Early and Safe Return to Work Policy Consultation Report—Second Round

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WSIB Benefits and Revenue Policy Branch

WSIB ONTARIO CSPAAT
Workplace Safety & Insurance Board
Commission de la sécurité professionnelle et de l'assurance contre les accidents du travail

1. Injured Worker/Labour Submissions

The WSIB received 30 submissions from individual injured workers as well as injured worker/labour groups. It should be noted that in this round of the consultation process the WSIB received an increased number of submissions from individual injured workers—although generally, these submitters commented on their own experiences within the workplace safety and insurance system, as opposed to providing specific comments on the revised draft early and safe return to work (ESRTW) policies. WSIB staff also met with the one injured worker/labour group that requested a meeting to discuss the revised draft ESRTW policies.

A) General Comments

Comparing draft policy versions
Overall, injured workers/labour remain in favour of the general direction that the WSIB has taken in the revised draft policies. By the same token, a number of submitters commented on their preference for the first version of the draft policies, arguing that some of the revisions made to the second version of the policies were less favourable to the interests of injured workers/labour.

Readability of revised draft policy documents
Overall, most of the submissions that commented on the general readability of the revised documents were positive.

Recommendation for mandatory Return to Work Committees
A number of submissions called for the establishment of joint return to work committees, either mandated by WSIB policy or legislative reform. Submitters indicated that such committees exist currently in some but not all workplaces across the Province.

Safety of post-injury work
Many injured worker/labour groups stated that the WSIB and employers ignore treating health professionals' recommendations. Accordingly, they stated that maximum discretion should be provided to the worker and the treating health professional to decide whether the worker is fit to return to work and what aspects of the pre-injury work are safe—without the threat of a non-co-operation penalty being levied on the worker.

Submitters argued that workers experience undue pressure to return to work too early, or to work that is not suitable. Submissions called for more stringent protections for injured workers, such as written job offers and physical demands analyses in all cases. Underpinning the call for written job offers in all cases is the notion that an injured worker can subsequently bring the written job offer along with the job's physical demands analysis to his/her treating health care provider for discussion and review.

Stakeholder education and training on the revised ESRTW policies
Labour and worker representatives highlighted the importance of educating workplace parties about their ESRTW obligations. Labour organizations reiterated their call for

basic training on the workplace parties' return to work obligations to be delivered on a parallel to that of legislated *Occupational Health and Safety Act* (OSHA) training, such as the Workplace Hazardous Materials Information System.

As well, a number of submissions reiterated the importance of the WSIB educating workers from the outset, and throughout the claim process, about (a) their obligations, (b) the consequences for failing to comply, (c) the availability of WSIB assistance and (d) the right to representation. The WSIB was called upon to ensure that workers understand the information that is to be provided, and that any language barriers are addressed.

Power imbalance
Some injured worker/labour groups requested that the revised draft policies explicitly recognize the power imbalance between workers and employers, especially in non-unionized and small workplaces. Moreover, submitters suggested that the draft policies acknowledge workers' and employers' conflicting interests, especially since these often arise in return to work situations.

Experience rating programs
As in the first round of consultation, a number of submissions strongly criticized the WSIB's experience rating programs. According to the submitters, these programs encourage employers to limit the duration of claims by any means possible, which undermines return to work best practices.

B) Policy Changes Approved by Workers/Labour

Workers/Labour generally support the following changes made to the ESRTW policies:
- having the workplace parties' focus their ESRTW activities on returning the worker to work that is suitable, available and that is most comparable in nature and earnings to the pre-injury job—19-02-02
- adding the reference to "time to heal"—19-02-02
- requiring both parties to agree on the safety of work before a worker is expected to attempt those aspects of the work considered safe—19-02-02
- recognizing the special needs of small business in the ESRTW process—19-02-03
- requiring verbal notice of suitable work decisions, and specifying that the wage loss is usually adjusted as of the next available shift—19-02-05.

C) Comments Specific to Revised Draft Policies

"Early" vs. "timely" return to work (19-02-02)
The first set of ESRTW draft policies introduced "timely" return to work as a key concept. In light of concerns expressed regarding the rules of statutory interpretation, the relevant policy was revised to use the language of "early" return to work. Although the revised policy continues to refer to the appropriateness of ESRTW activities, submissions suggested that a reversal to "early" from "timely" is perceived as a step backward, and recommended the reintroduction of the term "timely" to the policy document.

Additionally a few submitters indicated that since the *Workplace Safety and Insurance Act* (WSIA) stipulates that its purpose is to facilitate the return to work and recovery of injured workers, the policy should explicitly provide that an injured worker's "early" return to work must not jeopardize his or her recovery.

Time to heal (19-02-02)
In the initial round of submissions regarding the draft ESRTW policies, injured workers/labour argued that the policies should place greater emphasis on the need for workers to be given time to heal from their injuries, and that the dignity of the injured worker should be paramount in the return to work process. Accordingly, there was general support for the inclusion of "time to heal" in the second version of 19-02-02. However, a number of current submissions argued that the revised policy document should contain fuller, more robust language around this concept, similar to the language provided within the WSIB's Best Approach Guide entitled "Recognizing Time to Heal—Assessing Timely and Safe Return to Work."

Definition of suitable work—safe (19-02-02)
The revised draft policy defines "suitable work" to include "post-injury work that is safe." The policy goes on to provide that to assess the "safety" of the work offered one of the factors to be considered is whether the work is performed at a worksite that is covered by either the *Occupational Health and Safety Act* or the *Canada Labour Code*. A few submitters indicated that to ensure the safety of post-injury work, it is not sufficient that the work be performed at a worksite covered by health and safety legislation. Rather, the work should be performed at a worksite that is in compliance with its relevant health and safety legislation.

Definition of suitable work—consistent with the worker's functional abilities (19-02-02)
When discussing the definition of suitable work, the revised draft policy expanded on the concept of "consistent with the worker's functional abilities." However, a few submitters indicated that the WSIB should broaden the definition of functional abilities to include compensable mental health issues such as the psychological impact of, or negative reaction to, the injury and/or the proposed return to work options.

Definition of suitable work—sustained return to work (19-02-02)
The first version of this policy defined suitable work to mean work that is "safe, productive, remunerated, and sustainable." The revised draft policy removes the criteria of "remunerated" and "sustainable," and creates a separate key concept of "sustained" return to work.

The concept of "sustained" return to work was developed to address that stage in the ESRTW process when questions might arise as to whether the work the worker is doing is likely to restore pre-injury earnings on a long-term basis. Notwithstanding the creation

of the concept of "sustained" return to work, most injured worker/labour groups were of the view that the removal of "remunerated," and in particular "sustainable," weakened the definition of suitable work. They therefore requested the reinstatement of those criteria.

Echoing submissions made in the first round of the ESRTW draft policy consultation, many submitters argued that the definition of suitable work should be as expansive as possible:

- including reference to the therapeutic and rehabilitative nature of post-injury suitable work
- including the concept of vocational appropriateness
- including the criteria of "meaningful" and "sustainable"
- using the standard of "comparable in nature and earnings to the pre-injury job," and
- recognizing that an injury's psycho-social effects should be considered in the determination of a job's suitability.

It was also suggested that the policy specifically require the WSIB to consider sustainability once it is clear that the worker will be permanently impaired. In addition, it was argued that the guidelines dealing with sustained return to work do not provide clear direction as to how disputes over sustainability will be resolved, nor what the WSIB's role in addressing those issues will be.

Moreover, there was some criticism that the guidelines dealing with sustained returned to work did not provide clear protection for workers who are determined to be in jobs that are not sustainable. One submission suggested that the ESRTW policies should require the employer to state in writing whether the modified position is temporary or permanent, and that the WSIB more readily consider the use of Labour Market Re-entry (LMR) assessments.

Finally, some submitters were of the view that the worker should have the ultimate authority to decide whether he or she stays with the accident employer, or enters the LMR process.

Shared responsibility (19-02-02)

A number of labour submissions continue to argue that the revised ESRTW policies should recognize unions as having the legal right to be part of the ESRTW process. A concern that continued to be expressed was with respect to employers who refuse to allow union representatives to attend return to work meetings (including ergonomic assessments) on the employer's premises.

In addition, a few submitters commented that in some cases, unionized injured workers may be assisted by someone other than their union. In these cases it is recommended that both the representative of the worker's choice, and the union representative be accorded equal rights and responsibilities.

Health professionals' role in return to work (19-02-02)
Some submitters re-stated their request that the WSIB specifically address the health professionals' participation in the return to work process and develop a plan for informing and educating them.

Required activities to initiate and maintain communication (19-02-02)
Section 40 of the WSIA sets out the co-operation obligations of workers and employers. The revised draft policy contains a series of charts which describe the required activities of both workers and employers based on those legislative obligations.

A number of injured worker/labour groups indicated that the revised draft policy provided insufficient guidance on the nature of an employer's contact with his or her injured worker. In particular they highlighted the fact that the draft policy did not specify when the initial contact should be made nor how often follow-up contacts should take place. They expressed concern that certain employers utilize daily calls to pressure workers to return to work too soon—a situation that should be avoided and to this end addressed in policy. Submitters also called for the policy guidelines to make explicit the notion that the employers conduct themselves in a considerate manner during these communication exchanges.

Required activities to identify and secure suitable work (19-02-02)
Within the chart which sets out the required activities to identify and secure suitable work, the revised draft policy provides that employers, in the absence of a re-employment obligation, must make reasonable efforts to accommodate a worker's pre-existing and work-related disabilities/impairments. Some submitters oppose this, arguing that the ESRTW policies should emphasize that employers are bound by the Ontario *Human Rights Code* to accommodate the worker up to the point of undue hardship.

Further, a number of submitters specifically referenced a recent Supreme Court of Canada decision (Tranchemontagne v. Ontario [2006] 1 S.C.R. 513), which dealt with the authority of administrative tribunals to look beyond their enabling statutes in order to apply the whole law to a matter properly before them. One submitter argued that the WSIA does not specifically remove from the WSIB the power to decide issues arising under the Ontario *Human Rights Code* and, therefore, the WSIB must not decline to exercise jurisdiction over *Code* issues that arise in return to work appeals.

A few submitters suggested that the charts contain insufficient detail to determine if the workplace party was in compliance with his or her required activities.

Moving return to work forward despite obstacles (19-02-02)
The revised draft policy proposes that in cases where the workplace parties encounter difficulties in arranging a return to work, the parties should pursue other return to work activities and work opportunities until the difficulty can be resolved.

A few injured worker/labour groups expressed concern that this proposal was not reflective of the real world where often the return to work process gets stalled because the

worker's level of impairment has not been correctly determined and health care tests are the only means to resolve the issue. Submitters therefore called for the policy to address disagreements over the worker's level of impairment.

Role of the WSIB (19-02-03)
Under the revised draft policy regarding the WSIB's role in return to work, the guidelines provide 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. A few submissions criticized the use of the word "may" instead of "shall," arguing that the policy guidelines should mirror the relevant wording in the statute. In this respect, section 40(7) of the WSIA reads: "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."

Distinction between issues of co-operation and refusal of suitable work (19-02-05 and 19-02-06)
Section 40 of the WSIA sets out the co-operation obligations of the workplace parties in the return to work process. Under s.40, a worker is not specifically required to accept an offer of suitable work. The legislative provision under which the consequences of a refusal fall is s.43(2). Specifically s.43(2) of the WSIA says that loss of earnings benefits are paid at 85% of the difference between the worker's net average earnings before the injury, and the net average earnings that he or she earns or is able to earn in suitable (and as of July 1, 2007, *available*) employment after the injury.

The revised draft policy dealing with resolving disputes regarding the suitability of offered work provides that as long as the workplace parties are co-operating in all other aspects of their early and safe return to work, a benefit adjustment following a refusal of suitable work is adjudicated under policy 19-02-05. Where co-operation issues arise, however, the draft policy provides that wage loss benefits are generally adjudicated under the relevant co-operation policy, 19-02-06. Further, in cases where co-operation issues arise at the same time as a refusal of suitable work, the WSIB, whenever possible, adjudicates the refusal of suitable work issue first.

A number of injured worker/labour groups pointed out the difficulty in separating issues of refusal of suitable work, from issues of worker co-operation. One submitter noted that while the revised draft policy encourages the workplace parties to work with each other to resolve work suitability disputes, it is unclear whether the WSIB sees its mandatory duty to mediate ESRTW disputes as operating here. This submitter argued that it would be absurd to assume that the mediation provision did not contemplate resolution of job suitability disputes, as this is the primary goal of ESRTW—getting the worker back to work.

As well, some submitters contended that the same procedural safeguards that are in place for worker co-operation issues, i.e., verbal warning, verbal notice, written notice, and a phased-in penalty scheme, should be in place for issues dealing with refusal of suitable

work. A number of submitters commented on the unfairness of having procedural safeguards for non-co-operation cases only, especially if the misconduct of the worker might be more egregious than in the case of a refusal of suitable work.

Embedding the *Occupational Health and Safety Act* within the WSIB's early and safe return to work policies (19-02-02 and 19-02-05)
Labour organizations recommended that the WSIB develop a separate policy on the application of the *Occupational Health and Safety Act* (OHSA) in the return to work process. Under OHSA, employers have an obligation to take every precaution reasonable in the circumstances for the protection of their workers. Labour submissions advanced the position that these obligations should apply to ESRTW situations.

Under revised policy 19-02-05, neither workplace party has the right to unilaterally decide whether the work offered by the employer is suitable. Some submitters were of the view that this position conflicts with the worker's unilateral right to refuse unsafe work under OHSA, and could undermine the protections afforded to workers under that legislation.

Renewing compliance with co-operation obligations (19-02-06)
A number of submissions argued that the revised draft policy does not provide enough procedural safeguards for a worker who is found to be non-co-operative, but who subsequently wishes to:

- renew compliance with his/her co-operation obligations, or
- subsequently accept suitable work.

These submissions suggested that the possible long-term punitive effect for workers (i.e., closure of loss of earnings benefits and the forfeiture of any LMR services) is disproportionate to the one-time failure to meet a co-operation obligation. These submissions contrasted the possible long-term punitive effect for workers with the maximum twelve-month cap on employer penalties.

On a related note, a number of submissions argued that the policy guidelines dealing with subsequent findings of non-co-operation are too harsh.

Retroactive application of non-co-operation penalties (19-02-06)
The revised draft policy continues to set out criteria under which the WSIB can retroactively impose penalties for worker and employer non-co-operation in the return to work process. A number of submissions restated their opposition to this proposal.

Embedding the Ontario *Human Rights Code* within the WSIB's early and safe return to work policies (19-02-02, 19-02-03 and 19-02-07)
Revised draft policy 19-02-07 deals with the relationship between human rights legislation and the return to work process. This policy proposes that, when circumstances require, the WSIB educates employers about their human rights obligations. Similar concepts are set out in policies 19-02-02 and 19-02-03.

While the submissions support the creation of these policy provisions, they call for stronger linkages between the ESRTW policies and the *Human Rights Code* (the *Code*); for example, by linking the employer's co-operation obligations to their compliance with the *Code*. One submitter argued that the policy should provide that the WSIB not accept a return to work program that does not comply with the *Code*. Submissions also argued that, where non-work-related disabilities make participation in ESRTW or LMR programs difficult for the injured worker, non-work-related disabilities must be equally accommodated with compensable conditions,

A number of injured worker/labour groups argued that, under the *Code*, all employers have a duty to accommodate up to the point of undue hardship. They therefore suggested that the draft policies which speak of employers making reasonable efforts to accommodate, in the absence of a re-employment obligation, are inconsistent with the *Code*, and that the WSIB's policies should reflect that employers have an obligation to accommodate up to the point of undue hardship.

On a related note, a number of submissions criticized the limits that the revised draft policies place on the consideration of post-accident, non-work-related disabilities.

Some submitters indicated that the WSIB has an obligation to educate Ontario workplaces about accommodation requirements.

LMR Assessments (19-03-02)

A number of submissions argued that the policy should recognize that workers who are identified as "permanently unemployable" at the LMR assessment stage, should not be required to co-operate in an LMR plan.

As well, a number of submitters requested that the ESRTW policies explicitly provide that workers who would otherwise be eligible for LMR services, except for a finding of non-co-operation, should not be unreasonably denied those services.

2. Employer/Employer Representatives' Submissions

Overall, the 55 submissions received from employers and their representatives, while appreciative of some of the changes made following the last round of consultation, still did not approve of the general direction that the WSIB had taken with respect to its proposed early and safe return to work (ESRTW) policies. Employers and their representatives also voiced their concerns with the general policy direction at meetings attended by WSIB staff.

A) General Comments

WSIB's failure to substantiate why a new direction in return to work is needed
Employers remain of the view that the WSIB has not sufficiently explained the existing problems around return to work in a way that allows them to see how the proposed policies solve or address the existing problems. They are still of the view that the existing policies sufficiently meet their needs. In fact, many employers restated their view that the proposed policies, especially the new requirements around the definition of suitable work, will lead to more, not less, failed return to work efforts and will negatively impact labour relations.

On a related noted, some employers are concerned that the overall goal of reducing claim persistency is not likely to be met by the measures outlined in the draft policies. These submitters are of the view that there has to be a clearer understanding of the causes of claims persistency before policy solutions are proposed.

Timing and effective date of ESRTW policies
Due to the perceived complexity of the policies and their possibly punitive effect, especially in the penalty stage following a finding of non-co-operation, a few employers support a phasing-in period, after the policies have been approved by the Board of Directors, of at least 6 months. Additionally, they suggested that the policies only apply to claims with accident dates on or after the date the policies take effect.

Stakeholder education/training
Some submitters again raised the issue that the WSIB did not include specifics as to how it intends to inform and educate the workplace parties. According to these employers, this piece is necessary so that employers will have the level of confidence necessary to carry out their new responsibilities and avoid the harsh non-co-operation penalties being proposed by the WSIB.

B) Policy Changes Approved by Employers/Employer Representatives

Employers generally support and are appreciative of the following Round 2 policy revisions:

- change from "timely" to "early" return to work in policy 19-02-02
- removal of the "best practices" material throughout the policies

- change from "Enforcing Workplace Parties' Co-operation Obligations," to "Ensuring Workplace Parties' Co-operation Obligations," in the title of policy 19-02-06
- reduction in the number of policies (from 8 down to 6) and improvements in clarity and ease of use (especially with reference to the charts containing the workplace parties' s. 40 obligations).

C) Comments Specific to Revised Draft Policies

Focus on suitable work that is "most comparable in nature and earnings" (19-02-02)
The policy statement in revised policy 19-02-02 indicates that the focus of the workplace parties' return to work activities should be on returning the worker to suitable work that is most comparable in nature and earnings to his or her pre-injury job. However, some submitters were of the view that this represents an uncalled for expansion of the language of s. 40 of the WSIA, which only refers to suitable and available work that is consistent with the worker's functional abilities and, when possible, restores the worker's pre-injury earnings.

Time to heal (19-02-02)
While employers and their representatives generally supported the change from "timely" to "early" return to work, many employers were of the view that the notion that a worker may not be functionally fit to do any type of work, e.g., requires "time to heal," goes against the principle of "active recovery in the workplace."

Definition of suitable work—safe (19-02-02)
The revised draft policy defines "suitable work" to include "post-injury work that is safe." Some employers continue to maintain that the requirement that post-injury work be performed at a worksite covered by either the *Occupational Health and Safety Act* or the *Canada Labour Code* unduly restricts employers in their ability to provide creative "work-at-home" solutions that might be appropriate in some instances.

Under the heading of "safe," one of the factors in the revised policy to be considered is whether the work poses an increased health or safety risk to the worker or to co-workers. One submitter requested that the term "…or third parties" be added to this group.

Many employers are of the view that the WSIB has no authority to include the worker's ability to travel safely to work as part of the definition of suitable work.

Definition of suitable work—productive (19-02-02)
Because the definition of suitable work in s. 40(1)(b) of the WSIA does not mention "productive," employers and employer representatives continue to state that the WSIB has no legislative authority to require that such work be productive. In addition, and despite the fact that the policy guideline around productive work—"provides an objective benefit to the employer's business"—came from and was supported by many employer stakeholders who attended the May, 2006 stakeholder sessions, a number of submitters felt that the WSIB is in no position to determine this issue, and that, in any case, such inquiries are too intrusive.

Examples are provided in the revised draft policy of tasks that the WSIB would generally view as providing an objective benefit to the employer's business. A few submitters requested that the third example be changed from "tasks that generate revenue (aside from reducing WSIB costs)," to "tasks that contribute to business objectives."

Available work (19-02-02)
The revised draft policy states that available work is work that exists with the accident employer at the pre-injury worksite, or at a comparable worksite arranged by the employer. A number of factors are listed to assist WSIB decision-makers in making the determination of whether an alternate worksite is comparable or not. A few submitters requested that the following factor be included:

- work offered at the alternate worksite is more suitable in nature and earnings than work available at the pre-injury worksite.

Work at home (19-02-02)
The revised draft policy states that in any work at home arrangement, the workplace parties must satisfy the WSIB that the work is safe and productive. Several submitters incorrectly interpreted this statement to mean that the WSIB was requiring prior approval of all work at home arrangements. Such pre-approval is in their view not supported by any legislative authority, is unnecessarily intrusive and prescriptive, and will unreasonably limit return to work opportunities available to injured workers.

Shared responsibility (19-02-02)
Many employers and employer representatives were of the view that the section which provides that return to work is a "shared responsibility" in which all participants, including unions, representatives, and health professionals, work toward returning the worker to suitable work, was in the nature of a best practice, over which the WSIB has no legislative authority, and therefore should be removed from the policy.

Health professionals' role in return to work (19-02-02)
Some employers re-stated their request that the WSIB specifically address the health professionals' participation in the return to work process, and levy penalties against health professionals when the latter are frustrating or delaying the process.

Section 40 "required activities" charts too expansive and not supported by legislation (19-02-02)
The revised draft policy 19-02-02 now includes several charts which set out the required activities of both workers and employers based on s. 40 of the WSIA. However, many employers and their representatives stated that the material included in the "required activities" charts should be strictly limited to the requirements set out in s. 40 of the WSIA. Specifically, employers objected to the inclusion of the following items:

- to respond to written or telephone contacts within a reasonable time
- to be available to communicate with the worker during regular work hours
- to offer suitable work that is available
- to make reasonable efforts to accommodate a worker's pre-existing disabilities, and
- to be specific about the offer of work.

With respect to the requirement of offering suitable work that is available, employers continue to be of the view that the WSIB has improperly imported the s. 41 re-employment obligation into s. 40.

Some submitters suggested that the required activities set out in the charts must, of necessity, be included in a regulation pursuant to s. 40(1)(d) of the WSIA—"doing such other things as may be prescribed."

Identifying and securing suitable work (19-02-02)
The revised draft policy contains a NOTE in this section which says that the term "work" is used broadly and can include the combining of tasks/duties which together constitute a temporary or permanent job. Some submitters requested that this statement be moved to the "Policy" section of the document to give it more prominence.

Providing information to the WSIB (19-02-02)
The "required activities" chart in this section of the revised draft policy contains a requirement that employers "provide the WSIB, when requested, with relevant information and/or copies of any documented exchanges (e.g., documented negotiations, return to work plans, written description of job offered)." Several submitters requested that this item be clarified so that it is clear it only refers to documented exchanges between the workplace parties.

No legislative authority to require suitable work to be "sustainable" (19-02-02)
Because the definition of suitable work in s. 40(1)(b) of the WSIA does not mention "sustainable," employers remain of the view that the WSIB has no legislative authority to require that such work be sustainable, even for permanently injured workers. In addition, many employers are still of the view that requiring suitable work to be sustainable will unreasonably reduce the number of return to work opportunities available for injured workers.

The WSIB's role in return to work (19-02-03)
The revised draft version of this document clearly sets out the WSIB's responsibilities in the return to work process. These responsibilities are outlined under the following headings:

- education
- case management
- assistance and dispute resolution
- ensuring compliance, and
- providing labour market re-entry services.

However, some employers and employer representatives viewed this document as merely providing information about the WSIB's role in the return to work process, therefore not being true "policy." For this reason, these employers requested that this policy, with the exception of the mediation guidelines, be deleted in its entirety and replaced by WSIB developed educational materials.

A submitter requested that the words "…if necessary" be added after "providing labour market re-entry services" in the relevant policy statement.

Although a few submissions acknowledged the WSIB's role as facilitator of the ESRTW process, some submitters questioned the need for the WSIB to be involved unless a workplace party has identified a RTW barrier or dispute.

Small business (19-02-03)
In the section on the WSIB's case management responsibility, the revised draft version of 19-02-03 includes a paragraph which outlines the special responsibility the WSIB has towards small businesses in the return to work process. However, many employers stated that while they supported the reference to the special needs of small business in this policy, they did not feel that enough clarity had been provided as to how the WSIB intended to assist these businesses. Some employers were of the view that a stand alone policy should be developed dealing specifically with the special needs and requirements of small business in the return to work context.

Submitters also shared the view that the revised draft policies are particularly onerous for small businesses and will impede the ESRTW process in these establishments.

Resolving disputes regarding the suitability of offered work (19-02-05)
In cases where the workplace parties cannot agree on whether an offered job is suitable, the revised draft policy sets out the following three steps that should take place whenever reasonably possible:

1. The worker notifies the employer that the offered job is not suitable and provides reasons.
2. The employer considers the reasons and, through dialogue with the worker, considers further accommodations.
3. In the event that agreement cannot be achieved, both workplace parties promptly notify the WSIB and provide all information relevant to the dispute.

With respect to step 2, above, one submitter requested that the words "if appropriate" be added following the words "…considers further accommodations."

The revised draft policy also outlines the WSIB's role and responsibilities in resolving disputes over suitable work. In this respect the policy proposes the use of an ergonomic assessment to help resolve disputes where conflicting or inaccurate information exists regarding the suitability of the offered work. However, some employers interpreted this provision to mean that other types of assessments, for example industrial hygiene assessments, are by implication ruled out. These employers feel that such "ruling out" unnecessarily limits available options to assist in resolving disputes over an offer of suitable work.

The revised draft policy also provides a list of factors the WSIB considers when determining whether an offered job is suitable. One of those factors is the "worker's

ability to travel safely to the proposed worksite." In this context, one submitter requested that the following factor be added to the list: the employer's ability to provide safe transportation to and from the proposed worksite.

The other factors that the WSIB considers when determining whether an offered job is suitable are whether changes in the location of work and/or in work hours/shift will negatively impact the worker (e.g., the worker is required to make alternative child/elder care arrangements on short notice). Certain employer representatives took exception to the inclusion of these factors because they believe these factors are within management's right to schedule and manage work.

Refusal of suitable work not an issue of non-co-operation (19-02-05)
Employers and their representatives remain of the view that the policy position adopted by the WSIB on this issue, i.e., that refusal of suitable work is not an issue of non-co-operation, is incorrect and counter-intuitive. This is despite the fact that s. 40(2) of the WSIA does not include "acceptance of suitable work" as part of a worker's legislated co-operation obligations, and despite the fact that refusal of suitable work results in an adjustment of loss of earnings (LOE) benefits under s. 43(2) of the WSIA.

Date benefits adjusted where worker refuses suitable work (19-02-05)
In cases where the WSIB determines that the offered work is suitable, revised draft policy 19-02-05 states that the WSIB generally adjusts the worker's wage loss benefits as of the date of the worker's next available shift. An alternate date may be selected based on factors including but not limited to

- whether a workplace party needs some time to make reasonable arrangements for return to work
- if resolution of the dispute involves a mediated settlement, or
- whether return to work arrangements were unreasonably hindered by one workplace party or the other.

However, many employers and employer representatives remain of the view that the date benefits are adjusted should in all cases be the date the suitable work was offered.

Date written notice of non-co-operation comes into effect (19-02-06)
Currently, revised draft policy 19-02-06, Ensuring Workplace Parties' Co-operation Obligations, indicates that the date the written notice of non-co-operation comes into effect is 5 WSIB business days after the date that appears on the written notice. However, many employers were of the view that this date should be extended to 7 or 10 WSIB business days to allow sufficient time for the notice to get to the proper employer contact person, and for the employer to take the appropriate action to bring themselves back into compliance.

Penalties levied against Schedule 2 employers (19-02-06)
Some employers requested that a policy guideline should indicate that penalties levied against Schedule 2 employers be credited solely to Schedule 2 administration costs, and not included in the general administration costs of the WSIB.

Non-co-operation penalties are too harsh (19-02-06)
Many employers and their representatives re-stated their position that the penalty provisions for failing to co-operate in ESRTW are too harsh, especially on small employers and employers in Schedule 2.

On a related note, a number of employers found that the policy guidelines dealing with subsequent findings of non-co-operation are unduly punitive and recommended that the process that applies to the initial penalty scheme also be followed for a subsequent finding of non-co-operation.

Non-co-operation penalties and re-employment penalties—concurrent application (19-02-06)
Employers remain of the view that the WSIB should not be able to levy both a re-employment penalty and a non-co-operation penalty against an employer in the same claim.

Retroactive application of non-co-operation penalties (19-02-06)
The revised draft version of 19-02-06 states that the WSIB expects the workplace parties to begin co-operating immediately following a work-related accident—even if the WSIB has not made an initial entitlement decision in the claim. However, a number of submitters re-stated their position that the WSIB has no legislative authority to levy a non-co-operation penalty retroactively, i.e., for activities that occur, or fail to occur, before an initial entitlement decision is made.

Employers' human rights obligations (19-02-07)
Most employers and employer representatives are still of the view that since the WSIB has no legislative authority over human rights, all of revised draft policy 19-02-07 should be deleted and replaced by some type of educational document that does not have the force of policy and does not involve the WSIB enforcing human rights legislation.

A number of submissions re-raised the issue that the duty to accommodate contained in s. 41 of the WSIA only applies to employers with a re-employment obligation. When revised draft policy 19-02-07, as well as 19-02-02, speaks of the WSIB's expectation that employers "make reasonable efforts to accommodate a worker's disabilities/impairments in the absence of a re-employment obligation," employers remain of the view that the policies have improperly "imported" the s. 41 (re-employment) accommodation requirement into s. 40 (co-operation) of the WSIA.

Revised draft policy 19-02-07 sets out the responsibilities of all the workplace parties under applicable human rights legislation in the context of the early and safe return to work of injured workers. The WSIB's role is envisioned as one of informing and educating the workplace parties about such responsibilities and encouraging their fulfillment. However, many employers are still of the view that the WSIB will now be *enforcing* human rights legislation and by doing so will be usurping a legislative authority it does not possess. Connected to this concern is the employers' re-stated view that the WSIB has no authority to compensate for post-accident, non-work-related

disabilities under the guise of enforcing human rights legislation. On a related note, many employers felt that the WSIB has no legislative authority to be accommodating LMR plans to take into account a worker's post-accident, non-work-related disabilities.

A few submitters recommended that the policy clearly state that an employer's failure to comply with human rights obligations, in the absence of a re-employment obligation, does not constitute a breach of the employer's ESRTW obligations and, consequently, cannot give rise to a non-co-operation penalty.

Labour Market Re-entry (LMR) assessments (19-03-02)
A few employer submissions re-stated their position that the revised draft policy should specify that a worker is only entitled to an LMR assessment when all return to work options with the accident employer have been exhausted.

Moreover, a number of submissions indicated that LMR services should not be available to workers who have been found to be non-co-operative in the ESRTW process.