Section Title: Benefits Administration - Vocational Rehabilitation
Subject: Return to Work with the Accident Employer
Effective Date: For accidents occurring on or after January 1, 2007

POLICY PURPOSE

When a worker is injured or becomes ill at work, the goal of the Workers Compensation Board (WCB) is to reduce the impact of the injury by assisting the worker in returning to work, preferably with his or her accident employer. Most of the time the worker, employer and collective bargaining agent (where applicable) will make their own arrangements. The WCB encourages these permanent or transitional arrangements and will work with all parties to help the worker safely return to work.

Under *The Workers Compensation Act* (the Act), some employers are required to offer to re-employ injured and ill workers. The WCB will provide assistance to all employers, whether or not they are required to offer re-employment, to help them return an injured or ill worker to work.

This policy outlines the WCB's approach to the return to work of injured workers through modified or alternate duties with the accident employer. It also provides guidance and interpretation of the re-employment obligations outlined in section 49.3 of the Act.

The definitions in A. III are an integral part of this policy.

A. POLICY

I. Modified or Alternate Work

Employers are expected to consider the following objectives in the following sequence:

1) Return to the same work with the accident employer.
2) Return to modified work with the accident employer.
3) Return to different (alternate) work with the accident employer.

All employers, regardless of whether they are bound by the re-employment obligation, are encouraged to provide modified or alternate work to injured or ill workers as part of a process of safely returning those workers to work and helping them to regain their earning capacity.

The WCB will only become involved in two situations. The first is when either the worker or the employer requires financial or technical support to help the worker return to work. The second is when the worker and the employer disagree about whether the modified work placement is appropriate. This policy is consistent with the principles defined in policy 43.00, *Vocational Rehabilitation.*

Suitable Modified or Alternate Work

Suitable work is that which the worker is medically able to do, does not aggravate or enhance the injury, and will provide benefits to both the worker and the employer. Suitable work is permanent or transitional employment that takes into account the worker's pre-accident employment, aptitudes, skills, and what work is available. It also considers any safety concerns for the worker or co-workers.

To determine if the worker is medically able to perform *suitable work*, the WCB will compare the worker's compensable medical restrictions and capabilities to the demands of the work.

Essential Duties

To determine if the worker is medically able to perform the *essential duties* of the worker's pre-accident employment, the WCB will compare the worker's compensable medical restrictions and capabilities to the essential duties and demands of the work.

Criteria for Assistance

The WCB may authorize any reasonable and necessary expenditures, including wage-loss benefits, training subsidies, job-site modifications, and any other reasonable and necessary costs that will help the worker return to work. The WCB will help a worker return to the accident employer when:

a) The worker cannot return to the full pre-injury work with the employer without accommodation.
b) The worker has a temporary or permanent loss in earning capacity.
c) The employer will need assistance to accommodate the worker in modified or alternate work.

Work Interruptions

If a worker engaged in suitable work experiences a change in job requirements, lay-off, shutdown, lockout or strike, the worker may be eligible for additional benefits. When determining whether the worker is eligible for additional benefits, the WCB will consider whether there is a loss of earning capacity and, if so, whether or not it is due to the injury.

The WCB recognizes that when the work is interrupted due to economic conditions (labour issues or other factors that affect all workers), the initial loss of earning capacity is not due to the injury. If the worker is expected to return to the previous employment in a reasonable period of time, the worker is not at a disadvantage compared to other workers at that workplace who are also experiencing a loss of earnings.

If the work interruption becomes prolonged to the point where similarly employed workers are pursuing other employment opportunities, and the injury places the injured worker at a competitive disadvantage in the general labour market, then the WCB will determine whether there is further entitlement to wage-loss benefits and rehabilitation services.

When determining whether the loss of earnings was due to the injury, the WCB will consider the following questions:

a) Is the work interruption expected to be temporary or long term?
b) Is the work interruption a normal cyclical event?
c) What is the worker's actual earning capacity in the general labour market?
d) Is the worker's current wage representative of actual earning capacity, or is it partially subsidized as part of a rehabilitation initiative?
e) Is the worker at a competitive disadvantage compared to uninjured workers so that, as a result of the worker's injury, the worker cannot effectively compete with other workers in the job market?

If the WCB determines that the loss of earnings has occurred for reasons unrelated to the injury, there will be no change in benefits. If, however, there is a loss of earning capacity because the injury has affected the worker's ability to adapt to the changed workplace conditions, the WCB will provide benefits subject to Policy 44.80.30.20, *Post-Accident Earnings – Deemed Earning Capacity*. The worker may also be eligible for other vocational rehabilitation services.

Disagreements Between Parties

Whether the employer is bound by the re-employment obligation or not, if there is a dispute about whether the modified or alternate duties are suitable, or whether a worker is medically able to perform the essential duties of the pre-accident job or suitable work, the WCB will make the final determination and may arrange for a worksite analysis.

Non-Cooperation

If the employer initiates modified or alternate work that does not meet the standards for suitable work as described in this policy, the WCB may offer additional rehabilitation services to the worker.

If a worker refuses to participate in suitable work, wage-loss benefits will be reduced or eliminated by the amount the worker would have earned in the suitable work.

II. Re-Employment Obligations

The Act requires employers who employ twenty-five or more full-time or regular part-time workers to re-employ workers who have been employed by the employer for at least twelve continuous months prior to the date of accident and have been unable to work as a result of a workplace accident.

An employer's obligation to offer re-employment to an injured or ill worker ends on the second anniversary of the accident date, or six months after the worker becomes medically able to perform the essential duties of the pre-accident employment or suitable work, or the date the worker would have retired, whichever is earliest.

When a worker is medically able to perform the essential duties of the pre-accident employment (that is, the worker has fully recovered from the effects of the injury or illness and is able to

return to the pre-accident job), the employer must offer the pre-accident position or alternative employment comparable in nature and earnings.

When a worker has not fully recovered from the effects of the injury or illness but is able to perform suitable work, the employer must offer the worker the first opportunity to accept suitable employment that becomes available.

The employer must also make accommodations to the work or the workplace to accommodate the needs of the worker, to the point of undue hardship.

If an employer or worker notifies the WCB of a dispute concerning re-employment obligations, the WCB will seek to facilitate a successful resolution for all parties. If unsuccessful, the WCB must make a determination whether the employer has fulfilled its obligations to the worker. The WCB may also take the initiative to determine whether the employer has fulfilled its re-employment obligations.

If an employer terminates the employment of an injured or ill worker within six months of re-employment, the employer is presumed not to have fulfilled the obligation. However, the employer may rebut the presumption by showing that the termination was not related to the accident.

Employers may lay-off or alter a worker's employment for business reasons made in good faith that are unrelated to the accident.

An employer who fails to comply with the re-employment obligation is subject to an administrative penalty not exceeding the worker's net average earnings for the year before the accident.

The obligation prevails over a collective agreement when it provides a worker with greater re-employment terms.

Determining an Employer's Obligation to Re-Employ

The WCB may consider an employer to be a single employer even if it operates numerous, geographically distinct plants or branches within the province or has numerous firm numbers, so long as the firms are "associated" for purposes of WCB assessments as described in Policy 35.20.15, *Associated Employers.*

Unable to Work

Injured and ill workers are considered unable to work if, on the next scheduled shift following the day of accident, they are unable to perform the essential duties of their pre-accident job, or they require an accommodation to perform the essential duties of the pre-accident job.

Number of Workers Regularly Employed

Generally, the number of workers employed by the employer on the day of accident is considered to be the number of workers regularly employed, whether full or part-time. If the

worker or employer disagrees on this number, the WCB will determine the average number of workers employed in each of the twelve months before the day of accident. This number will be considered the number of workers regularly employed.

If the employer's operations are seasonal in nature and the worker or employer disagrees on the number of workers regularly employed, the WCB will determine the average number of workers employed in each of the twelve or fewer months that make up the full regular season of the employer's operations before the day of accident. The resulting figure represents the number of workers regularly employed.

> ***Exceptions***: Casual emergency workers, learners, volunteers deemed to be workers, declared workers, and persons engaged in a work-experience program are not considered when determining the number of workers employed.

Date of Retirement

The WCB will use the principles outlined in Policy 44.60.20, *Date of Retirement.*

Determining if the Employment Relationship was Severed

In general, the following types of work cessation do not break the employment relationship:

a) Strikes and lock-outs;
b) Sabbaticals, sick leaves, maternity and parental leaves, employer-approved leaves of absence, and vacations;
c) Work-related injuries resulting in time off work;
d) Lay-offs with a mutual agreement that the worker will return to work for the employer;
e) Instances when the employer continued to pay the worker;
f) Instances when the employer continued to make retirement, pension or employee insurance plan benefit payments for the worker.

Voluntary Severance

An employer must first comply with the re-employment obligation prior to the worker and employer agreeing to a voluntary severance.

Lay-Off

When a worker becomes medically able to perform the essential duties of the worker's pre-accident employment during an employer's seasonal lay-off period, the employer may satisfy the WCB that the decision not to offer re-employment was for a business reason made in good faith that was not affected by the worker being or having been unable to work as a result of the accident. However, employers are expected to offer re-employment at the beginning of the usual busy season.

Termination

If an employer re-employs a worker and terminates the employment within six months, it will be presumed that the employer has not fulfilled their obligation under 49.3(8). The onus will be on

the employer to show that the termination was not related to the accident. If there is a dispute as to whether the termination was due to the accident, the WCB will make the final determination.

Duration of the Re-Employment Obligation for Term, Contract, Temporary, or Project Workers

Generally, if a worker enters into an employment agreement for a specific period of time, the obligation does not extend beyond the end date of the contract or project. However, the WCB may consider the availability of other contracts, projects, or work the employer has available.

For example, if a construction worker is hired to work on a specific project, the obligation does not generally extend beyond the end date of the project or the component of the project on which the worker was hired to work.

Determining Undue Hardship

The WCB refers to the Manitoba Human Rights Commission's policy and guidelines on undue hardship and will consider the circumstances of each case. When the employer claims that the accommodation will cause the employer undue hardship, the onus is on the employer to show adequate evidence to support their claim. The WCB will consider a number of factors, including:

a) Health and safety concerns;
b) Business efficacy;
c) Interchangeability of employees and facilities;
d) Impact on employees and service users;
e) Impact on other protected rights;
f) Benefit of the accommodation;
g) Financial costs of accommodation.

Generally, employers are not required to create a new permanent position expressly for the injured worker that is comprised of new duties that were previously non-existent and do not suit the employer's business needs.

Alternative Employment – Comparable Nature and Earnings

When a worker has recovered from the effects of the injury or illness, the employer must offer the worker his or her pre-accident job or employment that is comparable to the pre-accident employment.

The WCB may consider the following factors when determining if alternative employment is comparable to the pre-accident employment:

a) Degree of physical and mental effort required;
b) Duties to be performed;
c) Geographic location of the work;
d) Level of responsibility and supervision of other employees;
e) Skills, qualifications, and experience required;
f) Bargaining unit status.

If the earnings in the alternative job are less than 90% of the worker's pre-accident earnings, the jobs will not generally be considered comparable.

Offer to Re-Employ

When an employer makes an offer to re-employ, the worker is required to accept or decline the offer within a reasonable period of time. If a worker declines an offer to re-employ, the employer is no longer bound by the obligation.

Obligation not Fulfilled

If the WCB determines that an employer has not complied with the obligation, it may levy an administrative penalty on that employer. The administrative penalty provisions do not apply to employers falling within the jurisdiction of the *Government Employees Compensation Act*.

Conflict with Collective Agreements

An employer should first attempt to offer employment within an injured or ill worker's collective agreement. However, if the obligation cannot be met within the framework of the worker's collective agreement, employers must consider employment opportunities outside the collective agreement, including opportunities contained in other collective agreements.

Recurrence

If a worker suffers a recurrence of the compensable injury or illness before an employer's obligation to offer re-employment expires, the employer is still bound by the obligation to re-employ, and by the original duration of the obligation.

III. Definitions

Accommodation:
Any change in the job duties, reorganization or reduction of work hours, physical changes to the work area, or changes in the use/type of equipment that is necessary to enable an injured worker to perform the job.

Alternate Work:
Alternate work is that which is offered when the worker is temporarily or permanently unable to perform the pre-accident work. It is a job or position that is different than the one performed by the worker prior to the injury.

Alternative Work:
When the re-employment obligation applies and a worker is medically able to perform the essential duties of the pre-accident employment, alternative work is work that is comparable in nature and earnings to the pre-accident job.

Continuous Employment:
Workers who are hired one year or more before the date of accident are considered to be continuously employed, unless the year was interrupted by a work cessation intended by the

worker or the employer to sever the employment relationship. Thus, continuous employment may include seasonal workers subject to lay-offs not intended by the worker or employer to sever the employment relationship.

Essential Duties:
The duties necessary to achieve the job outcome.

Modified Work:
Modified work is that which is offered when a worker is able to return to work but is unable to do all of the duties of the pre-accident job without help. It includes any modification of the previous job that helps a worker safely return to work. It may involve a modification to the job, task, function, hours of work, worksite, or any combination of the above. Graduated return to work (the worker temporarily working for limited hours or limited duties as part of a plan leading to full employment) is included in modified work.

B. REFERENCES

The Workers Compensation Act, section 49.3
WCB Policy 35.20.15, *Associated Employers*
WCB Policy 43.00, *Vocational Rehabilitation*
WCB Policy 44.10.30.60, *Co-operation and Mitigation in Recovery*
WCB Policy 44.60.20, *Date of Retirement*
WCB Policy 44.80.30.20, *Post-Accident Earnings – Deemed Earning Capacity*
Manitoba Regulation 15/2015, *Interest, Penalties and Financial Matters Regulation*

History

1. Policy 43.20.25 established by Board order No.26/06 on August 31, 2006. This policy is effective January 1, 2007, and outlines the WCB's approach to the return to work of injured workers through modified or alternate duties with the accident employer. It also provides guidance and interpretation of the re-employment obligations outlined in section 49.3 of *The Workers Compensation Act.* This policy replaces Policy 43.20.20, *Modified or Alternate Work with the Accident Employer*, for accidents occurring on or after January 1, 2007.
2. December 1, 2006, Policy 43.20.25 updated to reflect new Manitoba Regulation.
3. Minor formatting and wording changes were made to the policy, June 27, 2012.
4. Reference section updated to reflect Manitoba Regulation 15/2015, August 24, 2016.
5. October 2019 Reference to Policy 44.10.30.60 was updated to reflect the proper policy name.

C. ADMINISTRATIVE GUIDELINES

1. Modified/alternate return to work arrangements may be pursued through a workplace-based disability management program or on an individual case-by-case basis. Most of the time the worker, employer, and collective bargaining agent (where applicable) will make their own arrangements. When the WCB initiates a modified/alternate return to work with the accident employer, the WCB will:
   a. Pursue placement in a modified/alternate work situation concurrent with medical management and physical rehabilitation.
   b. Work with the worker, employer, and collective bargaining agent (where applicable) to identify and establish modified/alternate work.
   c. Where practical, assess the demands of the work through an on-site analysis.
   d. Ensure the work meets the criteria for suitable modified or alternate work established in this policy.
   e. Provide a written return to work plan, which is communicated to the worker, employer, collective bargaining agent (where applicable), and the worker's primary healthcare provider.
   f. Monitor the return to work plan to ensure it is safely implemented in accordance with the established goals. The return to work plan should be amended as required and any amendments communicated to all involved parties.

2. The WCB will determine whether the employer has met its re-employment obligations using the following approach:
   a. Determine if the re-employment provisions apply (for example, employer size, length of employment, and duration of obligation).
   b. Attempt to facilitate/mediate an acceptable solution for both the worker and employer. This will usually include a worksite visit.
   c. Provide all parties an opportunity to present any relevant information in a timely manner.
   d. Make, if an acceptable resolution cannot be found, a determination on whether or not the obligation has been fulfilled.
   e. In writing, advise the worker, employer, and collective bargaining agent (where applicable) of the determination, any recommended actions needed to fulfil the obligation including timeline for implementation, and if applicable, the possibility that a penalty may be imposed.
   f. If the employer has not met its re-employment obligations, follow-up with all parties to see if the dispute has been resolved or if the recommended actions needed to fulfil the obligation have occurred. The WCB may also request and consider any new information.
   g. If the dispute still exists and the recommended actions have not been fully implemented, make a determination on whether or not the obligation has been fulfilled. The WCB will advise all parties of the decision and if the employer has not met the obligation refer the matter to the Vice-President – RACS (or designate) for consideration of a penalty.

3. When attempting to facilitate an acceptable solution to re-employment obligation disputes regarding accommodation to the point of undue hardship, the WCB may use the following steps:

a. Review the accommodation procedure used by the employer. If the procedure is insufficient, encourage the employer to review the accommodation using an acceptable procedure.
b. Review the substance of the accommodation offered to the worker.
c. If the expense will cause the employer undue hardship, consider WCB support within the parameters listed in 43.20.25 to enable the accommodation. The employer is still required to pay the expenses up to the point of undue hardship.

4. When investigating disputes regarding the number of workers regularly employed, the WCB may use the following sources of information:

   a. The information collected at time of claim transfer to case management.
   b. The assessable payroll amount.
   c. Payroll information from the employer.
   d. Information from the worker, employer, collective bargaining agent (where applicable), or other worksite parties.

5. When determining if the employment relationship was severed, the WCB may consider the following factors:

   a. The length of time the worker was employed by the employer.
   b. The length of, and reason for, any work cessation.
   c. Any contractual arrangements between the parties.
   d. The worker's pattern of employment and the employment patterns of co-workers.
   e. The expressed views and behaviour of the parties.
   f. The extent to which aspects of the employment relationship are maintained (e.g. maintenance of employee benefits by the employer).

6. When determining the essential duties of the pre-accident job, the WCB may review:

   a. How often each duty is undertaken.
   b. The proportion of time spent at each specific duty.
   c. The effect on the job outcome if a duty is removed.
   d. The effect on the process before or after a duty, if a duty is removed.
   e. The current and relevant job description.
   f. The normal productivity expected in the job.

7. When determining whether or not the termination or lay-off was related to the accident, the WCB may review:

   a. The worker’s job description, performance reviews, discipline letters, and other related documentation.
   b. Explanations provided by workplace parties.
   c. The terms of the collective agreement.
   d. Pre-existing, written company policy.
   e. Established company practices.
   f. Current labour and employment standards and practices.