Submission

by the
Ontario Federation of Labour

to the
Workplace Safety & Insurance Board

Consultation on Early and Safe Return To Work (ESRTW) Policies

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INTRODUCTION

The Ontario Federation of Labour (OFL) is the central labour organization in the province of Ontario. The OFL has an affiliated union membership of over 700,000 members from all regions of the province with most unions in Ontario affiliated; our membership includes nearly every job category and occupation. Acting as the central labour body, the OFL works in conjunction with the affiliated unions to develop and coordinate policies passed at convention and by our Executive Board. One of the key roles of the OFL is to influence public policies that affect all working people, their families and communities.

The OFL and its affiliated unions appreciate the opportunity to address the issues outlined in the consultation documents regarding Early & Safe Return to Work (ESRTW) as we have raised these problems numerous times over the years.

OVERVIEW

Bill 162 introduced into Ontario an employer re-employment obligation that commenced in 1990. The effects of the obligation took time to materialize and both workers and employers struggled to understand the very structured and time activated processes.

The re-employment obligation, in part, could be held responsible for the significant shift that occurred in the early to mid 90's that brought much attention to the issue of the "duty to accommodate".

Although the statutory obligation was somewhat weak and significantly time limited, it began a trend to focus on the employability of persons with disabilities.

Through Bill 99, a new set of obligations regarding ESRTW were implemented. The original emphasis of Return To Work (RTW) in 1998 was the "self-reliance" of workplace parties. The Board described its associated policies as being relatively broad and non-prescriptive that would assumedly allow the workplace parties to embrace their new and active role in RTW. The workplace parties were expected to resolve differences and solve very difficult accommodation issues without very much assistance from the Board. The Board in turn took on a very limited and passive role.

Without resources, without proper education, without appropriate incentives/dis-incentives, the strategy was doomed to struggle for any measure of success.

In 2001 a value for money audit of the WSIB's ESRTW strategies highlighted the poor performance of RTW and reintegration practices in Ontario. It also supported the many disgruntled workers and union advocates who were leading a movement towards RTW reform.

In 2002 the employer community joined forces with the Labour movement to force the Board to listen and take seriously the many flaws in their RTW policies and procedures. Through the RTW Advisory Panel the Board heard the many concerns regarding its ambiguous and contentious policies and practices.

Although frustrated by the employer communities' withdrawal from seeking solutions to RTW problems, the Labour movement was encouraged by the constructive points and suggestions that were discussed in the process.

The OFL is pleased with the efforts of the Board to introduce these new policies that reflect an ambition to overcome the many flawed practices of the past. However, we believe there are significant amendments that must be considered before the draft policies are adopted.

Our submission will focus on four main issues that are not addressed satisfactorily in the draft policies. They are:

1. "Safe" Work
2. Employer Non-cooperation Penalties
3. Role of the Union
4. Education and Resources

1. **"SAFE" WORK**

Draft **Policy 19-02-02** provides that:

> "The following factors should be examined when considering whether the post-injury work is safe
> - the work is within the worker's functional abilities
> - the work does not pose an increased health or safety risk to the worker (e.g., should not cause re-injury or a new injury) or co-workers
> - the work is performed at a worksite that is covered by either the *Occupational Health and Safety Act (OHSA)* or the *Canada Labour Code*; and
> - the worker has the functional ability to travel to and from the worksite."

The OFL has concern as to how the Board will determine the worker's functional abilities and how it will be determined that the work being offered is indeed safe, or unlikely to prolong or cause further injury.

It must be remembered that many times the Board relies on only the Functional Abilities Form to assess the nature and extent of the worker's limitations and abilities. However, we know that the information provided by the health care provider on these forms is scant, and at best only represents a snap shot of the worker on the day they were examined.

We know that in many cases the offer of work is not fully explained or understood before the worker undertakes an attempt to perform it.

It is therefore, imperative that the decision-maker proceed with due caution when determining that a particular job offer is "safe". The OFL suggests that decision-makers ought to adopt the "precautionary principle" when considering the suitability and safeness of a job offer.

In its "strongest" formulations, the principle can be interpreted as calling for absolute proof of safety before allowing new technologies to be adopted. In a more meaningful sense we suggest that the precautionary principle should provide that:

> **"When an activity raises threats of harm to the worker's health, precautionary measures should be taken even if some cause and effect relationships are not fully established."**

Although the OFL supports the idea that before refusing an employer's offer of modified work, the worker should attempt to perform only parts of the offered work that are safe. The problem is that the policy does not clarify who is meant to determine the "safe" portions of the work. If it is the intent of the policy to reinforce that it is the worker whom decides what portions or tasks can be performed safely, then we would support the provision but would urge clarification. The policy must direct that when a worker attempting a modified job offer suffers some adverse health effect as a result of performing a task, the modified job offer must be reconsidered with consideration of the new circumstances.

It must also be considered that once an injured worker returns to the employment to attempt the safe portions of the offered work, there will be many times external forces (eg. supervisors, co-workers, etc) that may apply pressure, either directly or indirectly to the worker to attempt more tasks than what they may feel safe performing. It is vital that the policies reflect a pragmatic consideration of a worker's attempts to perform portions of a modified job offer.

The OFL supports the policy where it provides that one factor in considering whether the work is safe is that "the work is performed at a worksite that is covered by either the *Occupational Health and Safety Act* or the *Canada Labour Code*". Strict adherence to this provision will aid in ensuring that workers are not forced or pressured into working beyond their limitations.

For example, a worker returning to a site covered by the *OHSA,* may exercise their statutory right to refuse any work that they are asked to perform that may endanger their health. At Stage 1 of the work refusal process under the *OHSA* workplace parties try to resolve the matter but if no resolve is reached then the Ministry of Labour (MOL) must be called in and the inspector would have the responsibility to decide if the work is suitable.

The MOL has already developed a policy that deal with work refusals where the issue involves a worker with an allowed Workplace Safety and Insurance Board (WSIB) claim and an employer RTW program. **Policy 4.12A** of the Policy and Procedures Manual of the Ministry of Labour Operations Division, directs the inspector in such instances to instruct the workplace parties to continue a first stage investigation as required by s.43(4) of the *OHSA*, and to contact the WSIB.

A worker refusal regarding offered modified work cannot be considered as non- cooperation on the part of the worker, but rather as a significant indicator that the RTW process has broken down in regards to the previous determination of the worker's functional abilities or that the job offer was not adequately considered to ensure that it was safe.

The work refusal would give the Board and the workplace parties another opportunity to resolve the job suitability issue. If the Board or employer fails to take the appropriate actions needed to determine the health risks and compatibility of the offered work, the worker, as a last resort, could call in the MOL to make a determination.

The OFL suggests that the policies should clearly reinforce the protection afforded a worker under the *OHSA* or the *Canada Labour Code*, to give confidence to a worker that they cannot be forced to perform work that will cause them harm. This confidence will encourage more cooperation by all of the workplace parties.

2. EMPLOYER NON-COOPERATION PENALTIES

Policy 19-02-06 provides where an employer is found in non cooperation of their ESRTW obligations and a full penalty is applied:

> "The full penalty continues for each day that the employer continues to be non-cooperative; until
> - the employer has started cooperating again
> - Labour Market Re-entry (LMR) services have been completed, with no prospective wage loss; or
> - 12 months following the date of notice of non-cooperation
>
> whichever is earlier."

The OFL strongly objects to the penalty being limited to 12 months. S. 86 of the *Act* states "If the Board decides that an employer has failed to comply with s.40 (RTW), the Board may levy a penalty on the employer that is such percentage as the Board may determine of the cost to the Board of providing benefits to the worker while the non-compliance continues."

We would recommend that where an employer was aware of, and understood his or her cooperation obligations, and had no legitimate reason for failing to comply, they should be assessed. A penalty of 100 per cent of the cost of the wage loss benefits payable to the

worker, plus 100 per cent of any costs associated with providing LMR services to the worker for as long as the non-cooperation continues.

Any mitigation or limitation of the employer's penalty would only undermine the integrity and sincerity of the Board's mandate to enforce the statutory obligations. It must be remembered that the Board has not applied the provisions of s.86 since its inception in 1998. Other than consultation on "cooperation" policies and piloting draft policy in a few select sectors, the Board has allowed employers to ignore their statutory obligations under s.40 by not applying the provisions of s.86. The Board has itself ignored one of the most powerful statutory influences to persuade employer compliance in RTW.

When the province of Newfoundland Labrador amended their workers' compensation legislation to include ESRTW provisions, which were substantially adopted from the *Ontario Act*, the Commission made sure that employers were made aware that non-cooperation meant the full application of the penalty without limit, which in some cases could result in penalties approximating $500,000. As a result of this pledge, the Commission boasts that there has been 100 per cent employer cooperation since enactment of its ESRTW provisions in 2002.

Without significant financial penalty, the OFL fears that far too many employers in this province will continue to ignore their statutory obligations.

3. ROLE OF THE UNION

Policy 19-02-02 discusses the roles of the workplace parties:

> **Shared responsibility**
> Research shows that the workplace parties have the greatest influence on whether a positive RTW outcome will occur. The workplace parties' knowledge of the workplace and influence on the RTW outcome make them best suited to manage RTW. Workers and employers are therefore primarily responsible for planning RTW, identifying RTW opportunities, as well as identifying RTW issues in the workplace.
>
> However, there are other participants in the RTW process who also influence the RTW outcome. These participants can include:
> - a union representative or authorized worker representative
> - the worker's direct supervisor
> - an authorized employer representative
> - the treating health professional(s)
> - the WSIB; and
> - co-workers.

The OFL strongly criticizes the policy for not recognizing a union's legal standing in the RTW process. The union is the legal bargaining agent in the unionized workplace. The

union as the bargaining agent has signing authority for working conditions including accommodations of disabled workers.

The worker involved in RTW may elect not to have representation or authorize a non-union representative to act on their behalf. This would in no way mitigate or minimize the unions legal responsibility to be involved with RTW and accommodation discussions. The union always has the duty to protect the interests of all the bargaining unit members. This far more that just a moral stance. It is their legal obligation.

Bargaining with other than the bargaining agent is illegal and in contravention of the *Labour Relations Act*. Any RTW "agreement" negotiated without full union involvement would be null and void without union approval. The employer and the WSIB must be made aware of these facts. Human Rights Legislation and jurisprudence have established legal obligation on unions to participate in the accommodation of persons with disabilities. Labour Arbitration cases have confirmed that unions have legal standing at any RTW meetings or discussions.

The Board's policies must consider the union as an equal party in the RTW process, and cannot allow the stature of the union to be minimized to a "useful resource".

4. EDUCATION AND RESOURCES

The OFL recognizes that the issue of RTW is complex and multifactorial. We believe that there exists some research that will assist in developing evidence-based good RTW practices. We also believe that for there to be a significant shift in attitudes and practices regarding RTW, there must be adequate and appropriate education and resources made available to all of the workplace parties.

The body of research that is available seems to identify the same barriers to RTW and offer similar solutions.

There are two common themes in the research:

- proper injury reporting plays a significant role in successful RTW; and
- education of all participants in the process is crucial

The following is a sample of research findings that we have reviewed that confirms the importance of extensive education:

Factors Affecting Return To Work after Injury: A Study for the Victorian WorkCover Authority, December 2002

Elapsed time between injury and notification of injury may compound seriousness and costs of injuries:

- timeliness of reporting has an impact on RTW
- limits potential for early intervention

Assessment of a Person's Ability to Function at Work, 2002, What Helps and Hinders Return To Work, 2001

- sound channels of communication result in positive outcomes
- prior knowledge of employer's disability policy reduces anxiety
- timing and clarity are key to effectively address employees' financial, medical and work-related concerns
- increased interaction leads to more frequent discussion of RTW opportunities.

Amick III et al, 2000, Return To Work, Krause and Lund, 2002

Disability is shortened in companies with a workplace culture that emphasizes an interpersonal and value-focused environment, for example:

- company policies that stress early intervention
- communication and coordination in disability case management
- proactive RTW policy – education and accommodation of employees RTW after disability.

Return To Work in California, Institute of Industrial Relations, University of California at Berkley, July 2001

- education of all players of own and each other's roles and responsibilities would overcome problems arising from lack of knowledge.

The Injured Worker Participatory Research Project, 2001

- knowledge of one's rights had a positive effect on outcomes
- other factors associated with better outcomes include fewer barriers to treatment, a supportive workplace and respect for injured workers.

Return To Work in Small Workplaces: Sociological Perspective on Workplace Experience with Ontario's 'Early and Safe' Strategy, November 2002

- ESRTW in particular is dependent upon harmonious relationships in the workplace.

Institute for Work and Health: "What Helps and Hinders Return To Work", 2001

- satisfaction with the process is higher when employees feel they have a good understanding of the process and what to expect.

In the present context, we know that far too many workers, employers and workplace representatives are unaware of their legal rights and obligations regarding employment of persons with disabilities. This lack of awareness represents a significant barrier for workers with disabilities. This barrier will be significantly compounded by the introduction of the Board's new policies and directions regarding RTW.

The emerging strategy arising out of these initiatives, however, presents an opportunity to significantly improve workplace safety, accessibility and accommodation. The OFL would submit that this can only be accomplished by allocating adequate resources to support workplace-based training to workers, employers and workplace representatives.

It is imperative that training be developed and provided which will counteract the prevailing culture of blame by raising awareness of the plight of workers with disabilities and the rights and obligations of workers, employers and unions to accommodate them. Training must provide information on ways and means to remove barriers and promote best practices for establishing effective RTW programs. The training must also be designed to improve communications and cooperation amongst workers, employers, unions, insurance and health care providers.

We believe that basic training regarding RTW obligations must be delivered on a parallel to that of legislated *OHSA* training, such as WHMIS. Only a serious commitment to training initiatives and resources on a broad-base approach will result in the WSIB's new RTW strategies.

CONCLUSIONS

In summary the OFL supports the principles of a new RTW strategy. The OFL and its affiliates believe that it is socially unacceptable and contrary to the intent of heath and safety, compensation and equity legislation to maintain the status quo regarding workplace illness and injury and the RTW and employment of workers with disabilities.

The OFL is also of the view that many employers and unions are trying to be more proactive in addressing the challenge of integrating disabled workers into the workplace,

rather than just responding to legal demands.

However, a successful evolution of the Board's new strategies will only be accomplished by a sincere commitment by the Board to provide education and enforce compliance. The OFL eagerly supports initiatives that work to benefit the workers and employers of the province of Ontario by promoting workplace compliance with legislative requirements and reduces the human and financial cost of occupational illness and injury.

We are pleased that the Board is consulting on this important issue and look forward to further consultation on issues that are important to working people.

We wish to thank the Workplace Safety and Insurance Board for this opportunity to present our views on the issue of Early & Safe Return To Work by way of this submission and would encourage the Board to continue this positive practice of consultation with the stakeholders.

Respectfully submitted by,

THE ONTARIO FEDERATION OF LABOUR

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