WORK SAFE. FOR LIFE.
WORKERS' COMPENSATION BOARD OF NOVA SCOTIA

Clarification of WCB Re-employment Policies: Final Policy Decision and Supporting Rationale

September 2022

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1. Introduction

The WCB Board of Directors (the "Board") identified the review of Chapter 5 of the WCB Policy Manual - Re-employment as a high priority policy topic in 2019. Updating and clarifying these policies supports improved outcomes for safe and timely return to work. In December 2020, the WCB initiated Stage 1 consultation on re-employment by bringing together small stakeholder groups to obtain feedback on the issues and questions the WCB should consider as the re-employment policies were reviewed.

In the second stage of the consultation process, on June 30th, 2021 the Board invited stakeholders to comment on the draft revisions to the re-employment policies. In particular, the document "Policy Background Paper - Clarification of Re-employment Policies: Section 5 of the WCB Policy Manual" was e-mailed to the WCB's key stakeholder list and posted to the WCB website. The consultation period ended September 30, 2021.

It's apparent from the submissions received that stakeholders put a great deal of effort into the review of the paper and draft policy. The feedback was detailed and considered, resulting in several revisions to the policy. We take this opportunity to thank stakeholders for the time and effort it takes to participate in consultations like this one.

This report concludes policy development on the policy topic re-employment. This report identifies:

- key issues raised during consultation;
- the rational for why the WCB did or did not revise the draft policy in response to the submissions received; and
- the WCB's final policy on Re-employment in Appendix A.

2. Issues Raised During Stage 2 Consultation

The WCB received feedback from seven associations/organizations in response to the consultation. Injured worker and labour groups made five submissions (a labour organization and a worker organization made a joint submission). Employer groups made two submissions.

Most of the feedback was on the following topics:

- Content of the draft policy.
- Policy development and consultation process.
- WCB return-to-work (RTW) and vocational rehabilitation (VR) processes and procedures.
- Concerns with the re-employment provisions in the *Workers' Compensation Act* (the "*Act*")

The feedback on the WCB's RTW and VR processes and procedures as well as concerns expressed about the re-employment provisions in the *Act* cannot be addressed through the new policy. However, the feedback has been communicated to the WCB's service delivery leadership for consideration.

As noted above, feedback was received on the policy development and consultation process. In particular, the WCB was asked to develop policy on the following topics:

- Re-employment for workers and employers not subject to the re-employment sections in the *Act*.
- The practice of using of "extras" as part of the RTW process. One of the WCB's RTW strategies is returning the worker to work as an 'extra' person while someone else does his/her regular job. The injured worker works at a reduced capacity performing light/modified work with or without reduced hours and continue to receive WCB earnings replacement benefits.
- The use of S. 81 of the *Act*. Section 81 of the Act gives the WCB the authority to deny or reduce compensation if the work-related injury was caused by activities that were determined by the WCB to be unsafe for the worker.
- Factors to be considered when determining return to work, job positions and timelines.

The WCB will consider these requests for policy development along with other issues that have been identified when making recommendations for the next policy work plan.

As well, both injured worker/labour and employer groups who provided feedback requested further consultation be undertaken once revisions are made to the policy. The policy development process provides stakeholders opportunity to provide feedback at the issues identification stage (Stage 1) and on the actual wording of draft policy in Stage 2. The Board is provided with the final proposed policy, and a supporting paper (this paper) that communicates stakeholder feedback and how the WCB has considered that feedback in the development of the final policy. Based on this information, the Board makes a final decision on the policy changes.

In considering this request for further consultation, we note the approved policy development process has been followed. As well, the basic requirements contained in the updated re-employment policy are not new. Rather, they are clarifications of *Act* and policy provisions that have been in place for over 25 years. Therefore, the WCB will not be altering its policy development process at this time.

Please see Appendix B for a summary of feedback received in response to Stage 2 consultation on the WCB's re-employment policies. Feedback on policy content is discussed in detail in Section 3 below.

3. Stakeholder Feedback, Analysis, and Response

After considering the feedback received, changes have been made to the policy to improve clarity of intent and increase ease of use. Key changes are:

- Clarification of the scope and application of the policy.
- Clarification that transitional, modified, or similar duties being performed due to the workplace injury are not considered pre-injury circumstances for re-employment purposes.
- Specifying that workers will received notifications required in the policy.

- Adding wording to make it clear that the WCB is not limited to the factors listed in the policy when determining if an accommodation would pose undue hardship.
- Adding *Act* references in each section instead of at the end of the policy.
- Extending the time period an employer has to comply with an order to re-employ a worker from five days to fourteen business days.
- Changing the order and title of some sections, as well fixed the grammar and phrasing.

The following is a detailed discussion of feedback received on the content of the policy and the WCB's response.

➢ Format of policy

#1. The WCB received mixed feedback on consolidation of the sixteen re-employment policies into a single policy. One stakeholder organization believed the consolidated approach brought clarity to the topic while another believed the topic was too broad to be placed into a single policy and made it difficult to reference.

Analysis and response

As the WCB reviews policy topics we will be looking at ways to streamline and consolidate information. Re-employment occupied an entire chapter of the policy manual with sixteen policies in total. Many of these polices were a paragraph or two in length, and several were a single sentence. The WCB believes re-employment lends itself to consolidation into one policy given its specific coverage and eligibility requirements and that doing so promotes a fulsome understanding of the topic. To support referencing and readability the WCB has added relevant *Act* references to the bottom of each section and changed the order of some sections. In particular:

- Formerly Section 6. Length of Re-employment Obligation is now placed earlier in the policy at Section 3.
- Formerly Section 3. Obligations of Injured workers is moved to Section. 5, just before the now Section 6. Re-employment Obligations of Employers.

Of course, many workers, employers and WCB staff are very familiar with the old policy format. To support transitioning to the new format the WCB will produce a table of concordance that will map current policy content to the previous polices.

➢ Scope of application of re-employment policy

#2. An injured worker association believes the WCB must revise the policy to make it clear it applies to the RTW process. They believe that workers do not need to have plateaued medically before re-employment processes are initiated. Rather, the ability to perform transitional or modified duties makes a worker eligible to be re-employed per Sections 89-101 of the *Act*.

Analysis and response

The WCB agrees that a worker does not have to plateau medically or reach maximum medical recovery before being re-employed. However, they must be recovered sufficiently to do their

pre-injury work or perform suitable work only. This will mean they have reached a level of medical stability in their condition.

The WCB disagrees that the term “suitable work” in the re-employment sections of the *Act* refers to transitional or modified duties that are part of a RTW plan. The intent of the re-employment sections of the *Act* is to restore the worker to a place in the labour market, and that this place in the labour market should mirror as closely as possible the position held at the time of injury. Returning a worker to their place in the labour market (re-employing them per Sections 89-101 of the *Act*) is not the same as employers and workers participating in a RTW program that includes transitional/modified duties. While RTW programs support the ultimate re-employment of a worker, they are distinct from the specific employer re-employment obligations in Sections 89-101 of the *Act*.

Sections 97 and 98 of the *Act* specify the employer’s obligations when they are notified by the WCB that a worker is capable of their pre-injury job or can only do suitable work. This was discussed in the final Policy Paper provided to the Board in 1995:

> “…There are two categories of worker, each with a specific form of re-employment entitlement:
>
> • The worker fit for essential duties of the pre-injury employment is entitled to reinstatement in the pre-injury employment immediately, except under certain circumstances. In that case, the worker is entitled to either alternative comparable work or other suitable work.
>
> • The worker fit **only** for suitable work is entitled to suitable work as it becomes available during the re-employment period.”

Section 97 of the *Act* requires the WCB to notify the employer when the worker is able return to their pre-injury job or alternative work (work that is similar to their pre-injury job). If the employer can establish this is not possible, they shall offer to provide the worker with suitable work. Clearly, suitable work is not transitional duties given the worker has sufficiently recovered to carry out their pre-injury job. The worker is being offered suitable work because the employer has established they cannot offer pre-injury or alternative work.

Section 98 of the *Act* addresses situations where a worker is fit only for suitable work. Notification is made to the employer when the worker has reached a level of medical stability in their condition where the evidence indicates the worker will only be able to perform suitable work, and not (or likely not) be able to return to their pre-injury job. Upon receipt of this notification, the employer must offer to the worker the first opportunity to accept suitable work that may become available with the employer. Considering the use of the term “suitable work” in Section 97 and the overall intent of re-employment, it logically flows that suitable work does not mean transitional/modified duties as part of a RTW program. Rather, suitable work is a role or position within the employer's control which the employer fills or intends to fill. Alternatively, transitional/modified duties are part of a worker’s journey toward the “destination” of re-employment – whether it be to pre-injury or suitable work.

The WCB is mindful of the difference in the employer’s duty to re-employ in S. 97 and 98. While S. 97 requires immediate re-employment, S. 98 does not. It is in a worker’s best interest for the WCB to not prematurely determine a worker’s re-employment status. For example: A worker’s

prognosis is that they will recover sufficiently to return to their pre-injury job with some accommodations. Once the worker reaches this point in their recovery the employer must re-employ them (S.97). If, instead, the WCB makes a determination that the worker can do suitable work (even though we expect them to be able to do their pre-injury job within the re-employment period as their condition improves), the employer must only offer to the worker the first opportunity to accept suitable work that **may become available** with the employer.

The WCB does believe, however, that changes to the Preamble and section *6.3 Worker able to return to work with pre-injury employer* to clarify the scope and application of the policy would be appropriate. The following changes to the Preamble have been made:

> **Preamble**
>
> ~~For most injured workers, early and safe return to work (RTW) occurs quickly, with some workers able to stay at work during recovery. For others, time off from work and/or a workplace accommodation may be needed to achieve a successful RTW.~~
>
> ~~For those injured workers who are unable to stay at work, the WCB supports all workplace parties to work collaboratively in returning the injured worker to employment.~~ The re-employment sections of the *Workers' Compensation Act* (Sections 89-101) support returning injured workers to the workplace by setting out a re-employment obligation for certain employers. **Re-employment is intended to return the worker to a place in the labour market resembling, as closely as possible, the position held at the time of their injury.**

These changes ensure the focus of the policy is entirely on re-employment provisions of the *Act*.

Please see the discussion of feedback on section 6. Re-employment Obligation of Employers later in this paper to see changes made to that section that further clarify the scope and application of the policy.

➢ Re-employment Obligations and Human Rights Legislation

#3. An injured worker association and labour organizations were supportive of the inclusion of this topic in the policy and believe it is essential that the distinction between the re-employment obligations in the *Act* and the employer's duties under human rights legislation be clearly stated.

Analysis and response

The WCB agrees it is important to acknowledge the interplay of human rights legislation and re-employment obligations. The layering of these rules can result in complex workplace circumstances. This section, at a high level, explains the relationship between the pieces in the context of WCB re-employment obligations.

➢ Employer Coverage and Worker Eligibility

#4. An employer organization stated there is inconsistent wording in the policy regarding employer coverage and worker eligibility requirements – in particular regarding the use of the terms 1 year vs. 12 continuous months.

#5. An employer organization requested clarification on how “eligible pauses” is interpreted when an employee works for several employers, limiting their availability to work.

#6. Worker and labour organizations expressed concern with the use of the phrase “Generally, this will exclude those workers with sporadic, casual or short-term pre-injury tenure.” In section 2.2 Worker Eligibility. They believe it is confusing and unnecessary. For example, they state, “casual” has a specific meaning in collective agreements and may create confusion if used in the policy. Many workers can maintain a “casual” status over multiple years but effectively be working full time.

#7. An injured worker association asked why the phrase “. . . or a mutual agreement that the worker will return to work for the employer upon recall, subject to applicable seniority provisions ... “from old policy 5.1.2R is not included in draft policy?

Analysis and response:

Employers who regularly employee 20 workers and are not in the construction industry are covered by the re-employment sections of the *Act*. The workers of these employers are eligible to be re-employed if they have been unable to perform work for the employer for a period of time and been employed by the employer for at least twelve continuous months. A review of the policy identified that in the Preamble we referenced “one year”, but in section 2 of the policy reference “twelve continuous months”. The Preamble of the policy has been updated to read:

> “In particular, employers (except those in the construction industry) who regularly employ 20 or more workers are obligated to re-employ an injured worker who has missed time from work due to the work injury if: 1) that injured worker has been employed with them continuously for at least ~~one year~~ **twelve months** prior to the work-related injury; and 2) the worker can perform the essential duties of their pre-injury job, or other suitable work.”

When determining whether or not a worker has been employed for at least twelve continuous months the WCB will review the claim file for length of service information (for example, employment information on the WCB Injury Report. If the length of service is not clear, the WCB will contact the employer to confirm. As stated in the policy, eligible pauses are not considered when determining if a worker has been employed for twelve continuous months.

The WCB focuses on the employment relationship between the worker and employer they are working for at the time of the workplace injury (often called the “injury employer”). We will examine any pauses in employment with the “injury” employer to determine whether or not the worker has been employed for twelve continuous months at the time of the workplace injury. Unless the pause in employment is not an “eligible pause” as described in the policy (regardless of whether or not the worker also works for another employer), it will not impact on our assessment of the length of the employment period for the purposes of determining worker eligibility for re-employment.

The WCB agrees that the phrase “Generally, this will exclude those workers with sporadic, casual or short-term pre-injury tenure” is unnecessary. In effect, the eligibility criteria in Section 2b) excludes this type of employment. A review of the section also identified that part of the content of the old policy 5.1.2R Worker Eligibility was inadvertently not included in the draft policy. We have also changed the term “accident” to “injury” throughout the policy to be consistent with modern terminology at the WCB.

In light of this feedback, the following changes[1] have been made to the policy:

b) The worker has been employed by the employer for at least twelve continuous months, including eligible pauses, at the time of the **injury** ~~accident~~. Eligible pauses are those that are less than thirty calendar days, or those are thirty calendar days or more where the pauses:
   i. have been authorized by the employer (e.g. leaves of absence, vacations, or suspensions);
   ii. are the right of the worker under other legislation (e.g. maternity / paternity leaves; or
   iii. **notwithstanding Section 2.1**, are supported by substantive evidence of a continuing employment relationship (e.g. payment of ongoing employer paid benefits), **or a mutual agreement that the worker will return to work for the employer upon recall, subject to applicable seniority provisions.**

~~Generally, this will exclude those workers with sporadic, casual or short-term pre-injury tenure.~~

➢ Determining if case appropriate for re-employment

#8. An injured worker association believes that whether a worker has plateaued medically or functionally is irrelevant when it comes to re-employment.

#9. A worker organization as well as labour organizations expressed concerns about the WCB determining a case is not appropriate for re-employment due to labour/management issues and believe there is nothing in the *Act* that allows for re-employment to be delayed or deferred when labour/ management issues will interfere with the re-employment process. They request the phrase be removed from the policy. As well, a labour union and an employer association asked whether or not the re-employment period is extended if the WCB decides to defer re-employment. Labour also expressed concerns about delays being used in bad faith to artificially "run out the clock" on the employer's re-employment obligation.

Analysis and response:

The WCB agrees that a worker does not have to plateau medically or reach maximum medical recovery to be re-employed. However, as discussed previously in this paper, they must be recovered sufficiently to do their pre-injury work or perform suitable work only. The WCB has revised the policy to clarify this point. Please see revisions below:

4. Determining if case appropriate for re-employment

The WCB may delay or determine it is inappropriate to enforce the re-employment provisions where:

a) **it is not anticipated the worker will be fit to be re-employed**; ~~the work injury has not plateaued sufficiently medically or functionally to attempt re-employment;~~
b) labour / management issues will interfere with the re-employment process; or

[1] Additions are **bolded and underlined**. Deletions are ~~crossed-out~~.

c) the WCB has determined there is an established hiring and / or placement practice in the worker's trade or occupation that is reasonable and provides the worker with similar or improved re-employment opportunities.

The WCB may reconsider this determination if the situation changes.

~~The WCB's assessment of the situation may change and it may be determined at a future date that it is appropriate to move forward with re-employment.~~

Section 91 and 95 of the *Act* give the WCB the discretion to decide whether it is appropriate to move forward with re-employment. The content of this section of the policy (including reference to labour/management issues) has not changed substantively from the policy that had been in place for over 25 years. At that time, to support consistency and transparency, the circumstances under which the WCB will not invoke re-employment were placed in policy. One of those circumstances is when the WCB determines labour/management issues will impede re-employment. This would include, for example, the existence of an issue of a bona fide termination and an arbitration is pending, or there is a claim by the employer that termination of the worker is pending as a result of performance-related issues. Where these circumstances potentially exist, the WCB will do a thorough review and determine whether or not the case is appropriate for re-employment. If we determine re-employment is not appropriate, other options for labour market re-entry will be explored. This may include employment with another employer and/or vocational rehabilitation.

Section 92 of the *Act* and Section 3. of the policy specify that an employer's obligation to re-employ continues from the date they receive notice the worker can be re-employed until the earlier of the second anniversary of the date of the injury or the 65th birthday of the worker. The length of an employer's re-employment obligation is not impacted by the WCB's decision to delay or decide a case is not appropriate for re-employment with the injury employer.

- **Re-employment Obligation of Employers**

Feedback received:

#10. Labour organizations requested that notifications required by the policy should be sent to all workplace parties or their representatives.

#11. An injured worker association believes that the policy should state, in Section 5.1, that pre-injury circumstances should be those existing at the time of the initial injury, not when time loss commences. They explained many injured workers remain employed performing modified or transitional duties for weeks or months prior to the commencement of time loss, often in drastically different circumstances than those existing at the time of the initial injury. They also highlight that the current definition of "date of injury" in the policy is the "date that time loss commences".

#12. A worker organization and labour unions expressed concern with the definition of "essential duties" in Section 5.3(a) (i), in particular reference to a worker's ability to perform work at the "normal rate of productivity". They state that it is inconsistent with Canadian jurisprudence on the definition of essential duties for the purposes of accommodation. They believe the current definition implies that a worker must be able to return to the essential duties of their pre-injury

job without accommodation and that this is incorrect. Rather, accommodation can include adjusting productivity requirements.

#13. Both an employer organization and an injured worker association provided feedback on the description of "alternative" work in Section 5.3 (a) (ii) and (iii). The employer organization recommended the policy address how re-location to another province is addressed in determining if alternative work is available. The injured worker association objected to the listing of factors that may be considered when determining if alternative work is available, singling out the factor "travel or assignment to different job sites is the normal practice of the industry". They believe the inclusion of such pertinent aspects will, over time, result in adjudication that focuses on the itemized list rather than individual circumstances of each claim.

#14. An employer association asked whether section 5.3(b) - Injured worker able to perform suitable work only, meant that an employer is expected to create a job for the injured worker. They requested specific criteria that outlines how suitable work is determined.

Analysis and response:

Note: As mentioned previously Section 5 Re-employment Obligations of Employers is now Section 6.

The policy requires employers be notified in writing of:

- The worker's status when they are fit for either the essential duties of the pre-injury job or for suitable employment only (Section 6.3).
- Where the WCB has determined that an employer has failed to meet its re-employment obligations, an order directing the employer to re-employ the worker. The order also notifies the employer that the WCB will levy a penalty if the worker is not re-employed within 14 days (Section 9.1)

Generally, the WCB practice is to copy the workplace parties on correspondence that impacts their rights or obligations. The WCB agrees that both the employer and worker should receive these notifications. The following changes have been made to the policy:

> *6.3 Worker able to return to work with pre-injury employer*
>
> When the worker ~~has recovered sufficiently~~ **from the compensable injury** ~~such that the worker~~ is fit for either the essential duties of the pre-injury job or for suitable employment **only** the WCB will notify the employer **and worker**, in writing, of the worker's status.
>
> *9.1 Order and penalty upon finding of non-compliance with re-employment obligation*
>
> Upon determining that an employer has failed to meet its re-employment obligations, the WCB shall issue a specific and written order to the employer directing that the employer re-employ the injured worker as prescribed in the order. The order shall specify, at a minimum, that the employer is to re-employ the injured worker within fourteen business days of receipt of the order. The order will also notify the employer that the WCB will levy a penalty (amount to be calculated as described below) if the injured worker is not re-employed within the fourteen business days stipulated in the order.
>
> **The worker will be provided a copy of the order at the time of its issuance.**

In 1995 when the previous re-employment policies were written, it is likely policy makers did not fully anticipate the current best practice of "stay at work" and safe and timely RTW programs. A strict reading of the current wording of the policy could lead someone to an interpretation that transitional or modified duties a worker is performing as part of a "stay at work" program are the worker's "pre-injury circumstances". This is because the current policy wording states that "pre-injury circumstances" are the circumstances at the time earnings loss commences. Therefore, technically, it could be argued an employer would satisfy their re-employment obligations if the worker was re-employed in a role that was actually the modified or transitional duties they were performing at the time their earnings loss commences.

While the WCB is not aware that the scenario described above is a common occurrence, this is counter to the principles of re-employment embodied in the *Act*. As well, the WCB has not approached its interpretation of the *Act* or policy in this manner. The ultimate goal of re-employment is to return a worker to their place in the labour market prior to the workplace injury. That is, we would not consider transitional or modified duties as part of a RTW program to be "pre-injury circumstances" when determining if a worker is fit to return to their pre-injury work. However, to ensure clarity, the WCB has made the following change to the policy:

> *6.1 Pre-injury circumstances*
>
> References to pre-injury circumstances refer to those circumstances which existed when the worker's time loss commenced.
>
> **For greater certainty, pre-injury circumstances do not include transitional, modified, or similar duties that are being performed due to the workplace injury for which the re-employment obligations apply.**

This change makes it clear that, for the purposes of re-employment, the WCB will not consider transitional or modified duties to be a worker's pre-injury job.

Employers are required to re-employ an injured worker when they are notified that a worker is capable of performing the essential duties of their pre-injury job. Essential duties are described in Section 6.3 a) i) of the policy as duties that "…constitute the core tasks which achieve the usual outcome of the work at a normal rate of productivity." The WCB believes it is appropriate to consider productivity when assessing whether or not a worker is capable of performing the essential duties of their pre-injury job. We do agree, however, that the current description of "essential duties" does not acknowledge the role of accommodation with respect to productivity in the re-employment process. Therefore, the following change has been made to section 6.3 a) i) of the policy:

> a) Worker able to perform essential duties
>
> i) The employer shall offer to re-instate the worker into the pre-injury employment immediately upon receiving written notice from the WCB that the worker is capable of performing the essential duties associated with the work. Essential duties constitute the core tasks which achieve the usual outcome of the work. ~~at a normal rate of productivity.~~

Specific mention of productivity is not required given it will be considered as part of the "usual outcome of the work".

When an employer is notified that a worker is fit to return to their pre-injury work, the employer is required to re-employ the worker in that work unless they can establish this cannot be done. If this is the case, they must re-employ the worker in alternative work. Alternative work is considered to be equivalent to the pre-injury employment in its duties, functional demands, obligations, rights, rules, earnings, qualifications, opportunities and any other pertinent aspects which are considered to be relevant. Feedback during Stage 1 consultation indicated there was an opportunity to provide more guidance on what is meant by alternative employment. To that end we included examples of what may be considered "other pertinent aspects" and specifically outlined factors that may be considered when determining whether the geographic location of alternative work is comparable to the pre-injury employment. WCB case workers and employers are not limited to the examples and factors provided in the policy, and each claim will be considered on its merits.

As part of re-employment, employers are not expected to create new jobs that are not required by the business. Specifically, Section 7.1 of the policy states:

> While there are potentially many options to accommodate an injured worker, employers are not expected to create an unnecessary job for the injured worker. That is, an employer is not required to create a new permanent position expressly for the injured worker that is comprised of new duties that were previously non-existent that do not add value or provide a benefit to the employer.

If the WCB determines a worker cannot return to their pre-injury work, but can only do suitable employment, the employer is required to re-employ them in suitable work as it becomes available. Section 6.3 b) i) states that suitable work is "… work the injured worker has the necessary skills to perform, is medically able to perform and which does not pose a health or safety hazard to the injured worker or any coworkers." Employers and the WCB will use this definition when considering whether or not a worker is able to perform suitable work.

➢ Length of Re-employment Obligation

Feedback received:

#15. Labour organizations, a worker organization, an injured worker association, and an employer association provided feedback on the length of the re-employment obligation. Labour organizations believe there should be a mechanism specified in policy to extend the length of the employment obligation beyond the two years specified in Section 92 of the *Act* using Section 190 of the *Act*.

The employer association and injured worker association provided specific feedback on Section 6.5 Recurrences. The employer organization requested clarification of the impact of a recurrence on the length of an employer's re-employment obligation while the injured worker association argued that the 2013 Nova Scotia Court of Appeal decision *in Ellsworth v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, means that injury recurrences are new injures and therefore a new two-year re-employment obligation starts from the date of the recurrence.

#16. A worker organization and labour organizations do not believe an employer's re-employment obligation should end if a worker refuses unsuitable or non-permanent offers of re-employment. They explain that offers of temporary transitional duties are frequently the source of dispute. This is because there are often conflicting medical opinions on whether transitional duties are appropriate. Therefore, workers may decline an offer of a temporary accommodation based on their physician's advice or other circumstances. They don't believe this should result in the end of an employer's re-employment obligation. They suggest the policy state the employer's re-employment obligation end where the injured worker refuses a suitable offer of permanent accommodation.

#17. An employer organization believes it should be clear that if a worker refuses suitable work with another employer, the injury employer's re-employment obligations cease.

Note: As mentioned previously, Section. 6 Length of Re-employment Obligation is now Section 3.

Analysis and response:

The length of an employer's re-employment obligation is specified in Section 92(1) of the *Act*:

> 92 (1) Subject to subsection (2), an employer is obligated pursuant to Sections 89 to 101 until the earlier of the day that
> (a) is two years after the date of the injury to the worker; or
> (b) the worker attains the age of sixty-five years.

The *Act* speaks specifically to the extension of the time of an employer's re-employment obligation in Section 92 (2):

> (2) Where an employer re-employs a worker pursuant to Section 89 to 101 less than six months before the time described in clause (1)(a), the employer is obligated, pursuant to Sections 89 to 101, for six months after the date of re-employment. 1994-95, c. 10, s. 92.

Section 190 of the *Act* is a general section providing the WCB the authority to extend time limits prescribed in Part I of the *Act* (with the exception of S. 83) where an injustice would result. Section 190 states:

> Subject to Section 83, the Board may, at any time, extend any time limit prescribed by this Part or the regulations where, in the opinion of the Board, an injustice would otherwise result.

The WCB agrees that there is no bar to applying S. 190 to any time limit (except S. 83) in Part 1 of the *Act* – including the length of the re-employment obligation. However, it is clear from the construction of the *Act* that it is intended that an employer's re-employment obligation last 2 years from the date of the injury, or until the worker reaches 65 years of age – whichever comes first. As well, the *Act* specifically provides for an extension of six months from the date of re-employment if the worker is re-employed less than 6 months from the end of the re-employment period. Therefore, the WCB does not believe it is appropriate to include reference to S. 190 in the re-employment policy. However, the WCB has the authority to consider the application of S. 190 on a case-by-case basis where appropriate.

An employer continues to be obligated to re-employ the worker for the duration of the re-employment period where a worker that has been re-employed within the re-employment period suffers a recurrence of the injury that results in them being unable to work. If the worker experiences a recurrence after the end of the re-employment period, the employer is not obligated to re-employ the worker under Sections 89-101 of the *Act*.

The WCB does not agree that the Nova Scotia Court of Appeal's decision in *Ellsworth v. Nova Scotia (Workers' Compensation Appeals Tribunal)* means that injury recurrences are new injures. The *Ellsworth* decision was a very unique fact situation involving an injury experienced prior to the implementation of the current *Act*, and the application of the transitional provisions of the *Act*. The Court, in effect, determined the worker experienced a new workplace injury, not a recurrence.

To clarify the intent of Section 3.5 Recurrences the WCB has made the following changes:

> *3.5 Recurrences*
>
> Where a worker, who continues to be employed by the ~~accident~~ **injury** employer, suffers a recurrence within the re-employment period, the ~~accident~~ **injury** employer continues to be bound by the re-employment provisions **for the duration of the re-employment period specified in Section 3.2 Length of Obligation.**

Section 3.4 of the policy states:

> An employer is no longer bound by the re-employment provisions of the *Act*, with respect to an injured worker, where that injured worker refuses an offer of re-employment made in accordance with the re-employment provisions of the *Act* and this policy.

As discussed previously, re-employment obligations in Sections 89-101 of the *Act* are not the same as transitional/modified duties that are often part of a RTW program. A worker's refusal of modified/transitional duties that are offered as part of a RTW program would not result in the end of an employer's re-employment obligation[2]. If an offer of re-employment is made that meets the requirements of the Section 89-101 of the *Act* and policy, and a worker refuses the offer, then the employer's re-employment obligation would end.

Attempting to specify that an offer must be "suitable and permanent" does not recognize that re-employment may also take the form of the pre-injury (or alternative) employment. Further, the policy states in Section 6.2 that the "…employer's re-employment obligation is generally limited to the duration of the pre-injury contract and / or the nature of the pre-injury employment arrangement". Requiring an employer to offer permanent employment when the worker, for example, is on a 16-month contract, would be inconsistent with the policy and the overall intent of re-employment. Therefore, the WCB does not believe it is necessary or appropriate to specify in policy that refusal of "suitable and permanent" employment would result in the end of an employer's re-employment obligation.

[2] This may, however, impact the worker's receipt of WCB benefits. Section 84 of the *Act* requires workers take reasonable steps to mitigate their earnings loss. For example, if the WCB determines the offer of modified duties was medically appropriate and the worker refused the offer it could be determined they are not mitigating their earnings loss. This may result in the reduction or termination of earnings loss benefits.

During the re-employment obligation period, an injured worker may receive an offer of employment from an employer other than the injury employer. The worker's decision to accept or refuse the offer from the non-injury employer has no impact on the injury employer's re-employment obligations. As discussed above, an employer's re-employment obligation to **their** worker ends if the injured worker refuses an offer of re-employment **from them** that meets the requirements of the Section 89-101 of the *Act* and policy. Therefore, it would be inconsistent with the *Act* and policy to include a provision in the policy stating that if a worker refuses suitable employment with another employer, the injury employer's re-employment obligations cease.

➢ Claiming undue hardship

#18. Labour organizations and an injured worker association provided feedback on section 7.2 Claiming Undue Hardship that contains a list of factors that may be considered in determining whether an accommodation would pose an undue hardship to an employer. Labour organizations identify one item from the list – "the morale of other employees" - as problematic. They believe that without context, employee morale is likely to be a factor that is misunderstood and has a high potential for misuse. They believe the factor should be removed from the policy. The injured worker association believes these factors should not be identified in the policy because common law principles are constantly evolving and listing some in a policy is inappropriate.

#19. An employer organization sought clarification on how undue hardship will be interpreted by the WCB and what definition the WCB will be using. They also sought clarity on long-term accommodation in the context of employer obligations.

Analysis and response:

The *Act* requires employers to accommodate the work or workplace to facilitate an injured worker's return to work, providing the injured worker is capable of performing either the essential duties of the pre-injury employment or suitable employment only. The employer is required to accommodate the injured worker to the extent that the accommodation does not cause the employer undue hardship.

Section 7.2 Claiming Undue Hardship sets out factors the WCB may consider as it evaluates an employer's claim of undue hardship. The WCB believes including a list of factors that may be considered when determining if an employer has proven undue hardship promotes transparency and consistency in decision-making while at the same time allows each case to be considered on its own merits. However, the WCB agrees that consideration of the "morale of other employees" could be problematic in the evaluation of undue hardship claims. As well, we believe some language changes that makes it clearer that decision-makers are not limited to the factors listed in the policy would be prudent. Please see changes to the policy below:

> *7.2 Claiming Undue Hardship*
>
> Where the employer claims that an accommodation will cause undue hardship, the onus is on the employer to show adequate evidence of the detrimental impact on productivity, the operation, or the profitability of the business. There are general principles that set out the factors usually considered when assessing undue hardship, but the finding of undue hardship will vary according to the specific circumstances. What is undue hardship for one employer may not be for another. ~~Factors that may be considered in determining~~

~~whether the accommodation would pose an undue hardship include~~. **The WCB will consider a number of factors when determining whether the accommodation would pose an undue hardship. These factors may include:**

a) employee and customer safety;
b) financial costs **and benefits of the accommodation**
c) interchangeability of the workforce and facilities;
~~d) disruption of a collective agreements;~~
e) disruption of services to the public; **and**
~~f) the morale of other employees; and~~
g) the size of the employer's operation.

Where the WCB is satisfied that the accommodation will cause undue hardship, it may assist the employer in overcoming the hardship and/or may assist the worker directly, if the worker is otherwise eligible under the vocational rehabilitation program.

The factor "benefits of the accommodation" was added to balance the financial costs factor that is included. Section 6.4 Collective Agreements states that where the terms of a collective agreement conflict with the re-employment provisions, whichever provides the injured worker better re-employment opportunities shall prevail, with the exception that seniority provisions set out in the collective agreement always prevail. Given that this section already deals with collective agreements and the re-employment provisions of the *Act*, it is unnecessary to include collective agreements in the list of factors.

Long-term accommodation of injured workers is not addressed in the re-employment provisions of the *Act*. Employers are required to re-employ (and make accommodations to the point of undue hardship) for the time period specified in the *Act*. Additionally, the *Act* and Section 8.2 Termination within six months of re-instatement of the policy require an employer to provide evidence that the termination of an injured worker's employment within six months of being re-employed is unrelated to the worker's injury and/or claim. That being said, human rights legislation and collective agreements may have requirements related to accommodation and re-employment beyond the re-employment obligation time period in the *Act*.

➢ Failure to re-employ

#20. An injured worker association believes the only defense for a failure to re-employ is the demonstration of sufficient evidence of an undue hardship and that examples of possible reasons for a failure to re-employ should not be included in the policy because they restrict the definition of "undue hardship".

#21. In reference to Section 8.2 of the policy an employer association expresses concern about confidentiality breaches if a worker's termination is not related to the claim.

Analysis and response:

There are a number of defenses to not re-employing a worker that do not involve the employer's duty to accommodate. For example, the employer's re-employment obligation is two years from the date of injury. If the worker is not able to be re-employed in their pre-injury job or suitable work within the re-employment obligation, the employer would have a defense for not re-

employing the worker. This Section 8.1 simply lists them all in one spot and provides some examples.

As mentioned previously, if an employer terminates an injured worker's employment within six months of re-employing the worker, the onus is on the employer to show that the termination was not related to the injury/claim. To make this determination, the WCB will need sufficient information about the termination to determine if it was/was not related to the claim. In these instances the WCB will work with both the employer and injured worker to identify a way for the WCB to gather the information it needs without compromising confidentiality.

- **Orders and penalties**

#22. An employer association expressed concern about the penalty amounts for non-compliance with the re-employment provisions of the *Act*.

#23. An injured worker association believes the policy should be changed to remove the WCB's discretion to reduce or withdraw an employer penalty where the employer has provided an acceptable defense for not re-employing a worker.

Analysis and response:

The penalty amounts specified in the policy for non-compliance with the re-employment provisions of the *Act* are taken from the *Act* and the WCB has no ability to calculate penalties in a different manner. The WCB's discretion to reduce or withdraw a penalty where an employer has not re-employed the worker for a reason that is satisfactory to the WCB is also specified in the *Act*.

The purpose of re-employment is to return a worker to the place in the labor market they held before the injury. The WCB will work with the workplace parties to achieve this objective without the need for penalties. However, if an employer does not comply with the re-employment provisions the WCB can impose penalties per our authority in the *Act*.

The WCB recognizes that the penalty amounts resulting from the calculations specified in the *Act* can be substantial. Therefore, the WCB has increased the time provided to comply with the order to re-employ from five days to fourteen business days. The section now reads:

> *9.1 Order and penalty upon finding of non-compliance with re-employment obligation*
>
> Upon determining that an employer has failed to meet its re-employment obligations, the WCB shall issue a specific and written order to the employer directing that the employer re-employ the injured worker as prescribed in the order. The order shall specify, at a minimum, that the employer is to re-employ the injured worker within ~~5 days~~ **fourteen business days** of receipt of the order. The order will also notify the employer that the WCB will levy a penalty (amount to be calculated as described below) if the injured worker is not re-employed within the ~~5 days~~ **fourteen business days** stipulated in the order.
>
> The worker will be provided a copy of the order at the time of its issuance.

During the fourteen days an employer might, for example, clarify accommodation requirements; submit additional evidence to support an argument that to accommodate the worker as part of re-employment creates an undue hardship (see Section 7 of the policy); or provide further

evidence in support of a defense for failure to re-employ (see Section 8 of the policy). The WCB will consider this information when deciding whether to alter the order or the penalty.

Appendix A

Final Re-employment Policy

Policy Number: 5.6.1

Topic: Obligation, Duties, and Penalties
Section: Re-Employment
Subsection: General

Effective: September 28, 2022
Issued: October 14, 2022
Approved by Board of Directors: September 28, 2022

Preamble

The re-employment sections of the *Workers' Compensation Act* (Sections 89-101) support returning injured workers to the workplace by setting out a re-employment obligation for certain employers. Re-employment is intended to return the worker to a place in the labour market resembling, as closely as possible, the position held at the time of their injury.

In particular, employers (except those in the construction industry) who regularly employ 20 or more workers are obligated to re-employ an injured worker who has missed time from work due to the work injury if: 1) that injured worker has been employed with them continuously for at least twelve months prior to the work-related injury; and 2) the worker can perform the essential duties of their pre-injury job, or other suitable work.

Typically, the WCB, is not required to invoke the re-employment obligations. Where disputes arise, the WCB will first meet with the employer and injured worker as a part of the case management process in an attempt to identify barriers to re-employment and establish a plan to return the worker to the workforce. Where disputes cannot be resolved, the WCB will take appropriate actions to invoke the re-employment obligations in the *Act*, which may include issuing orders to re-employ or levying penalties.

This policy provides guidance and interpretation of the re-employment obligations, and other supporting provisions, set out in the *Workers' Compensation Act (the "Act")*.

Policy

1. Re-employment Obligations and Human Rights Legislation

Under human rights law, all employers have a duty to accommodate workers with disabilities. The *Nova Scotia Human Rights Act* and (for federally regulated employers) the *Canadian Human Rights Act* apply in Nova Scotia. In addition, provided certain criteria are met, employers have an obligation under the *Act* to accommodate and re-employ workers injured on the job. The WCB's jurisdiction to deal with issues of accommodation applies only to a workplace accommodation required for the compensable work injury.

In circumstances where the re-employment provisions of the *Act* apply, the WCB is responsible for determining whether an employer has met its obligation to accommodate the worker to the point of undue hardship. If WCB determines that an employer or injured worker has not fulfilled their obligations under the *Act*, the employer or injured worker has the right to appeal a WCB decision.

If the worker also requires accommodation under the *Nova Scotia Human Rights Act* or the *Canadian Human Rights Act*, employers may have additional accommodation requirements that coincide with actions taken as part of the WCB re-employment process. Complaints about accommodation for those other protected grounds should be made to the Nova Scotia Human Rights Commission or the Canadian Human Rights Commission.

References: Workers' Compensation Act (Chapter 10, Acts of 1994-95), Section 91.

2. Employer Coverage and Worker Eligibility

2.1 Employers

a) All employers, except those in the construction industry[3] and those who are determined by the WCB to regularly employ fewer than twenty employees, are obligated to offer re-employment to an eligible injured worker.

b) An employer shall be deemed to have "regularly" employed twenty or more workers if the company actively employed and paid:

i) at least twenty workers per month in eight out of the twelve months preceding the calendar month of the worker's injury; and
ii) an average of twenty workers per month over the twelve months preceding the calendar month of the worker's injury.

2.2 *Workers*

An employer covered by the re-employment sections of the Act is obligated to offer re-employment to a worker following an injury, where the worker's circumstances meet the following conditions:

a) The worker has been unable to perform work for the employer for a period of time, due to the injury. Eligibility for earnings replacement benefits is not a necessary pre-condition to this obligation; and
b) The worker has been employed by the employer for at least twelve continuous months, including eligible pauses, at the time of the injury. Eligible pauses are those that are less than thirty calendar days, or those are thirty calendar days or more where the pauses:
    i. have been authorized by the employer (e.g. leaves of absence, vacations, or suspensions);
    ii. are the right of the worker under other legislation (e.g. maternity / paternity leaves; or
    iii. notwithstanding Section 2.1, are supported by substantive evidence of a continuing employment relationship (e.g. payment of ongoing employer paid benefits), or a mutual agreement that the worker will return to work for the employer upon recall, subject to applicable seniority provisions.

References: Workers' Compensation Act (Chapter 10, Acts of 1994-95), Sections 89 and 90.

[3]Employers classified under SIC codes 4011-4499 in the Standard Industrial Classification (SIC) published by Statistics Canada

3. Length of Re-employment Obligation

3.1 Definition of "date of injury"

For the purposes of Sections 89-101 of the *Act* only "date of injury" means the date that time loss commences.

3.2 Length of Obligation

An employer's obligation to re-employ an injured worker continues from the date they receive notice of the injured worker's ability to return to either pre-injury employment or other suitable work until the earlier of:

a) the second anniversary of the date of injury; or
b) the 65th birthday of the worker.

3.3 Re-instatement in last six months

Where the injured worker is re-instated in the last six months of the re-employment period, the obligation is extended for an additional six months beyond the date of re-employment.

3.4 Worker refuses offer of re-employment

An employer is no longer bound by the re-employment provisions of the *Act,* with respect to an injured worker, where that injured worker refuses an offer of re-employment made in accordance with the reemployment provisions of the *Act* and this policy.

3.5 Recurrences

Where a worker, who continues to be employed by the injury employer, suffers a recurrence within the re-employment period, the injury employer continues to be bound by the re-employment provisions for the duration of the re-employment period specified in Section 3.2 Length of Obligation.

References: Workers' Compensation Act (Chapter 10, Acts of 1994-95), 89(2), 92, 92(1)(a), 93, 96(1), 97, 97(1), 99(3)(b)

4. Determining if case appropriate for re-employment

The WCB may delay or determine it is inappropriate to move to enforce the re-employment provisions where:

a) it is not anticipated the worker will be fit to be re-employed;
b) labour / management issues will interfere with the re-employment process; or
c) the WCB has determined there is an established hiring and / or placement practice in the worker's trade or occupation that is reasonable and provides the worker with similar or improved re-employment opportunities.

The WCB may reconsider this determination if the situation changes.

References: Workers' Compensation Act (Chapter 10, Acts of 1994-95), Sections 91, 95.

5. Obligations of Injured Workers

Injured workers are responsible for mitigating the loss caused by a work-related injury by taking all reasonable steps to reduce or eliminate any impairment and loss of earnings resulting from a work-related injury. This includes accepting bona fide offers of re-employment made by an employer and cooperation with efforts to accommodate the work or the workplace in order to facilitate re-employment.

References: Workers' Compensation Act (Chapter 10, Acts of 1994-95), Section 84.

6. Re-employment Obligations of Employers

6.1 Pre-injury circumstances

References to pre-injury circumstances refer to those circumstances which existed when the worker's time loss commenced.

For greater certainty, pre-injury circumstances do not include transitional, modified, or similar duties that are being performed due to the workplace injury for which the re-employment obligations apply.

6.2 Terms and conditions at the time of the injury

The employer's re-employment obligation is generally limited to the duration of the pre-injury contract and / or the nature of the pre-injury employment arrangement.

6.3 Worker able to return to work with pre-injury employer

When the worker is fit for either the essential duties of the pre-injury job or for suitable employment only the WCB will notify the employer and worker, in writing, of the worker's status.

a) Worker able to perform essential duties

i) The employer shall offer to re-instate the worker into the pre-injury employment immediately upon receiving written notice from the WCB that the worker is capable of performing the essential duties associated with the work. Essential duties constitute the core tasks which achieve the usual outcome of the work.

ii) If the employer has satisfied the WCB that it is unable to re-instate the worker to the pre-injury employment, the employer shall offer the injured worker alternative work. Alternative work is considered to be equivalent to the pre-injury employment in its duties, functional demands, obligations, rights, rules, earnings, qualifications, opportunities and any other pertinent aspects which are considered to be relevant. Other pertinent aspects may include, but are not limited to:

- geographic location of the work;
- level of responsibility and supervision of other employees;

- skills, qualifications, and experience required; and
- bargaining unit status.

iii) The following factors may be considered in determining whether the geographic location of the alternative work is comparable to the pre-injury employment:

- travel or assignment to different job sites is the normal practice of the industry;
- travel or assignment to a job site other than the injury job site forms part of the employment contract;
- the worker normally accepts employment assignments in various geographic areas;
- travelling to the alternative employment falls within the normal parameters of travel expected of the worker; and
- the reasonableness of the offer.

If the employer has satisfied the WCB that it cannot offer pre-injury or alternative work, the employer shall offer to provide the injured worker with suitable work.

b) Injured worker able to perform suitable work only

i) Upon receiving written notice that the injured worker is fit to return to suitable work only, an employer shall offer an injured worker the first opportunity to accept suitable work that may become available. Suitable work is work the injured worker has the necessary skills to perform, is medically able to perform and which does not pose a health or safety hazard to the injured worker or any coworkers.

ii) As the injured worker's functional capability continues to increase, the employer shall, for the duration of the re-employment period, continue to offer available work which more closely compares to the pre-injury employment.

c) If there is a dispute about whether an injured worker is medically able to perform the essential duties of the pre-injury job or suitable work only, the WCB will make the final determination. In making it's determination, the WCB and may arrange for a worksite analysis or gather other relevant information.

6.4 Collective Agreements

Where the terms of a collective agreement conflict with the re-employment provisions, whichever provides the injured worker better re-employment opportunities shall prevail, with the exception that seniority provisions set out in the collective agreement always prevail.

6.5 Suitable work with another employer

Where an employer is unable to offer the injured worker re-employment opportunities within the company, but assists the worker is finding suitable work with another employer, the obligation remains with the injury employer until the expiration of the obligation period.

References: Workers' Compensation Act (Chapter 10, Acts of 1994-95), Sections 89 (2), 89(3), 92, 92(1)(a), 96(1), 97, 97(1)(a), 98, 99(3)(b), 100(1).

7. Accommodation and Undue Hardship

7.1 Duty to Accommodate

The employer shall accommodate the work or workplace to facilitate an injured worker's return to work, providing the injured worker is capable of performing either the essential duties of the pre-injury employment or suitable employment only. The employer is required to accommodate the injured worker to the extent that the accommodation does not cause the employer undue hardship.

The expectations and requirements for accommodation and meeting the undue hardship standard for re-employment in the *Act* are consistent with those required by human rights law. Examples of possible accommodations include, but are not limited to, such things as:

a) supplying or modifying tools or equipment;
b) making the premises accessible;
c) modifying the hours of work or offering flexible work;
d) changing schedules;
e) moving the worker to a different work location;
f) altering aspects of the job, such as job duties; and/or
g) moving the worker to a different job.

While there are potentially many options to accommodate an injured worker, employers are not expected to create an unnecessary job for the injured worker. That is, an employer is not required to create a new permanent position expressly for the injured worker that is comprised of new duties that were previously non-existent that do not add value or provide a benefit to the employer.

7.2 Claiming Undue Hardship

Where the employer claims that an accommodation will cause undue hardship, the onus is on the employer to show adequate evidence of the detrimental impact on productivity, the operation, or the profitability of the business. There are general principles that set out the factors usually considered when assessing undue hardship, but the finding of undue hardship will vary according to the specific circumstances. What is undue hardship for one employer may not be for another. The WCB will consider a number of factors when determining whether the accommodation would pose an undue hardship. These factors may include:

a) employee and customer safety;
b) financial cost and benefits of the accommodation;
c) interchangeability of the workforce and facilities;
d) disruption of services to the public; and
e) the size of the employer’s operation.

Where the WCB is satisfied that the accommodation will cause undue hardship, it may assist the employer in overcoming the hardship and/or may assist the worker directly, if the worker is otherwise eligible under the vocational rehabilitation program.

References: Workers’ Compensation Act (Chapter 10, Acts of 1994-95), Section 91.

8. Failure to re-employ

8.1 Defenses for failure to re-employ

a) The employer may claim that failure re-employ an injured worker is due to:

i) reasons beyond the control of the employer that could not have been foreseen and avoided by the exercise of due diligence; or
ii) other justifiable reasons.

b) Examples of possible reasons for a failure to re-employ include, but are not limited to:

i) The re-employment obligation expires.
ii) The worker refuses an offer of employment.
iii) The employer is unable to offer pre-injury or alternative work. The WCB presumes an employer is able to offer the employment unless there is evidence to the contrary, for example, such as:

- The employer has permanently or temporarily laid off the staff in that function;
- The essential duties of the position have genuinely changed and now exceed the worker's functional ability, skills, and/or ability to obtain skills;
- The worker had been employed on a fixed-term contract which has expired, and for which there is no longer need of the worker's services.
- The employer can only meet their re-employment obligation by violating the Section 71 Labour Standards Code rights of another employee.

iv) Suitable work is unavailable:

- Where an injured worker is fit only for suitable work, the employer is required to offer such employment as it becomes available during the re-employment period.
- Therefore, unavailability of suitable work is a defence to not re-employing an injured worker, but only for the period of time in which the work is unavailable.

8.2 Termination within six months of re-instatement

Where an employer terminates an injured worker's employment within six months of re-instatement, the onus will be on the employer to provide evidence that the termination is for reasons unrelated to the worker's injury and / or claim.

8.3 WCB review

The WCB may on its own initiative, or at the request of the worker, make a determination about whether the employer has fulfilled their re-employment obligations. In making its determination, the WCB may consider evidence from the employer and other appropriate sources, including the worker.

References: Workers' Compensation Act (Chapter 10, Acts of 1994-95), Sections 94, 95,100(3).

9. Orders and Penalties

9.1 Order and penalty upon finding of non-compliance with re-employment obligation

Upon determining that an employer has failed to meet its re-employment obligations, the WCB shall issue a specific and written order to the employer directing that the employer re-employ the injured worker as prescribed in the order. The order shall specify, at a minimum, that the employer is to re-employ the injured worker within **fourteen business days** of receipt of the order. The order will also notify the employer that the WCB will levy a penalty (amount to be calculated as described below) if the injured worker is not re-employed within the **fourteen business days** stipulated in the order.

The worker will be provided a copy of the order at the time of its issuance.

9.2 Penalty calculation - non-compliance with re-employment obligation

The penalty for non-compliance with an employer's re-employment obligations will be the greater of:

a) the full amount of any compensation payable to the worker and any expenditures made by the WCB in respect of the worker, during the year after the injury, or

b) the amount of the worker's net average earnings for the year preceding the injury;

9.3 Reduction or withdrawal of re-employment obligation penalty

The penalty levied for an employer's non-compliance with their re-employment obligations may, at the discretion of the WCB, be reduced or withdrawn where the WCB is satisfied that:

a) the employer has offered to re-employ the worker as specified in the order, or assists the worker in finding suitable work elsewhere. In these instances, the penalty may be no less than the wages which the worker would have earned during the delay in re-employment.; or

b) the employer has provided a defense for not re-employing the worker that meets the requirements of Section 8 of this policy.

9.4 Penalty for non-compliance with order

a) Where the employer fails to comply with the order to re-employ, the WCB may levy a penalty of two thousand dollars for the first offence. Penalties for subsequent failures to comply with an order to re-employ may be levied at the WCB's discretion to a maximum of ten thousand dollars.

b) In determining whether to apply a penalty in the first instance, or the amount of a penalty for non-compliance with an order to re-employ, the WCB will take into consideration the employer's:

i) history of compliance with re-employment obligations or orders to re-employ; and
ii) overall willingness to co-operate in the re-employment process.

References: Workers' Compensation Act (Chapter 10, Acts of 1994-95), Sections 99, 99(1)(a), 211.

Application

This Policy applies to workers whose date of injury is on or after September 28, 2022 (see Section 3.1 Definition of Date of Injury).

Appendix B

Overview of Stakeholder Feedback

Below is a summary of the feedback submitted by an injured worker association (1), a worker organization (1), labour organizations (3), an employer association (1) and an employer organization (1) on the policy topic re-employment in response to the document "Policy Background Paper - Clarification of Re-employment Policies: Section 5 of the WCB Policy Manual" and the draft policy.

Injured workers' association, worker organization, and labour organizations

- Policy development
  - There should be policy on;
    - Workers and employers not subject to the re-employment provisions of the *Act*.
    - The use of "extras" and RTW generally.
    - Section 81 of the *Act*.
  - Further consultations should be undertaken before the policy is finalized.
- Concerns with the use of "extras"
  - The Board position on the use of extra's is inconsistent with the cited Appeals Tribunal decisions and with the intent of the legislation. The Appeals Tribunal decisions relate to the general legal interpretation of sections 90 and 91 and policies 5.2.4 and 5.2.6 and are not unique to the specific facts of each case. The Board did not appeal the decisions to the Nova Scotia Court of Appeal and the decisions are final and binding upon Board decision makers on this issue.
  - There is no legislative authority for a worker performing meaningful and productive employment for an employer to be paid earnings replacement benefits. The legislative intent is for a worker to mitigate the loss of earnings. The worker meets this objective by returning to work at transitional or modified duties following confirmation by the Board the worker can perform suitable work.
- Consolidation and reorganization of the policies
  - The policy should be divided over several policies rather than contained in one policy. It is unwieldy and difficult to reference.
  - In general, we support the clarity that a consolidated approach provides.
- The difference between RTW and re-employment
  - The Preamble section needs to be revised to incorporate the correct interpretation and application of the re-employment provisions of the *Act*. "suitable work" referenced in sections 89-101 of the *Act* is the same as transitional or modified duties in a RTW program. Therefore , for workers and employers subject to sections 89 to 101 of the *Act*, the re-employment process is initiated at the time the Board determines a worker is safe to return to work at transitional or modified duties. It appears the Board has misinterpreted the re-employment sections of the *Act* and existing Board policies. The proposed policy needs to be completely revised in order to be consistent with the legislation.

- Re-employment obligations and human rights legislation
    - It is essential that the distinction between the Board's re employment determination and the Employer's duties under Human Rights or other authorities be spelled out clearly. …By making it clear that the expectations are consistent with current Human Rights law, the Policy ensures all parties understand the source and extent of their obligations.
    - The Duty to Accommodate is a complicated matter defined by decades of jurisprudence. It simply isn't possible to contain all of this information within a WCB Policy. By making it clear that the expectations are consistent with current Human Rights law, the Policy ensures all parties understand the source and extent of their obligations.
- Coverage/eligibility
    - The final phrase of Section 2 that references "casual" employment is unnecessary and could potentially lead to the exclusion of workers who may otherwise be entitled to inclusion. Casual has a specific meaning in most collective agreements and may create confusion if used here in this context. Many workers can maintain a "casual" status over multiple years but effectively be working full time.
    - Section 2.2b) Why has the phrase ". . . or a mutual agreement that the worker will return to work for the employer upon recall, subject to applicable seniority provisions ... " from policy 5.2.1R not included in draft policy?
- Determining if case is appropriate for re-employment
    - re-employment is indistinguishable from RTW and bringing a worker back on transitional or modified duties.
    - A case is appropriate for re-employment when the Board determines a worker can perform suitable work. The issue of whether a worker has plateaued medically or functionally is irrelevant.
    - Nothing in the *Act* allows for re-employment to be delayed or deferred when "labour/ management issues will interfere with the re-employment process. It is unclear what this phrase means. "Labour / management issues" are common in every workplace.
    - We have been unable to think of a single situation in which labour / management issues would require a delay in re-employment processes. Even a work stoppage such as a strike or lockout does not require a delay in the re-employment process. This phrase should be struck from the Policy entirely. It serves only to open an unnecessary avenue for the parties to resist re-employment processes. If the phrase is not struck, examples of specific situations where labour/management issues could appropriately delay re-employment must be included.
    - Clarification of the nature of any delay should be provided. For example, does the delay move the two-year time frame, or happen within it? An effort should be made to ensure delays are not used in bad faith to artificially "run out the clock". The possibility of labour/management issues leading to delay should also be clarified.
- Re-employment Obligation of Employers
    - We support the principle that Maximum Medical Recovery is not a pre-requisite of re-employment. Maximum Medical Recovery is a legal term, not a medical one. It often takes years for injured workers to reach this milestone in the management of their claim. By that time the re-employment obligation period is often long passed. By clarifying that MMR is not a requirement of re-employment, the expectation that the accommodation process can begin earlier in a claim has been set.

- We support the principles that employers are presumed to be able to reemploy a worker and are required to act immediately to do so. Employers are often given months of time to determine whether they can permanently accommodate a worker.
- By reinforcing the legislators' intent that Employers are presumed to be able to reemploy a worker, and that they must do so immediately, the policy ensures the matter will be given the urgency that it deserves.
- Notifications should be sent to "the employer, the worker and any representatives" or "all involved parties".
- Pre-injury circumstances should not refer to the circumstances that existed when the time loss commenced. Many injured workers remain employed performing modified or transitional duties for weeks or months prior to the commencement of time loss and often in drastically different circumstances than those existing at the time of the initial injury. Pre-injury circumstances should be those existing at the time of the initial injury, not when time loss commences.
- We support the factors provided to be considered in determining the equivalency of alternate work, including geographic location. This is the first time the Board has provided any guidance or direction on what "alternate work" should look like. In particular, the clear expectation that this work be equivalent in many respects will be helpful in assisting the parties to identify a suitable accommodation.
- The circumstances of each claim, worker and employer vary greatly. It is more prudent to maintain the broad definition/explanation of alternative work. The inclusion of such pertinent aspects will, over time, result in adjudication that focuses on the itemized list rather than individual circumstances of each claim.
- Keep the phraseology general and sufficiently broad to enable the facts of each case to be adjudicated on its merits. The factor ". . travel or assignment to different job sites is the normal practice of the industry . . ." listed under 5 (3) (a) (iv) is not relevant. The circumstances of the individual worker must be the consideration, not the industry practice. If the worker did not travel to different locations as part of the employment with the pre-injury employer, the industry practice cannot be considered.
- Definition of essential duties. The phrase "normal rate of productivity" is problematic because it is inconsistent with Canadian jurisprudence on the definition of essential duties for the purposes of accommodation.
- Productivity should not be included in the definition of "essential duties".

- Length of re-employment Obligation
  - There should be a mechanism to extend the 2 year obligation per S. 190 of the *Act* and this should be included in the policy.
  - Section 6.3. Offers of temporary transitional duties are frequently the source of dispute. There are often conflicting medical opinions on whether transitional duties are appropriate. Workers may decline an offer of temporary accommodation based on their own physician's advice or other circumstances.
  - 6.4 Definition of "date of injury". The phrase "date of injury" is contained in s. 90 (b) relating to the eligibility of a worker as having to be employed for 12 continuous months, at s. 92(1) (a) where the duration of the duty is two years, and at s. 97(1) where the employer must reinstate the worker to the pre-injury position if able to perform essential duties. Reinstatement under s. 97(1) should be at the pre-injury circumstances at the time of the initial injury and not at the date of time loss.

    - Section 6.5. As per the court in Ellsworth the recurrence of an injury must be treated the same as a new injury under s. 10(1). If a worker is re-employed under sections 89 to 101 and suffers a recurrence of the injury which results in time loss, the 2-year re-employment obligation is renewed.
- Claiming undue hardship
    - Section 7.1. All employers have a duty to accommodate. The Board has a duty to ensure the duty to accommodate and proof of undue hardship principles are entrenched in policy and practice for employers and workers not covered by sections 89 to 101 as well as those that are covered. The burden on a smaller employer to meet the burden of demonstrating an undue hardship is just less onerous than that on a larger employer.
    - Section 7.2. Without context, employee morale is likely to be a factor that is misunderstood. Given the high potential for misuse of this factor in undue hardship, it is preferable to remove employee morale entirely.
    - We support the examples provided in the Policy of possible accommodation efforts.
    - We frequently see cases where little to no effort is put into accommodating injured workers before it is determined they cannot return to their pre-injury employer. The examples included in the Policy, such as modifying hours, altering aspects of the jobs, or supplying tools and equipment, make it clear that every reasonable effort should be made.
    - Factors to be considered in determining whether the accommodation would pose an undue hardship should not be identified in the policy. Common law principles are constantly evolving and listing some in a policy is inappropriate. The Board has a legal department that can keep decision makers up to date on the evolving common law principles.
- Failure to re-employ
    - The only defense for a failure to re-employ is the demonstration of sufficient evidence of an undue hardship. The listing of examples of "evidence to the contrary" at (iii) serves no purpose other than to restrict the definition of "undue hardship". As stated earlier, the common law principles on the issue of undue hardship are continually evolving and such "examples" should not be included in a policy that is binding on all decision makers.
- Orders and penalties
    - Remove statement (b) as it serves no purpose...the only defense is satisfactory proof of undue hardship.

<u>Employer associations and organizations</u>

- Policy development
    - Employers request review of any changes to the policies before they are approved by the Board. Return to Work issues remain one of the most difficult aspects of the system and are protracted by case conference meetings that lack objectives/agenda, case management schedules of vacation and the constant changing of who has oversight of the claim.
- Policy is needed to outline factors to be considered when determining return to work, job positions and timelines, and specific situations.

- Labour Market Re Entry Process/Vocational Rehabilitation/RTW
    - What is the Labour Market re-entry process? What does it look like with the Vocational Rehabilitation (VR) approach and how does this fit in with the WCB? How does the VR process ensure that the “injured Worker” who cannot go back to their job, is the right person for another position? The employer knows their Workers better than anyone else.
    - Within the return to work process the one process where case managers block the Employers’ right to be involved is the VR process. Case Managers only occasionally advise the Employer that this process is in play and only rarely invite the Employer to assist. Employers advise they may have other positions that could be explored; however, WCB does not involve the Employer in this process.
    - Psychological support for Workers following workplace injuries needs to support Workers to return to work, not remain off work, particularly when the Workers are in their 20’s to 50’s.
    - “Meaningful Work” and Failed Return to Work.
        - How many times does the Employer have to attempt to return to work? For example, Employers have expressed their concerns and frustrations in regard to prolonged concussion syndrome and ongoing attempts to return a Worker to work over a number of years.
        - The term “meaningful work” is mentioned numerous times in case conference meetings by WCB case managers, however there is not a definition for this and more often seems to be a personal value of the case manager in how this term is interpreted and adopted. There is nothing consistent and we disagree the term even has relevance when it is not included in the Strategic direction of WCB NS.
        - Who decides what meaningful work is? Employers have experienced return to work in which Workers who have stated the work is beneath them and it is not meaningful to them, but it is a service to the Employer and the duties are necessary for the employer.
        - As case managers insist on referring and using the term “meaningful work” when determining return to work, job positions and timelines, the policies require: Reference to a definition of what “meaningful work” is which is broad enough to encompass reference to the job position and job demand analysis.
    - What are the standards of practice to include the “collaborative practice” approach as stated in the “Working to well” as outlined in detail in the WCB Website. There is no reference to this in the WCB policy. What objective information and standards of practice does the WCB use in regard to return to work? What is the role of the case manager? How often does the Employer expect updates and communication from the case managers? Employers have reported lengthy time periods (three to eight months) before they have calls returned and updates from the case manager.
    - Case manager’s need to review previous claims of the worker to ensure there are no previous restrictions, limitations or accommodations as per section 81 of the *Act*.
    - In summary, the essence of the suggested recommendations provided by Employers amount to a necessity for a detailed, objective and best practice return to work and duty to re employ.
    - Definition of objective medical evidence is recommended.

- Re-employment and human rights legislation
    - What are the implications for employers? Are all injuries considered as disabilities?
- Coverage and eligibility
    - Requirement that injured worker has been employed with them continuously for at least one year prior to the work related injury" - Inconsistent wording regarding 1 year ...12 continuous months, or one year?
    - Concerns could arise with those employees who work for several employers and are only available a couple of days a month. The employer may have the work, but the employee cannot work because they are working elsewhere. How will the "eligible pauses" work in these circumstances? Attendance issues may also cause absences, how will this be factored in?
    - Related to "staff will seek out appropriate information to confirm the number of regularly employed" … When this information is confirmed, employers should have time to provide input.
- Obligations of injured workers
    - There should be a policy that assists employers and workers in understanding their responsibilities for re-employment.
    - It is imperative that Workers be provided with the proper information regarding their obligations, role and responsibilities for return to work.
    - Can the employer work with another organization to employ workers?
    - PTSD is tricky - when several things trigger the injured worker & they have repeated setbacks, when does it become the employee not the employer's obligation? Can this be clearly articulated within the policy?
    - There seems to be a lack of content for the obligations of injured workers versus the employer's obligations. Asking an injured worker to participate in mitigation may not be understood. Obligations of injured workers needs to be more clearly articulated in lay terms to ensure they clearly understand who is responsible for what. Many employees feel it all falls on the employer.
- Determining if case is appropriate for re-employment
    - Should additional costs be removed because of a delay in implementing re-employment?
- Re-employment Obligation of Employers
    - Obliged is a strong word as many factors come into play as to why modified duties or alternative employment are not suitable. Will consideration be given for these situations? For example, in office are frequently nonunionized staff, while front line staff are unionized, this can create various practical and logistical challenges when developing an appropriate modified work option.
    - What happens if a company has a position they can permanently accommodate in another province. What is the duty of the Worker to relocate? For example, Canada Post. Policy should address location to another province and how alternative work is determined.
    - Policy 5.2.5 refers to suitable work. There is no reference to meaningful work. Employers reported workers, refusing to do modified work, for example housekeeping or custodian duties, as this was deemed beneath them. These attitudes present barriers for return to work….The term "meaningful work" is

mentioned numerous times in case conference meetings by WCB case managers, however there is not a definition for this and more often seems to be a personal value of the case manager in how this term is interpreted and adopted.
    - Is the employer expected to create jobs for the injured worker because it can be seen as suitable work? Clarity and specific criteria that outlines how “suitable work” is determined is necessary.
    - Section 5.3 - Does this mean WCB expects the employer to put an injured worker in an office as suitable work? Is the employer expected to create jobs for the injured worker because it can be seen as suitable work? Clarity and specific criteria that outlines how “suitable work” is determined is necessary.
    - Section 5.4 - Collective agreements. If an injured worker feels the duties another worker is doing is "better re-employment", is the work taken from the non-injured worker? If so, this could mean the non-injured worker loses hours. What about additional costs to the employer to provide the "better re-employment"?
    - Section 5.5 - Suitable work with another employer. With respect to 6.3 - it needs to be very clear that if the worker refuses suitable work with another employer, the accident employer obligations cease.
    - Section 6.2 Re-instatement in last six months. Employer's obligation extends for an additional 6 months, could create a hardship on the employer or could mean another employee may lose work
    - Section 6.3 - it needs to be very clear that if the worker refuses suitable work with another employer, the accident employer obligations cease.
    - Section 6.5 Recurrences. Regardless of when the reoccurrence happens in the re-employment, is the employer’s obligation still for two years from the date of injury?
    - If termination is because of business closing the employer cannot re-employ or if that part of the organization is gone, i.e., closed part of the business, then the employer should not have to re- employ.
    - Duty of employer on receiving notice (97.3). Wording is confusing, if an employer cannot reinstate or does not have alternative employment, how would the employer have to provide suitable work – the wording suggests and leaves the impression that the employer is in an unmanageable position and therefore will receive for a penalty as per section 99.
    - Duty of employer on receiving notice (99.1.3). Define what is considered suitable work, outline who determines what is considered suitable work. Are there criteria that can be shared with employer and how is subjectivity of assessment controlled?
    - Effect of Sections 89 to 101 100 (1) Does this conflict with the employer's contractual obligation of a Collective Agreement? This has the potential to take work away from non-injured employees at no fault of the non-injured employee should the injured worker feel the other work is better than what they used to do. Also, does this increase the cost to the employer?
- Length of re-employment obligation
    - Section 6.2 Re-instatement in last six months Employer's obligation extends for an additional 6 months, could create a hardship on the employer or could mean another employee may lose work.
    - Section 6.5 Regardless of when the reoccurrence happens in the re-employment, is the employer’s obligation still for two years from the date of injury?

- Claiming undue hardship
    - Will “undue hardship” be interpreted and what definition of undue hardship is the WCB going to use? More clarity on “long term accommodation” and what is the obligation of the Employer.
    - Who defines undue hardship, and will this be a collaborative assessment between WCB and the employer?
    - The cost associated with arguing against re-employment decisions is often cost prohibitive within the home care sector.
- Failure to re-employ
    - Termination within 6 months of re-instatement. Could there be a breach of confidentiality if the termination is not related to the injury/claim? Will a simple 'terminated following an arbitration' be enough explanation?
    - Section 8.2 Termination within six months of re-instatement. Could there be a breach of confidentiality if the termination is not related to the injury/claim? Will a simple 'terminated following an arbitration' be enough explanation?
- Orders and penalties
    - Penalties are high.
    - This is excessive and could cause undue hardship on small businesses to the extent that other employees get laid off or forces the business to close.
    - Section 9.3 Reduction or withdrawal of re-employment obligation penalty. Although not specific to this clause, the case manager must be willing to go with this.