

WORK REINTEGRATION and NEER POLICIES

CONSULTATION REPORT

JULY 2011



Workplace Safety and Insurance Board

Commission de la sécurité professionnelle et de l'assurance contre les accidents du travail

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Introduction

As part of the commitment to improve return to work outcomes for injured workers, the WSIB released interim Work Reintegration (WR) policies and a draft New Experimental Experience Rating (NEER) policy for stakeholder consultation on November 8, 2010.

The interim WR policies became effective on December 1, 2010, when the WSIB began providing Work Transition (WT) case management services internally under the new Work Reintegration Program. The interim WR policies provided an integrated policy framework to support the new WR program. The key features of the WR program include:

- maintaining the employment relationship between the workplace parties
- promoting compliance with legislative and policy requirements
- giving workers meaningful input and choice into their programs and training institutions, and
- ensuring the costs and quality of retraining.

Stakeholders had until February 15, 2011 to submit responses. A total of 39 submissions were received from the worker and employer communities, with one independent submission. Copies of each of the submissions can be found in the WSIB's Reference Library, 17th Floor, 200 Front Street West, Toronto. (Note: The total number of submissions and the separate worker/labour and employer stakeholder counts do not match as some submissions contained both NEER and WR comments in the same document.)

Topic	Worker/Labour Stakeholders	Employer Stakeholders
WR interim policies	17	17
Draft NEER policy	6	15

The policy documents were revised based on the feedback provided in the consultation submissions as well as internal staff feedback. The revised draft policies were subsequently shared with key worker/labour and employer stakeholders in May and June, 2011. Some further adjustments were made as a result of this additional input, and the finalized policies are effective July 15, 2011.

While the WSIB carefully reviewed and considered all comments provided during the consultation process, the following information highlights the WSIB response to the general themes and key issues raised by stakeholders.

General Themes Raised By Stakeholders

	ISSUE	EMPLOYERS	WORKERS/LABOUR	WSIB RESPONSE
1.	Adoption of interim policies	<ul style="list-style-type: none"> - questioned the urgency of implementing interim policies without the opportunity for consultation first 	<ul style="list-style-type: none"> - questioned why interim policies were adopted without consultation first 	<ul style="list-style-type: none"> - in some circumstances, the WSIB may be required to address a pressing legislative, program or legal issue - interim policies will be developed as a short-term solution to guide decision makers while the WSIB takes the opportunity to consult on the interim policies - feedback obtained through the consultation will allow the WSIB to improve on the policies - this type of policy development will be the exception
2.	Policies too broad	<ul style="list-style-type: none"> - commented on the need for greater clarity in the policies to ensure consistency of understanding 	<ul style="list-style-type: none"> - preferred to see more detail in the policies so that there was greater transparency of what rules would be used by WSIB decision-makers to make WR decisions - preferred the detail that was in the prior policies 	<ul style="list-style-type: none"> - in the past, the WSIB has been criticized for developing policy documents that were seen to be complicated and contained extensive process - the WR policies are principle-based, and provide WSIB decision-makers, workers, and employers with guidelines on how work reintegration decisions will be made based on the fundamentals of the legislative framework
3.	Language in policies not consistent with language in <i>Workplace Safety and Insurance Act (WSIA)</i>	<ul style="list-style-type: none"> - concerns that some of the policy concepts go beyond the legislative authority of the Act as well as use new terms such as Work Reintegration (WR) and suitable occupation (SO) that are not specifically set out in the statute 	<ul style="list-style-type: none"> - concerns that language within policies is not consistent with WSIA or requires legislative change 	<ul style="list-style-type: none"> - in 2009, KPMG conducted a Value for Money Audit on the Labour Market Re-entry Program - one of its six recommendations was for the WSIB to develop an integrated approach to work reintegration, and to align its policy and incentive frameworks to the development of a new work reintegration program - the WSIB accepted KPMG's recommendations - the WR policies respect the legislative provisions governing early and safe return to work, re-employment, and labour market re-entry while taking a plain, principle-based approach

Summary of Key Issues Raised By Stakeholders

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

	ISSUE	EMPLOYERS	WORKERS/LABOUR	WSIB RESPONSE
1.	Return to Work (RTW) Hierarchy	<ul style="list-style-type: none"> - it is improper for the WSIB to impose a higher requirement to return workers to pre-injury work to a point of undue hardship - WSIB should consider evidence of hardship using a lower standard - WSIB does not have the legislative authority to enforce <i>Human Rights Code</i> 	<ul style="list-style-type: none"> - workers should not be forced to return to injury employer if relationship is poor, and WSIB should provide worker with a WT plan - concern that workers will be given jobs that are not suitable or dignified (meaningful) 	<ul style="list-style-type: none"> - RTW Hierarchy removed - WR goal included: the effort of the workplace parties to return the worker to work that he/she has the skills to perform, is consistent with the worker's functional abilities, and that, to the extent possible restores the worker's pre-injury earnings
2.	Definition of suitable work	<ul style="list-style-type: none"> - do not include the concept of "safe" or "productive" in definition of "suitable" - the WSIA only refers to "suitable work" that is available, within the worker's functional abilities, and to the extent possible, restores the worker's earnings 	<ul style="list-style-type: none"> - define "safe" work and include worker's right to refuse unsafe work 	<ul style="list-style-type: none"> - "safe" and "productive" now defined as per previous proposed ESRTW draft policies - consistent with the remedial nature of the WSIA - did not include reference to worker's right to refuse unsafe work since this is a right under other legislation [<i>Occupational Health and Safety Act (OHSA)</i>]

Summary of Key Issues Raised By Stakeholders

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

	ISSUE	EMPLOYERS	WORKERS/LABOUR	WSIB RESPONSE
3.	Sustainability	<ul style="list-style-type: none"> - WSIA does not require suitable work to be sustainable post injury - WSIB has no legislative authority to use the term - WSIA does not impose obligation to attempt to provide sustainable work 	<ul style="list-style-type: none"> - definition of sustainability should be strengthened and included in definition of suitable work 	<ul style="list-style-type: none"> - removed the concept of “sustainable” - included language that work offered in cases of permanent impairment should have reasonable prospects of being available in the longer term - purpose of policy guideline is to ensure job offer is reasonably viable for a worker with a permanent impairment - clarified the language respecting the impact of collective agreements

Summary of Key Issues Raised By Stakeholders

19-02-02, Responsibilities of the Workplace Parties in Work Reintegration

	ISSUE	EMPLOYERS	WORKERS/LABOUR	WSIB RESPONSE
1.	RTW Hierarchy	<ul style="list-style-type: none"> - it is improper for the WSIB to impose a higher requirement to return workers to pre-injury work to a point of undue hardship - WSIB should consider evidence of hardship using a lower standard - WSIB does not have the legislative authority to enforce <i>Ontario Human Rights Code</i> 	<ul style="list-style-type: none"> - workers should not be forced to return to injury employer if relationship is poor, and WSIB should provide worker with a WT plan - concerns that workers will be given jobs that are not suitable or dignified (meaningful) 	<ul style="list-style-type: none"> - language of the “WR goal” inserted to ensure consistency across WR policy documents
2.	Disputes over job suitability or health and safety issues	<ul style="list-style-type: none"> - concerns that employers will be found non-co-operative if there is disagreement over a job offer where the worker believes the job is suitable but the employer does not agree 	<ul style="list-style-type: none"> - concerns that workers will be found non-co-operative if they refuse to take a job that they believe is not suitable, or they raise a health and safety issue under (OHS) 	<ul style="list-style-type: none"> - WSIB does not consider these matters to be acts of non-co-operation
3.	Length of co-operation obligation	<ul style="list-style-type: none"> - obligation is open-ended, even when worker voluntarily quits job 		<ul style="list-style-type: none"> - co-operation obligation ends the earlier of: <ul style="list-style-type: none"> o 72-month lock-in date o when worker voluntarily quits, or employer terminates the employment for reasons unrelated to the injury o when the WSIB is satisfied that no current or future work opportunities exist with the injury employer

Summary of Key Issues Raised By Stakeholders

19-02-02, Responsibilities of the Workplace Parties in Work Reintegration

	ISSUE	EMPLOYERS	WORKERS/LABOUR	WSIB RESPONSE
4.	What are reasonable behaviours that should not be considered to be acts of non-cooperation	Internal feedback - clarification required regarding matters beyond workplace parties' control		- factors which will not lead to finding of non-co-operation now included
5.	Amount of full penalty to worker	- worker penalty should be applied from date of non-co-operation	- levying a full penalty to reflect the earnings of a fully experienced worker is unfair	- policy revised to fairly reflect the wages the worker could earn had he or she completed WT plan
6.	Penalty scheme for small employers	- policy should recognize that small employers may not have capacity or resources immediately available to achieve WR outcomes		- policy revised to extend the date of written notice for the small employer to come into compliance with co-operation obligations
7.	More detail required regarding re-employment rights and obligations	- not clear what re-employment obligations are for seasonal and contract workers	- it would be helpful to provide more clarity about re-employment rights of workers where such a right exists	- inserted detail that existed in prior policy or practice

Summary of Key Issues Raised By Stakeholders

19-03-03, Determining Suitable Occupation

	ISSUE	EMPLOYERS	WORKERS/LABOUR	WSIB RESPONSE
1.	Copies of WT assessments	- would like to have access to WT assessments		- policy on Disclosure of Claim File Information to Employers (21-02-03) revised to allow employers to receive copies of WT assessment documentation - clarify that authorized worker representatives may participate in the discussion of the assessment results with the external assessor
2.	Suitable Occupation (SO)	- workers should pursue all work opportunities available in the broader labour market	- concerns that workers will be forced to travel long distances, or relocate in order to secure a SO (when suitable work with the injury employer is not possible)	- revised to clarify the approach <ul style="list-style-type: none"> o first, a SO with the injury employer (local or surrounding area to which the worker may reasonably be expected to commute) o second, a SO with a new employer in the local labour market o third, a SO with a new employer in the broader labour market
3.	Relocation (worker required to relocate to find a suitable occupation)	- more detail as to what relocation expenses WSIB will pay	- concerns that workers will be forced to relocate or have their benefits reduced/suspended - personal reasons cited for wanting to stay in the community that they were injured in	- created a new policy, 19-03-11 to address relocation - clarified the approach that will be followed when the worker is required to find a SO (as outlined above) - worker will have a choice of whether to relocate - if the worker chooses not to relocate and there is no SO in local labour market, the loss of earnings will be adjusted to the earnings of the established SO in the broader labour market

Summary of Key Issues Raised By Stakeholders

19-03-03, Determining Suitable Occupation

	ISSUE	EMPLOYERS	WORKERS/LABOUR	WSIB RESPONSE
4.	Enhanced WT plan	<ul style="list-style-type: none"> - question posed as to why WSIB would provide enhanced WT Plan to workers if following the injury they are able to go back to work, regardless of the fact that the post-injury job is a low-paying job - WSIB does not have legislative authority 	<ul style="list-style-type: none"> - suggested that enhanced WT Plan should be provided to all workers, regardless of their earnings at time of injury 	<ul style="list-style-type: none"> - revised to clarify that an enhanced WT plan will apply to young workers who on the date of injury are between the ages of 15-24 who have not had a reasonable chance to establish their earnings profile - enhanced WT services will help young workers to realize an earnings potential that goes beyond what they were earning at time of injury - an enhanced SO is for the purposes of a WT plan only, and not for the purposes of calculating loss of earnings (LOE) benefits

Summary of Key Issues Raised By Stakeholders

19-03-05, Work Transition Plan

	ISSUE	EMPLOYERS	WORKERS/LABOUR	WSIB RESPONSE
1.	Older worker option (for workers over 55 who require vocational skills training)		- concerns that older workers will be forced to take this option instead of being given the opportunity to pursue vocational skills training	- workers will not be forced to take this option; it is a very reasonable option for someone who does not want to retrain in a structured learning environment

Summary of Key Issues Raised By Stakeholders

19-03-06, Work Transition Expenses

No key themes raised through stakeholder submissions. Minor changes made to improve clarity of document.

Summary of Key Issues Raised By Stakeholders

13-02-02, Draft NEER Policy

1.	Expansion of NEER Window	<ul style="list-style-type: none"> - some question the proposed change given the Funding Review - suggestion that the policy is retroactive 	<ul style="list-style-type: none"> - some worker representatives are opposed to experience rating altogether 	<ul style="list-style-type: none"> - the change is important to promote and optimize return to work opportunities of injured workers and support work reintegration - moving closer to consistency with CAD-7 program and six-year lock-in - evidence indicates increase in reopened cases in line with the three-year NEER window - Professor Harry Arthurs will make recommendations for systemic change and design of all experience rating programs - a retroactive change would be if the WSIB decided to recalculate the employers' 2010 experience year using a 4-year window
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