

**Construction Employers Coalition  
(for WSIB and Health & Safety and Prevention)**



October 19, 2021

Ms. Elizabeth Witmer, Chair  
Workplace Safety & Insurance Board  
200 Front Street West  
Toronto ON M5V 3J1

Mr. Tom Bell, Acting President & CEO  
Workplace Safety & Insurance Board  
200 Front Street West  
Toronto ON M5V 3J1

Dear Ms. Witmer and Mr. Bell:

**Re: Return to Work, COVID-19 Vaccination Status and Loss of Earnings Benefits**

We present a policy query accompanied with a policy suggestion. The circumstances are simple and contemporary: A worker is fit to return to suitable or pre-injury employment; the worker has chosen to *not* receive the COVID-19 vaccine; the company has a mandatory vaccine policy in place; this policy was put in place while the worker was off work. There are several other related scenarios but this scenario captures the relevant policy considerations.

*Our question is:* How will the WSIB address such cases? Neither WSIB policy, WSIB COVID Q&A materials and we have been informed, internal WSIB COVID training materials, address this situation. *Our request is:* To ensure clarity and adjudicative consistency that the WSIB develop a specific and official policy for these circumstances that meets the test for policy in the context of the **WSIA s. 126(1)** so that the policy is binding on the Appeals Tribunal.

**We reached out to the WSIB**

We recently reached out to a senior operations official at the Board. This is what we were informed:

- WSIB COVID communications including internal WSIB policy training material does not address this specific question.
- The likely outcome would be that unless the worker has a medical predisposition which would preclude the worker from being vaccinated and unless it is very carefully documented, benefits would stop.
- The issue of the vaccination would be considered by the WSIB to be a non-occupational barrier to return to work.

While this is very helpful, and we do not disagree with the result, we offer this additional analysis.

**CEC analysis**

First, we address the legal rights and obligations of the parties. Construction workers and employers have prescribed duties of cooperation vis-à-vis return-to-work (“RTW”) matters. See [WSIA O. Reg. 35/08](#).

## **PART II RETURN TO WORK**

### **Requirements — employer**

3. The employer of an injured worker shall co-operate in the early and safe return to work of the worker in accordance with the following requirements:

1. The employer shall contact the worker as soon as possible after the injury occurs and shall maintain appropriate communication throughout the period of the worker's recovery and impairment.

2. The employer shall attempt to provide suitable work that is available.

3. The employer shall give the Board such information as the Board may request concerning the worker's return to work. O. Reg. 35/08, s. 3.

### **Requirements — worker**

4. The worker shall co-operate in his or her early and safe return to work in accordance with the following requirements:

1. The worker shall contact the employer as soon as possible after the injury occurs and shall maintain appropriate communication throughout the period of the worker's recovery and impairment.

2. The worker shall assist the employer, as may be required or requested, to identify suitable work that is available.

3. The worker shall give the Board such information as the Board may request concerning the worker's return to work. O. Reg. 35/08, s. 4.

If a worker is fit to return to suitable work, the employer is obligated to offer "suitable work which is available."

### **Worker medically able to perform suitable work in construction**

12. (1) This section applies if the employer receives information indicating that the worker, although unable to perform the essential duties of his or her pre-injury employment, is medically able to perform suitable work in construction. O. Reg. 35/08, s. 12 (1).

(2) The employer shall offer to re-employ the worker,

(a) in a position whose duties consist of suitable work in the worker's trade and classification at a collective agreement workplace, if such a position is available;

(b) if there is no position described in clause (a), in a position whose duties consist of suitable work in the worker's trade at a collective agreement workplace, if such a position is available;

(c) if there is no position described in clause (a) or (b), in a position whose duties consist of suitable work in construction at another workplace of the employer, if such a position is available.

O. Reg. 35/08, s. 12 (2).

Under normal circumstances, if available suitable work with no wage loss is offered and refused, the worker forfeits the worker's right to benefits by virtue of **WSIA s. 43(7)**. However, as established, the work in question requires vaccination. The worker is unvaccinated. While the work is generally available, it is arguably not specifically available to the worker. It could be argued that a refusal would not necessarily negate entitlement to benefits. We seek to avoid the capacity for these arguments to be given merit.

Take a less complicated but somewhat analogous example. A worker is disabled from regular work, but fit for suitable work. A driving job is identified as suitable, which of course requires a suitable driver's licence. The worker has no such licence. The offered job is not available to that worker. The worker cannot accept. There would be no adverse LOE benefit consequences attached to that inability to accept.

There is another relevant section under the WSIA dealing with worker cooperation in medical treatment, **s. 34**:

### **Duty to co-operate**

**34** (1) A worker who claims or is receiving benefits under the insurance plan shall co-operate in such health care measures as the Board considers appropriate.

**Failure to comply**

(2) If the worker fails to comply with subsection (1), the Board may reduce or suspend payments to the worker under the insurance plan while the non-compliance continues. 1997, c. 16, Sched. A, s. 34.

The Board could apply **s. 34** in such circumstances and request the worker to be vaccinated as a health care measure considered appropriate. A failure to cooperate could result in cessation of benefits. However, **s. 34** requires additional specific notice requirements and adjudicative steps which render it ineffective in routine RTW matters and we seek a more viable and simpler policy solution.

**The desired outcome**

The decision of the worker not to become vaccinated must be construed purely and exclusively as a labour/employment issue, with any sought remedies being addressed through standard employment/labour law processes, not the WSIA. What is desired is that the WSIB develop and publish a specific policy that answers the question. The “self-imposed barrier” approach is sound and should be codified in specific WSIB COVID policy. There will be more cases of this type. Interestingly, if the WSIB were to take the position to continue benefits in such cases (i.e., a RTW is possible but for the vaccination), it would be acting in a manner contrary to general government policy, and as we understand it, WSIB internal HR policy.

We would welcome an opportunity to discuss this issue.



David Frame, CEC Chair