they are pressured to resign because they are made to feel that they are not able to do the job. But it may also be that they are fired allegedly "for cause" - absenteeism or disobedience to their boss. These equally wrong scenarios should not leave workers blamed for severing their employment. The policy

must be amended to address these situations as well, including recognition of the difficulties that workers will experience in relaying their stories to the Board and providing corroborating evidence.

Definition of Cooperation

The concept of “cooperation” between workplace parties (WPP) is very important, but it generally means different things to the workplace parties, and thus needs to be explicitly defined. The employer, the more powerful party in the employment relationship, tends to define “cooperation” as de-facto “obedience”. Professor Eakin, *et al*, note that

[w]hat constitutes ‘co-operation’ is negotiated socially, through interaction. All aspects of the RTW process such as the timing of initial return, or acceptance of a particular modified job – become part of the negotiation and performance of co-operation, and of course, then, subject to the distribution of power within the workplace.¹²

A worker is hired to do the job as outlined by the employer and under the employer’s terms. In most cases, the worker’s need for the job is much stronger than the employer’s need for that particular worker. It is therefore essential that the Board define “cooperation” in this policy in line with its dictionary definition as working together, in harmony, while recognizing the unequal power relationship between the workplace parties.

Eliminate the Experienced Worker Wage Penalty for “Non-Cooperation”

The interim policy currently states that workers will be penalized by reducing benefits to those of a fully experienced worker after 14 days of “non-cooperation”. We strongly object to this penalty. This represents an escalation of deeming whereby injured workers will now be penalized as if they are fully experienced after only two weeks. Under the old policy, this level of deeming (which we also object to) would only happen at the 72 month mark.

The penalties for the parties are also greatly disproportionate. Would the Board permanently shut down a business for non-cooperation under any circumstances – for the worst behaviour by an employer? For a single infraction with one injured worker? That would be unfair to the employer. Consider, though, the impact of deeming a worker to be fully employed and experienced and cutting off training. This could result in an injured worker never working again and having no benefits, which is essentially the equivalent of shutting down a business.

To make matters worse, there is a double standard in the penalties applied. The employer can break two rules: fail to cooperate in work reintegration, and violation of the reemployment obligation, but receives one penalty. In contrast, the injured worker breaks one rule, fail to cooperate in work reintegration, and is penalized twice – first by being deemed at the earnings rate of a fully experienced worker, potentially in a job he

¹² *Supra* Note 2.

has not been trained in, and second, in cutting off the training to become employed in that job. The result is that the injured worker is plunged into poverty.

We request that the policy be amended to eliminate the escalation of deemed earnings to those of an experienced worker.

Add Provisions for Parties who Resume Cooperation

If a worker responds before the reduction or suspension with a good reason for the action in question, presumably the reduction or suspension will not take place. But a good reason for the actions may extend past the deadline for resuming co-operating e.g. the worker leaves due to a death or illness in the family. These cases should not have to go to Appeals to be fixed.

We suggest adding a provision that where the injured worker resumes co-operating and provides a reasonable explanation for the events leading to the reduction or suspension of benefits, the benefits may be restored retroactively to the date of reduction or suspension.

We also recommend that the policy address situations of employers who resume cooperation. Once a worker has started a work transition plan to be trained in a new job at a new employer, the worker should not be removed from the plan simply because an employer has decided to start cooperating. This would be unfair to the worker, and could place him in a very precarious employment situation with an employer who has already shown a want to be rid of that worker.

Take, for example, the case of an employer who is non-co-operative from the start – he decides the worker is not coming back. The Board does its best but the employer does not budge. The Board starts the 50% penalty, to no effect. The Board starts the 100% penalty but there is still no change. At this point, more than two months have passed since the worker was sent to WT. The Board and the worker have developed a plan and he has started school. All of a sudden the employer changes its mind and offers to take the worker back. This could be extremely unfair and perhaps harmful to the worker. Employers should not be allowed to play ping pong with the injured worker's vocational rehabilitation. Once a worker's WT plan is established based on the employer not taking the worker back, it should not be changed unless the worker so chooses, even if the employer changes its mind.

We suggest that the policy is amended to include the statement that when an employer has been penalized and starts co-operating again, the worker chooses whether to continue with the WT plan in effect or return to the injury employer.

Eliminate the Three Month Time Limit on the Terminations within 6 Month Presumption

We suggest that the statement that workers have three months following termination to ask the Board to investigate be removed from the policy. We recognize that the legislation permits the Board to not investigate if a worker complains more than three

months following termination, but it is permissive, not mandatory. This time limit is especially unfair considering that many workers will not know about the presumption or what their rights are, let alone that they only have three months in which to make a complaint.

Recognize that Small Business Workers are Vulnerable

We support the provision of assistance to small businesses in accommodating injured workers. Along with this assistance, we recommend acknowledgement of the vulnerability of the workers in small businesses, who are often non-union. Professor Joan Eakin's research on small businesses has shown that injured workers in small businesses face special challenges, can be seen as disloyal, and easily becomes part of the discourse of abuse.¹³

Return Ergonomists to Work Reintegration

Ergonomists are often a necessary part of safe return to work. It is unclear why the Board eliminated these positions. Are the parties now expected to hire ergonomists on their own? This seems to be a step backwards in a new work reintegration approach that puts more emphasis on Board intervention and assistance in return to work. We recommend restoring these positions and consider adding ergonomic assessments to the policy as one of the services the Board provides to the parties in facilitating cooperation between the parties in return to work.

Disputes over Suitability is not Non-Cooperation

We commend the Board for including this statement in the policy. We are optimistic that this clarification will give workers a stronger voice to speak out when asked to do unsafe or inappropriate work without the threat of being labelled non-cooperative. It will be important that injured workers understand this concept before they return to work.

Policy 19-03-03 Determining Suitable Occupation

We emphatically oppose the expansion of deeming that is evident in this policy. The previous policy considered whether the SEB was available in the worker's local labour market. The new policy now refers to the SO in the general labour market. This change means that a worker can now be deemed as long as a job within the SO is available somewhere in Ontario. This is completely unacceptable. We demand that references to "general" labour market be replaced with "local" throughout.

¹³ *Supra* Note 2.

Remove Forced Relocation

Of particular insult is the Relocation section of the policy. Workers will now be deemed to have relocated if work is not available in the local labour market. The Board is now requiring that injured workers, persons with new disabilities, choose between staying in their homes and communities and having no (or very little) income to live on, or moving to a new location where there is merely the prospect of finding work, not even an actual job.

Forced relocation stands in stark opposition to the Board's traditional role in rehabilitation, including social rehabilitation. It is simply inconceivable that the Board would expect injured workers, many of whom are still adjusting to life with a permanent disability, to uproot themselves from their families, social support networks, communities, and medical caregivers on the threat of lost benefits. Research has shown that injured workers frequently develop mental health problems after injury.¹⁴ Workers may also have spouses with actual jobs, children established in schools, or other family commitments. The expectation that these workers can simply pick up and move shows a complete lack of respect for injured workers, a lack of understanding of the risks and circumstances they face, and is simply put, cruel.

Additionally, please be aware that forced relocation will infringe the *Human Rights Code*, and perhaps in some cases, the *Canadian Charter of Rights and Freedoms*. For all of these reasons, we demand that deemed relocation be removed from the Policy.

That said, we also recognize that in some circumstances, an injured worker may want to relocate. This will particularly be true for workers who may have been working in new locations outside of their home communities at the time of injury. In our experience, these workers often want to relocate back to their communities of origin because their injuries have left them with an increased need for family support. Younger workers without families, or those without strong community ties may also be interested in relocating. In these cases, where the worker **seeks** to relocate, we support the Board's provision of relocation assistance. For workers who choose to relocate, the policy should set out exactly what constitutes "reasonable costs".

Remove Deeming at Mid-Level Wages

We also demand removal of the provision that some workers will be deemed at midlevel wages. The policy states that workers who are provided with work transition plans designed to improve existing or transferable job skills will be deemed at mid-level (rather than entry-level) wages. Recall that in "determining" wages, the Board is really talking about deeming wages for workers who have not found actual employment. There is simply no good reason to deem these workers at a higher wage, regardless of the type of work transition plan they are provided with. Once again, it is our recommendation that wages should only be deemed when there is evidence of an actual job offer in the SO that

¹⁴ *Supra* Notes 5 and 3.

a worker has unreasonably refused. At the very least, though, this escalation of deemed earnings should be removed.

Clarify Work Transition Assessments and Timelines

It is not clear from the policy what a work transition assessment actually is, what it entails, or who performs the assessment. This should be clarified. The time requirements are also unclear. What happens if a worker is still recovering and is not fit for an assessment by the 12 month mark? The wording of the policy suggests that in such a case, the worker would not be entitled to an assessment. Will this worker simply be provided with ongoing loss of earnings benefits until age 65?

The time limits, in general, should be guidelines rather than absolute. The worker's health status should determine the timing of the assessment, not an arbitrary time line.

Amend "Determining Suitable Occupation"

The first bullet, that "every effort will be made to maintain the employment relationship with the injury employer", should be amended to include the phrase "when it is in the worker's best interests to do so". As discussed previously, staying with the injury employer is not a suitable option for some workers, and this should be recognized.

The reference to reintegrating workers "within a reasonable cost structure" should also be removed. Cost should not be a primary consideration and does not belong in the policy.

Finally, we recommend adding the concepts of "safe" and "available in the local labour market" back into the list of factors to be considered in determining SO. On the final bullet point of determining SO in accordance with Human Rights legislation, the word "pre-existing" should be removed. All conditions need to be accommodated under Human Rights legislation, regardless of when the conditions arose.

Expand Enhanced WT

We commend the Board for the inclusion of enhanced WT to allow workers to retrain to exceed pre-injury earnings capacity. This could open up many opportunities for workers that were not available before, when workers were limited to those SEBs that matched pre-accident earnings.

The problem, though, is that the policy as it reads now, limits enhanced WT to young workers. We recommend that this be changed to explicitly recognize that enhanced WTs are an option for any worker. There are some groups, such as recent immigrants, whom the enhanced WT may be specifically valuable for, but really, there is no good reason to limit this option to only young workers, or certain groups of workers. Indeed, there is no good reason to limit the earnings capacity of any worker. All workers should be able to avail themselves of these plans.

As an integral aspect of its rehabilitative mandate, the Board should consider the best interests of the worker as the foremost consideration in developing a WT plan, even if the plan costs more.

Clarify Part time Employment Expectations

Again, we commend the Board for explicitly recognizing that some injured workers will only be capable of returning to part time work. We also commend the Board for now allowing workers to work part time while in WT plans.

It will be necessary though to clarify that part time work may not be available in all SOs, and that having the ability to work for an hour or two a day does not mean that a worker is employable. Expectations of the availability and feasibility of part time employment need to be realistic. Of course, a part time worker must retain entitlement to LOE benefits for the full difference in pre and post accident earnings.

Amend Older/High Seniority Workers Provision

This is also a positive step in the policy. With the older worker provision, the Board has recognized the higher rates of unemployment that older injured workers face – 87% unemployment, by the Board’s own statistics.

We recommend that all older workers, not just those with high seniority, should have the option of staying with their injury employers, even at a wage loss. We suggest that the high seniority requirement be removed from the policy. We also suggest that the policy make clear that these workers will be entitled to LOE benefits for the difference in pre and post injury wages.

We further recommend that, given the dire employment rates faced by workers in this age group, the policy should state that for older workers who are not able to return to employment with the accident employer, the decision-maker must consider whether the worker is competitively employable.

Policy 19-03-05 Work Transition Plans

Remove Time Limits

Our biggest concern with this policy is the strict time limits placed on all programs. For vocational training, the interim policy allows up to one year for literacy and basic skills; one year of ESL; one year of academic upgrading; 2 year community college maximum. Be forewarned that these time limits will violate the Human Rights of some workers. For instance, workers with learning disabilities who reduced course loads, or injuries that necessitate part time study, may not be allowed college courses, which typically require two full time years of study, but for these workers, require a period in excess of the three year total plan length limit. This is discriminatory.

In addition, many of the time limits are simply not realistic and will severely hamper workers' employability. We are especially concerned with the one year limit on ESL. One year will not be sufficient time to learn English as a second language for many workers. Similarly, one year of academic upgrading will be short to allow many workers to complete a grade 12 education, which is the minimum required to have any reasonable prospect of employment in many jobs (particularly non-manual jobs). This is equally true for workers who require literacy and basic skills training. These workers need to get at least a grade 12 education, not grade 9, to be employable. Limiting literacy and basic skills to one year is simply insufficient.

The three year total plan length will also preclude workers from taking engaging in university level courses, most of which are four year programs. We know of at least one injured worker who completed a university degree in his LMR program and then went on to become a lawyer. We wonder, too, if Estelle Cairns, the worker representative on the WSIB Board of Directors would have been able to be as successful as she has been if her retraining had been subject to the time limits now in effect.

Similarly, the time limit for training on the job (TOJ) and work trials is also problematic. Four weeks will be insufficient to determine whether a job will be sustainable for a worker in many cases. The 26 week maximum on TOJs will also be too short in some cases, particularly for trials in some of the high skilled trades.

We recommend that the policy be amended to remove all references to time limits. Instead, plan length should be tailored to the individual needs and circumstances of the worker.

Major Amendments Required for Over 55 Transition Plan

It is very disturbing to see that the policy has included a "choice" for workers over age 55 to receive one year of LOE for a self-directed transition plan. By the Board's own statistics, only 17% of injured workers over age 55 were able to secure employment. The Board has attempted to diminish the magnitude of this statistic by characterizing it as the result of worker choice to take early retirement. What evidence is there that this was a choice? It has been long recognized by the Workplace Safety & Insurance Tribunal and by the Federal Court of Appeal in *Villani*¹⁵ that age is an important aspect of employability. Certainly it has been our experience that older persons with disabilities face poor prospects for employment, particularly when they must start over in a new job.

No doubt, this section was added in recognition of the fact that the vast majority of injured older workers cannot find work in the labour market. What has been construed as a choice between completing a WT plan, and then facing unemployment, or accepting 12 months of benefits instead is not really a fair choice. In fact it is a major cutback. Instead, the Board must recognize that many, perhaps the vast majority of injured

¹⁵ *Supra* Note 6.

workers over 55 are competitively unemployable and should receive LOE benefits until age 65. Limiting these benefits to one year is simply unjust.

Extend Job Search Training (JST) and Employment Placement Services

Ten weeks of employment placement services and two weeks of JST are simply insufficient. Particularly considering the current economic climate, it is unrealistic to expect injured workers to secure employment in that short amount of time. Such a short job search time combined with ongoing reliance on deeming, means that many injured workers and their families will be quickly thrown into poverty. A minimum of six months of job search time would be more realistic. Please recall that a year and more used to be offered.

Expand WT Plan Interruption Provisions

We recommend that the policy be amended to state that the plan will be put on hold, amended, or replaced with a new plan as required in accordance with the duty to accommodate under Human Rights legislation.

No Private Schools unless there is no Public Alternative

The policy should explicitly state that whenever possible, WT plans will use high quality public institutions rather than private schools. Similarly, whenever possible, the Board should use public over private ESL providers. ESL and LINC classes available through community agencies are free and monitored by public Boards of Education.

Remove Maximum Spending for Private Career Colleges

It is unclear why there is a \$10,000 maximum, particularly when the policy recognizes that this will be insufficient for some programs. The quality of the program should be the foremost factor in selecting a college, not cost.

Policy 19-03-06 Work Transition Expenses

Overall, we disprove of the new interim expenses policy. The policy seems to have been designed with cost reduction in mind. Notably, the policy is much shorter than its predecessor and does away with many of lists of specified items that the Board will pay for. The interim policy also gives greater discretion to the decision maker to decide whether an expense will be paid, rather than making payment mandatory. The policy replaces the statement that it will pay for “necessary” expenses for those the Board deems “appropriate”. We are concerned that front line decision makers considering whether to pay for certain expenses will look at the policy guidelines and not see the item in question and conclude “we don’t pay for that.” These changes should be reversed.

We suggest that the policy begin with the statement that “The WSIB pays the necessary expenses related to a WT assessment or plan. The word “may” (as in “the WSIB may pay”) should be replaced with “shall” throughout. Like the old policy, this policy should specify that tools, equipment, and clothing will be paid for. We also propose the following amendments by section:

Guidelines

For the expenses paid, replace the phrase “consist primarily” with more inclusive language. Restore travel expenses as one of the specified items. Our suggested wording is “expenses paid include travel and parking expenses, service fees for assessments/evaluations, and interpreters”.

We also recommend removing the provision that expenses paid are to be agreed to before the plan begins. Injured workers do not know everything that they will need prior to commencing the plan. Instead, the policy should provide that expenses will be reviewed at relevant stages of the plan to ensure that workers have appropriate accommodations. The policy should include examples of special accommodation assistance, such as tutor assistance.

Assistive Devices

We recommend including examples of necessary assistive devices. For example, ergonomic workstations and wheeled book bags.

Return Trip Home

One trip home per month is insufficient. But for the compensable injury, the worker would be seeing his family every day, not once per month. Injured workers should be allowed one trip home every weekend.

Relocation Expenses

We have already set out our position on forced relocation (referred to here as “appropriate circumstances”) so it will not be repeated here. The policy needs much more detail to set out what expenses the Board will pay for when a worker relocates (hopefully by choice). We note that the CUPE Local 1750 policy on relocation provides reimbursement of up to \$16,500 if a new job increases one’s commuting distance by 40 kilometers or more. The Legal Aid Ontario policy provides for up to \$30,000 in relocation expenses, some of which must be paid back if the job is vacated within 2 years.

We recommend the following wording:

If a suitable job is not available in the local labour market, **and an injured worker wishes to relocate** to an area where a suitable job is available, the WSIB will pay reasonable expenses for relocation. These expenses include the cost of

preliminary travel/accommodation to apply/interview for employment in the new location, the difference in cost for comparable housing, the expenses related to the sale and purchase of a home, increased home and car insurance rates (if any) related to the new location for three years and the packing and shipping expenses of the move, and the travel cost for the family to the new home.

Policy 13-02-02 Experience Rating (NEER) Draft Policy

As best we can make out, this draft policy introduces three new elements:

1. Expands the NEER window from three to four years
2. Amends the process to produce a surcharge or rebate after the 1st year in addition to the final year.
3. Provides that the value of one week's worth of benefits will not be counted in the NEER costs over the four years. (so worker may be off for a week at the beginning for example, OR (but not AND) may lose up to 5 days over the four years for compensable reasons without having it count against the employer.

Experience Rating Expansion: Against all Empirical Evidence

The extension of the NEER window from three years to four (and the original intention to extend it to six years) sends a four-alarm signal to those who work on behalf of injured workers that the best interest of injured workers is not at play in the WSIB/WCB's work re-integration initiative.

The work re-integration policies may well have some good ideas and intentions woven in the framework, however they are completely undone, by their reliance on the twin pillars of deeming and experience rating. This commentary is on the NEER policy; however the combination of deeming and experience rating magnifies the damaging results for injured workers.

The extension of the NEER window underlines that it will be a **key** policy lever in the overall work re-integration policy. It is, in fact, **the key** lever that the Board will rely on in attempting to meet its main goal of reducing claims duration. The WSIB/WCB knows that it is a powerful tool in motivating employer action.

A fundamental problem exists however, and that is that exactly what action is taken by the employer is not under the WSIB/WCB's control. This is of critical significance for workers and injured workers and their families. It is of critical significance in the development of responsible public policy.

Injured Workers Consultants Community Legal Clinic has worked extensively along with others to bring to bring the serious design flaw of the NEER to the WSIB/WCB's attention. We have worked with individuals at the highest level of the Board. There can

be no doubt that the Board is aware of the “unintended consequences” of experience rating. We are shocked that, despite this awareness, the program is being expanded.

Flawed WSIB/WCB rationale for reliance on experience rating:

According to the letter to “stakeholders” of November 12th, 2010, the ongoing reliance on experience rating and its extension to four years is justified by findings in both the *KPMG Value for Money Audit on LMR* and the *Experience Rating Review*. These studies, the letter claims, “found that the NEER window can directly influence the return to work process, and needs to be changed to support work reintegration moving forward.”

What did those studies actually say?

Morneau Sobeco Recommendations for Experience Rating¹⁶:

This report was commissioned by the WSIB/WCB due to the intense criticism of the experience rating programs that was coming to public light at that time. We did not agree at the time that the company Morneau Sobeco constituted an appropriate independent review. Our disagreement included the fact that this company was in the business of designing experience rating programs and assisting compensation boards with their implementation. This firm clearly has a vested interest in maintaining experience rating programs, and therefore, we are not able to give credence to the recommendations of this company.

However since the Morneau Sobeco report is being cited, let us provide a direct quote from the report:

There is currently no link within the Experience Rating programs between an employer receiving a refund (or surcharge) and its meeting its legislative obligations under either the Occupational Health & Safety Act or the Workplace Safety & Insurance Act. Changes are needed to ensure that the WSIB’s Experience Rating programs are not working at cross-purposes with legislation and regulation governing injury reporting and workplace safety. Employers may be entitled to rebates for “performance” as defined by Experience Rating programs while at the same time being non-compliant with their regulatory obligations.¹⁷

While there has insufficient study of the actual effects of experience rating on employer behaviour, the Board commissioned another study of experience rating (NEER) through another private company in 1990.

The KPMG study: NEER Case Studies Final Report¹⁸

This study found that 82% of the firms studied “place an emphasis on controlling claims costs.”¹⁹ It goes on:

¹⁶ Oct 28th, 2008

¹⁷ P.9.

¹⁸ July 1990

Although there do not appear to be specific guidelines available, a certain level of claims management activity by employers is appropriate and desirable. For example, it is legitimate for employers to contest claims when they have a substantial reason to believe the claim is inappropriate . . . At the same time, these and most types of claims management can clearly become excessive or undesirable, if pursued too aggressively. Although we have not been able to quantify our results at this level of detail, during the case studies we encountered a number of cases of what might be termed “legitimate” claims management, and some cases of what might be termed “excessive” or “undesirable” claims management. The NEER program has had incremental impacts on both of these categories of claims management.²⁰

In regard to the incentive to provide modified work, the study found that it was difficult to get at the details:

However, it is our impression that, among the case study employers, there was a much higher incidence of short term modified work in comparison to longer term modified work with a rehabilitation focus.

These observations alone surely demand that any continuation of NEER, and certainly any expansion of it, must put in place clear, strong, and enforced rules which will ensure that that cost control measures do not trump genuine concern and support for the injured worker and his or her long-term financial, physical and mental health.

To continue to use and to expand NEER without doing this is simply irresponsible.

KPMG Value for Money Audit on LMR²¹

This report is also undermined by its lack of attention to the fundamental purpose of our workers compensation system which provides a basic right to injured workers and is something quite different and apart from social programs which developed subsequently in Ontario’s legislative history. However, as it is cited as a rationale for reliance on experience rating in the work re-integration policies, let’s look at what it actually said.

On page 14, the report addresses employer accountability and speaks of “aligning legislation, policies, and incentive programs to increase the proportion of injured workers who return to appropriate employment with the injury employer . . .” The Board responds: “WSIB agrees with the recommendation. Following the release of the Morneau Sobeco report on Experience Rating, WSIB is consulting with stakeholders on future changes with its incentive programs to effectively align those programs to the Road to Zero.”

- What, we ask, has been done to change anything about the experience rating program to “align” it with either the “Road to Zero” or to “appropriate employment with the injury employer”?

¹⁹ P.17.

²⁰ P.18.

²¹ December 3rd, 2009

On page 23, performance goals and metrics are addressed and notes:

Current WSIB incentives to promote early and safe return to work with injury employers may actually be contributing to a disproportionate number or {sic} workers being referred for LMR services. Feedback indicated that employers are incented to retain injured workers until the experience rating window closes . . . at which time, such workers can then be referred to LMR with no experience rating consequences to the employer.”

Then on page 33, the report points out that leading practices provide employer incentives to retain or hire injured workers. These are described as

. . . the use of financial incentives (e.g. premium adjustments, wage subsidies) to encourage employers to retain and employ disabled workers with careful calibration required to ensure that sustainable jobs and/or relevant work experience are provided through the programs.

- What, we ask, has been done to introduce careful calibration into the NEER system to support actual suitable, sustainable jobs?
- How does expanding the system by another year prevent ongoing manipulation of the system to avoid a surcharge and/or gain a rebate without regard to the best interests of the injured worker?

We note that the Board’s initial response to the observation that many workers are referred to LMR after the NEER window is closed, was to seek to expand the window to six years. This intention exposes the fundamental desire of the Board to simply get the injured worker off its books notwithstanding his or her actual need. If an employer lets a worker go after six years, the worker will be “locked in” at no wage loss and so it’s too late for the worker to come back to the Board for help. Good for the “unfunded liability”, bad for the injured worker.

The two reports, which are cited as supporting reliance on the experience rating program, do not actually support that reliance. Quite the contrary—they call for significant changes to the program.

According to the letter to letter to “stakeholders” of November 12th, 2010:

“The WSIB believes that an expanded NEER window will result in significantly improved work reintegration outcomes, overall cost reductions and fair premiums for employers. That is why the draft NEER policy is part of the Work Reintegration consultations.” (Our emphasis)

- Significantly improved work reintegration outcomes?

It is possible that the WSIB/WCB may be able to mitigate some of the worst aspects of return-to-work case management techniques by many employers in the short-term through its greater intervention in return to work efforts. NEER itself will, however, continue to provoke harmful case-management strategies. We do not see anything which will prevent this.

- What will the Board do to prevent harmful case-management strategies by employers (and by their hired consultants)?
- What is there in the policies which will protect the worker in the long run?
- How will the improved outcomes be measured? By the experience of the injured worker? Or by the cost of the claim?
- We are interested in knowing what evidence in research and/or experience the WSIB/WCB relies on for this belief that expanding the NEER window will result in significantly improved work reintegration outcomes.
- Overall cost reductions?
 - Will the long-term cost reduction for the accident fund be measured against the long-term financial outcomes for the injured worker?
 - If not, why not. And if so, how?
 - Specifically, how will adding a year to the current NEER window produce an overall cost reduction?
 - What is the specific estimate of how much will be saved?
- Fair Premiums for employers?

There is no prevention within the NEER program against employers using claims management techniques instead of providing genuine, sustainable, suitable employment. As a result then, there is nothing to prevent the present phenomena of the larger employers shifting the costs to the smaller employers who may not have the idea or the capacity to engage in this manoeuvring. Furthermore, there is nothing to prevent the cost-shifting to employers that genuinely support injured workers by refusing to engage in claims control techniques, do not contract out work to temporary agencies, and do not shut down only to open up with a clean compensation record. It seems to us that adding another year to the system will distort the “fairness” of rates by another year.

- How does the interest in “fair premiums” sort out the variation in these behaviours amongst employers?
- How will expanding the window for a year produce fairer premiums?
- How does an increase experience rating fit with the fundamental principle of collective liability?

We are seriously concerned that the WSIB/WCB's rationale for expanding the NEER window by an additional year does not rest on reliable theories or proven results. As part of this consultation process, we urge the Board to provide significant evidence to support its move to expand the window.

Experience Rating works against the employment of injured workers

It is our belief, based on both experience and its' actuarial logic model that experience rating does not promote serious, supportive, sustainable employment of injured workers. In fact it does quite the opposite.

Under experience rating, once a worker becomes an injured worker, she becomes a specific risk for any employer. The logic of the system creates a risk of a surcharge to the employer if the worker loses even one day from work due to their injury in the year that the claim is being experience rated. The result? A cost conscious employer will bring an injured worker back to suitable work to comply with the system, but then seek to terminate his or her employment in a manner which is not obviously linked to the injury. This is not difficult to do, especially in non-union environments.

Out in the open labour market, without the support of the Board, the injured worker must now face competition with healthy workers in an environment made worse by the fact that employers specifically avoid hiring injured workers either through plain stigma, or a real fear of a recurrence which may be considered a new injury and subject the employer to strains of experience rating.

Unless and until the WSIB/WCB can prevent this highly negative impact of experience rating on injured workers, it is completely irresponsible to expand the NEER window.

"Unintended consequences" harm injured workers

The WSIB/WCB is fully aware of the "unintended consequences" of experience rating, including the NEER program. The following list is simply an attempted reminder of some of the main ones. Experience rating:

- encourages workplace programs to discourage accident reporting.
- motivates employers to tell injured workers to go on private insurance or EI sickness benefits.
- makes employers openly tell injured workers not to put in a claim.
- makes employers challenge initial entitlement not because of a true belief that the claim is not valid, but because they do not want to risk a surcharge.
- subjects the injured worker to the ongoing strain of employer challenges to all aspects of his claim for the time the claim is experience rated.

- subjects the injured worker to physical and mental harm through claims management based return-to-work programs.
- motivates companies to produce “hurricane watch” jobs which have nothing to do with genuine work or long-term commitment.
- can make a temporary injury become permanent by denying time to heal, due to the pressure to avoid lost time claims
- can cause new and permanent injuries by having workers pushed back before there has been sufficient time to heal. This frequently happens with upper limb injuries when the opposite limb is over-used.
- may cause injuries to co-workers who are forced to carry out the heavier aspects of an injured worker’s “modified” job.
- prompts companies ‘go out of business’ and re-open with a clean record in order to avoid surcharges.
- forces workers to operate as “independent contractors” to separate the employer from the effects of experience rating.
- fosters the underground economy and the production of a precarious workforce through the expansion and use of temporary agencies
- causes many workplaces to develop toxic environments, which puts injured workers back to work in a setting where they are resented.
- produces statistics regarding lost time versus no lost time injuries which are invalid and yet are heavily relied on by the system to measure success in health and safety.
- can award an unsafe and unsavoury employer.
- can penalize a safe and well-intentioned employer.
- Makes injured workers become a “risk”, leading employers to seek to dismiss them or have them leave by discouragement.

It is our opinion that the extension of the window by one year will not change much except to extend the present pressures and problems by another year.

There is no good reason to expand the NEER window

The WCB/WSIB knows that there are serious problems with the experience rating system: that it carries an exorbitant price tag; that there is insufficient evidence that it positively affects health and safety or leads to the sustainable, suitable employment of injured workers; that it’s inherent structure produces damaging experience for injured workers; and that it produces claims statistics that are completely unreliable. What can be the possible reason to rely on it further?

The Board has powerful financial incentives under s. 86 to promote employer compliance with the legislation and the work reintegration policies have put in place significant penalties for employer non-co-operation. These are sufficient and these are more clearly directed at the actual purpose of promoting the retention of injured workers in the workforce.

Furthermore, given that a key mandate of the *Funding Review* is to look into the suitability of incentives, it is inappropriate to lengthen the controversial experience rating program while the review is still underway.

Recommendations:

1. Do not expand the NEER window beyond the present three years.
2. Put NEER and all the experience rating programs on hold and divert the staff and the budget currently used to support those programs into a *design investigation program* to explore and draft policies, programs, and incentives which will clearly and rationally support the employment of injured workers by employers who can and will provide truly suitable work.
3. In the ongoing discussion of this draft policy, provide the full documents, which are being relied on for the WSIB/WCB belief
 - that the use of NEER will improve work reintegration outcomes;
 - that injured workers can expect ongoing or new employment, on a level playing field with healthy workers, after the 4 year mark, and after the 6 year mark;
 - that NEER fits with the collective liability foundation of our compensation system; and
 - that NEER will produce fair premiums for employers.
4. Put into place a system to monitor and measure the actual experience of workers after workplace injury or illness. Include in this a clear method of identifying the actual impacts of NEER or any other incentive system which introduced to replace it.

Concluding Thoughts

We have now set out our concerns with the new work reintegration program. We do appreciate that the Board has undertaken a considerable effort in developing the new policies. As we have indicated, some of the changes are a step in the right direction; others, however, such as the expansion of deeming and experience rating, and stricter time limits and expenses are a giant step backwards. We hope you will consider implementing the changes we have suggested, and we look forward to a public review of the program in the future, once there has been sufficient time to observe how the program is operating in practice.

In the end we all agree that the proof is in the pudding. The success of the program will be determined by how many injured workers will be suitably re-employed with the injury

employer, how many who do not return to work will be suitably re-employed with other employers, and how many will have financial security in the absence of successful re-employment.

Respectfully submitted this 15th day of February, 2011 by
INJURED WORKERS' CONSULTANTS Community Legal Clinic