Return to Work and the WSIB:
What Advocates Need to Know

Your Legal Rights webinar
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IAVGO Community Legal Clinic
Overview

The basics
The basic 3 stages

Step 1: Attempt to return to work with accident employer

Step 2: If return to work fails, WSIB decides if worker needs retraining plan

Step 3: WSIB pays benefits based on job it says worker can do ("deeming")
Step 1: Return to work with employer

- The Workplace Safety and Insurance Act (s. 40) imposes return to work cooperation obligations on workers and employers.

- WSIB goal is successful return to work with accident employer, even while worker still injured (because then no or fewer loss of earnings).
Step 2: Labour Market Re-entry (Work Transition)

- If return to work with accident employer unsuccessful ...
  - WSIB determines whether retraining plan needed to allow worker to re-enter labour market and reduce or eliminate loss of earnings
Step 3: The endgame: deeming

- WSIB picks (deems) a job the worker can do with injury restrictions, called the suitable occupation.

- The Board “deems” workers who have:
  - been determined not to need a retraining plan,
  - finished their re-training plan, or
  - had their plan terminated for non-cooperation;

  to be earning an amount based on deemed job.
Deeming means determining earnings based on earnings worker should be able to make, even if they are not working.

- Loss of earnings benefits reduced by deemed earnings

- “Phantom” jobs
The bottom line on cooperation

- Workers who don’t cooperate, including who refuse suitable work with the accident employer, don’t get loss of earnings benefits.
- Avoid non-cooperation, because difficult and slow to reinstate benefits.
- Penalties for non-cooperation in both return to work and WSIB re-training.
- Almost always advise workers to try the job or training program.
- Advise worker about daily diary of work duties, problems with training, etc.
When in doubt

- Read WSIB policies on return to work/ work reintegration, available at http://www.wsib.on.ca/en/community/WSIB
- Or call specialty legal clinic like IAVGO at 416-924-6477 or other expert practitioner for advice
Return to Work with the Accident Employer
(“Work Reintegration”)
Role of WSIB

- Employer and worker primarily responsible for
  - Planning return to work (“work reintegration”)
  - Identifying return to work opportunities
  - Identifying work reintegration issues in workplace

- But WSIB much more involved than in the past
  - Emphasis on enforcement of obligations
Worker and Employer Obligations

- Must cooperate in RTW process
  - Initiate early contact
  - Maintain “appropriate contact” throughout worker’s recovery
  - Identify and secure WR opportunities for worker
  - Give WSIB all relevant information
  - Notify WSIB of any dispute or disagreement
WR Goal

- Goal is work that:
  - Worker has the skills to perform
  - Is consistent with functional abilities
  - Restores pre-injury earning to the extent possible

- Ideally, worker will return to pre-injury work
Suitable Work

- Post-injury work that is
  - safe
  - productive (objective benefit to business)
  - consistent with worker's functional abilities
  - restores pre-injury earnings to extent possible

- Includes worker's pre-injury job

- Can include combining tasks/duties or short-term training leading to a job
Suitable Work – Consistent With Functional Abilities

- Looks at tasks/duties of job
- Must be able to be performed within worker’s:
  - Reported physical capabilities
  - Reported cognitive capabilities
- Note the emphasis on “reported”, problem is often that capabilities have not yet been determined
Duty to accommodate

- Employer must modify work to accommodate needs of worker
- If job available that can be made suitable, employer must provide accommodation unless causes undue hardship
Duty to accommodate

- Not great enforcement of accommodation duties at WSIB
- Workers may also consider other venues/options to protect their human right to disability accommodation e.g. grievances, complaints to Human Rights Tribunal of Ontario
Resolving Suitability Disputes

- If dispute about whether a job is suitable, WSIB will often arrange meeting with WSIB Return to Work Specialist and the parties.

- If no agreement, WSIB will make a determination of suitability.
Non-cooperation Penalties

- Where refusal to cooperate, WSIB may
  - Reduce or suspend worker’s benefits and/or terminate WT assessment or plan
  - Levy penalty on employer equivalent to cost of worker’s benefits (have never done to date)
- Multi-step process with warnings and escalating penalties
Avoiding non-cooperation

- Best to try to avoid non-cooperation, difficult and slow to reinstate benefits
- Almost always advise workers to try the job, even if concerned about ability to do it
- When worker is doing the job, if concerns should consider daily diary about duties and worker’s experience with injury
Some employers have an additional statutory re-employment obligation (see s. 41 of the Act)
Return to work meetings

- Try to get a written description of job duties
- Raise concerns about suitability of duties given restrictions or fake jobs
- If uncertainty about worker’s restrictions, consider asking RTWS to recommend further medical assessment
- Communicate willingness to make good faith effort to return to work notwithstanding concerns about suitability
José is a labourer who works for Sod On, a landscaping company. Three weeks ago he injured his low back. He has been on WSIB benefits. José is in a lot of pain. He struggles just to get out of bed. José’s family doctor hasn’t made a diagnosis yet. She referred José for an x-ray and an MRI. She doesn’t know why José is in such extreme pain. She recommends that José stay away from work until the test results come in and she could make a diagnosis. She has written a note for José saying only that he is unable to return to work for eight weeks.

José’s supervisor, has been calling him every other day since he was injured, saying they have modified work for him. The supervisor explained that it involved getting coffee and “measuring things”. Mr. Sheet also said there will be a cot on the worksite so José can lie down if the pain becomes intolerable.

José has refused the modified duties. He wants to follow his doctor’s advice and stay away from work until he knows what is wrong with him. He is worried about hurting himself again. He also thinks it is ridiculous for him to have to get coffee and “measure things”. José has seen other injured workers at Sod On doing such duties – they were ridiculed by everyone and dismissed as “fakers”.
Yesterday, José got a phone call from a WSIB Return to Work Specialist. The Return to Work Specialist wants to meet with José and Mr. Sheet at Sod On’s office on Monday. On the phone, when José mentioned his family doctors advice that he stay off of work, the Return to Work Specialist was dismissive and said that the best thing for José was to get back to work right away.

José is now in your office telling you about this situation. His English is very limited, so his wife is with him to help with the translation. It is clear that he is upset. He describes his constant pain, and his frustration with Sod On and the Board. At some points, he is choking back tears.

José doesn’t want to go to the meeting. He is in too much pain and he doesn’t trust either Sod On or the Board. He doesn’t see any good coming out of this meeting. He just wants to be left alone so he can get better.

What advice would you give to José? If you were going to attend the meeting with the Return to Work Specialist, what would your strategy be?
Work Transition
Work Transition

- Work transition provided by WSIB where no suitable work with injury employer

- Consists of
  - Assessment
  - Specialized assistance (e.g., retraining)

- Objective is RTW with injury employer or, if necessary, suitable occupation available in labour market
Initiating Work Transition

- WT assessments if:
  - Worker has (or likely has) a permanent impairment
  - Worker is not capable of performing pre-injury job
  - Employer is unable to provide suitable work, or
  - Employer has identified a job, but it is unclear if it is suitable
Goals of WT assessment:
- Identify suitable occupation (SO)
- Determine services and activities necessary to facilitate successful work reintegration

WT assessment must look at all impairments/disabilities
- Both compensable and non-compensable
Determining SO – Priorities

- Maintaining employment relationship with injury employer
- Re-integrating workers into suitable and available work
- All within a “reasonable cost structure”
  - WSIB generally motivated to offer the cheapest training that allows it to deem the worker able to restore their earnings
Determining SO – Considerations

- Worker’s functional abilities
- Worker’s employment related aptitudes, abilities and interests
- What jobs are available with the injury employer through direct placement, accommodation and retraining
- Labour market trends
- Pre-existing non-work-related conditions or any other HR-related accommodation requirements
Direct to Placement retraining

- Applies where WSIB identifies suitable occupation worker already has the skills to perform
- Very short (usually 12 weeks)
- Common with lower-wage workers
- WSIB may refer worker to:
  - Job placement support services
  - Job search training
Work Transition Plan

- Outlines assistance and services worker requires:
  - To enable RTW with injury employer in identified suitable and available work
  - To re-enter the labour market in SO

- Generally subject to following limits:
  - Worker offered only one plan
  - Maximum three years in duration
WT Plan Services

- ESL training (up to 1 year)
- Literacy and basic skills (up to 1 year)
- Academic upgrading (up to 1 year)
- Vocational Skills Training (up to 2 years)
  - up to $10,000 for private career college
- Training on the job
- Job search training
- Employment placement services
- Work trial
Strategies

- Argue that suitable occupation should be consistent with pre-existing barriers like ESL or non-compensable disabilities
- Suitable occupation also needs to be suitable for worker’s physical abilities and available to the worker
- Be wary of asking for suitable occupation with higher earnings – worker will be deemed based on those higher earnings
- If your client is not working and not in WSIB retraining anymore, mitigation is key
- Consider arguing worker can work only part-time
- If program terminated for non-cooperation worker will be deemed as an experienced worker in SO
It is ten months since you first saw José. After he refused to go back to work on the modified duties proposed by Sod On, the Board cut off his benefits for non-cooperation. A few months later when an MRI revealed that he had a herniated disc, the Board reinstated his benefits retroactively.

José is still in a lot of pain. He is uncomfortable sitting and standing for longer than 30 minutes. Lifting is out of the question and he can only walk for about 20 minutes or so without having spasms in his back.

Sod On now says that it can’t accommodate José. The Case Manager agrees and she is probably right. She has referred José for work transition services.
José's spoken English is very limited. He can't read or write in English. He has a grade nine education from Brazil, from where he immigrated six years ago. He has no other vocational qualifications. He is now 36-years old. His only Canadian work experience was with Sod On, where he worked for the last three years. In Brazil, he worked for six years as a construction labourer. Before that, he spent three years working on a beef cattle farm.

The Work Transition Specialist determined that José could work as a customer service specialist. He had two weeks of job search training. He understood very little of that training, but he now has a résumé. The Board deemed him able to earn minimum wage and his benefits reduced accordingly. He was only making $14.00/hour, so his LOE was almost entirely eliminated.

José is frustrated at the reduction of his benefits. He appears as despondent and dejected as he did when he first met you, but he hasn’t talked to anyone about his mental health.

How would you approach his case?