April 24, 2025

Sent via email – policy@wcb.ns.ca

Policy Department
WCB Nova Scotia
5668 South Street
Halifax, NS B3J 2Y2

To Whom It May Concern:

Re: OEA NS Submissions relating to WCB Draft Policies 5.7.1, 5.7.2, and 5.7.3

Please accept these submissions from the Office of the Employer Advisor, Nova Scotia Society (OEA NS) in response to the WCB's public call for comments on the following proposed additions to the WCB Policy Manual:

- Policy 5.7.1 - Return to Work - Overview
- Policy 5.7.2 - Early and Safe Return to Work - Roles and Responsibilities
- Policy 5.7.3 - Early and Safe Return to Work - Plans and Functional Abilities Information

We will begin with substantive feedback on the *Policy Background Paper: Return to Work and Duty to Cooperate* (the "policy paper"), which was shared with WCB stakeholders on February 20, 2025. Following that, we will provide our comments on each draft policy in sequence.

Policy Background Paper: Return to Work and Duty to Cooperate

OEA NS has identified several key issues within the policy paper that we wish to highlight for your consideration. We believe that certain messaging in the policy paper is likely to cause confusion among employers regarding the duty to cooperate. To ensure clarity, our commentary will be structured to align with each section header from the policy paper.

1. Purpose

A. The "New" Duty to Accommodate

In the policy paper, the duty to cooperate is consistently referred to as a "new" duty. We appreciate this is likely because the words, "the duty to cooperate" were not explicitly referenced in the *Workers' Compensation Act*, SNS 1994-95, c 10 (the "*Act*") prior to the enactment of section 89A. However, by referring to the duty to cooperate as "new", you are leaving employers with the impression that prior to this enactment, they were under no legal obligation to cooperate with the WCB.

The duty to cooperate, as a legal concept, is not new. It has always been an integral part of the duty to accommodate, both in the human rights context and under the *Act.* The duty to accommodate, which

includes the duty to cooperate, has long been outlined in section 91 of the *Act.* Additionally, WCAT has consistently referenced the duty to cooperate in various contexts related to the *Act.*[1]

We interpret the codification of the duty to cooperate as intending to introduce an additional enforcement mechanism to ensure compliance with the *Act*, rather than create an entirely new freestanding legal doctrine.

Our suggestion to clarify this point is that you include an introductory paragraph within the preamble to Policy 5.7.1. to clarify your intent and the fundamental purpose of the duty to cooperate - namely, to better facilitate compliance with the aims of the *Act*. We propose the following language for your consideration:

> While section 91 of the *Act* and the common law have long recognized the duty to cooperate as part of the duty to accommodate, the addition of section 89A explicitly codifies this obligation within the *Act*. By formalizing the duty to cooperate, this amendment enhances the Board's ability to ensure that all parties and stakeholders fulfill their responsibilities under the *Act*, thereby supporting the timely and equitable resolution of claims.

B. Definition of "Early and Safe Return to Work Process" ("ESRTW") and "Acute Phase of an Injury"

This section states the following:

> At the same time, a new "duty to cooperate" was added to the Act that empowers the WCB to hold both workers and employers accountable **for their collective participation during the early and safe return to work process (ESRTW). ESRTW is the process and plans implemented concurrent to active medical treatment during the acute phase of an injury to facilitate stay at work (when possible) and return to work with the injury employer.** [*Emphasis Added*].

By creating to create new terminology for pre-existing obligations, this will create additional confusion on the part of employers.

It is unclear what the "acute phase of an injury" is. That phrase is not defined in the policy paper, or within draft policies 5.7.1, 5.7.2, or 5.7.3.

In the March 27, 2025, WCB webinar, Kevin Foster defined the acute phase of an injury as "when the worker is still recovering." However, this definition is not included in the draft policies and introduces further confusion, as workers often continue receiving treatment even after reaching maximum medical recovery.

If the WCB intends to adjudicate claims and duty to cooperate obligations based on the definition provided by Mr. Foster, it should be formalized in the policy. This would ensure that all WCB

[1] 2015-384-AD (Re), 2016 CanLII 7675 (NS WCAT), 2015-309-AD (Re), 2016 CanLII 4804 (NS WCAT), 2010-539-AD (Re), 2013 CanLII 30420 (NS WCAT), 2009-418-AD (Re), 2011 CanLII 4064 (NS WCAT), 2015-265-AD (Re), 2015 CanLII 66341 (NS WCAT), 2017-463-AD (Re), 2019 CanLII 11169 (NS WCAT), 2020-45-AD (Re), 2020 CanLII 35860 (NS WCAT).

stakeholders operate on the same basis and promote consistent adjudication of claims, regardless of the employer, worker, or case manager involved.

Additionally, the definition of ESRTW in the policy paper specifically refers to “during the acute phase of an injury,” which implies that the responsibilities of the parties involved in an ESRTW are limited to this phase.

Clarity is needed on this point. If the ESRTW (and by extension, the duty to cooperate) is limited to the "acute phase of the injury," employers must understand what this means for their obligations. Without this clarity, there is a risk of increased disputes, appeals, and tribunal hearings, which would place further strain on all WCB stakeholders and erode confidence in the claims administration process. This would be counterproductive to the core goal of codifying the duty to cooperate, which is to facilitate the timely resolution of claims.

C. ESRTW / “Acute Phase of the Injury” in the context of GPI claims

It is difficult to reconcile the definition of ESRTW and the confusion surrounding the “acute phase of the injury” with the adjudication of GPI claims. Specifically, it is unclear how the “acute phase of the injury” is defined in the context of GPI claims and how this definition applies to the duty to cooperate and ESRTW process.

Our office understands from speaking with Mr. Foster that the “happening of the accident” as referenced in section 10J of the *Act* occurs when a “work disruption” takes place, described as the point at which a worker requires some form of intervention, such as wage loss benefits or medical aid.

Regarding the GPI claims our office has handled so far, most involve allegations that are several months old or older. In some cases, we have encountered claims based on allegations dating back multiple years. Simply put, **most workers do not immediately report allegations of bullying and harassment to their employers, despite the requirements in section 83 of the *Act.***

Given that reality, the following questions arise which require clarification to avoid confusion moving forward:

- If “the happening of the accident” is not considered to occur until a “work disruption” takes place, how does this align with the ESRTW framework, especially in cases of bullying and harassment, where the allegations and the resulting “work disruption” may not occur simultaneously? If the “acute phase of the injury” is defined as the recovery period, this often occurs before the work disruption and before the claims are approved. This creates ambiguity in applying the ESRTW framework consistently in these cases.

- How does the delay in reporting bullying and harassment allegations impact the determination of the “acute phase of the injury” and the application of ESRTW?

- Does the definition of “the happening of the accident” change if the work disruption occurs significantly after the alleged bullying and harassment took place?

- How should employers approach ESRTW obligations when a worker does not experience work disruption until long after the alleged incidents?

2. Background – The Stronger Workplaces for Nova Scotia Act

A. Section 1A of the Act

This section begins with the following:

> On September 20, 2024 changes were made to the Act that added a new Section 1A that makes it clear the WCBs purpose is to, in a financially responsible and accountable manner, **"facilitate the rehabilitation and the safe and timely return to suitable work of workers who sustain a work-related injury…"** and **"require workers, employers and organizations supporting the workers' compensation system to work collaboratively with each other for the benefit of workers and employers.**" The WCB has always strived to administer the Act in this manner and welcomes the clarity that comes with this change to the Act. [*Emphasis added*].

While the WCB may aim to administer the Act in this manner, our experience with claims adjudication suggests a longstanding disconnect still exists. For quite some time, there has been a prevailing implicit perception that workers are the *clients*, while employers are merely the *premium payers.* An example of this is the routine misapplication of section 187 of the *Act.* For ease of reference, section 187 reads as follows:

> **Applicant entitled to benefit of doubt**
> **187** Notwithstanding anything contained in this Act, on any application for compensation an applicant is entitled to the benefit of the doubt which means that, where there is doubt on an issue respecting the application and the disputed possibilities are evenly balanced, the issue shall be resolved in the worker's favour.

Despite clear guidance from WCAT and the Nova Scotia Court of Appeal, this provision is routinely misapplied. The section explicitly states that workers are to be given the benefit of the doubt **only** when the evidence is evenly balanced.

Yet, case managers and hearing officers frequently default to applying section 187 whenever both parties submit conflicting evidence, without first assessing its quality. Too often, disputes are reduced to a "he said, she said" scenario, when in reality, the evidence is not always equal. And if the evidence is not evenly balanced, section 187 does not apply. That is not happening in practice.

We raise this issue because it highlights a broader, necessary shift in perception which is required for the duty to cooperate to function as the WCB is intending.

For the duty to cooperate to function effectively, it must be applied equitably to all parties. Workers and employers must be treated as equal participants in the claims process, with adjudications based on the quality of evidence rather than assumptions. Only then can the intent of the new section 1A be realized in practice.

B. Clarity on when the Duty to Cooperate is triggered

The second paragraph in this section states that:

> Building on this new purpose statement in the Act, and coming into effect on July 15, 2025, the new Section 89A of the Act "**duty to cooperate" requires all employers and workers to cooperate in a worker's early and safe return to suitable and available work (ESRTW).** Failure to comply with these cooperation obligations may result in penalties for the employer and/or worker. [*Emphasis in original*].

This section has a high probability of causing confusion for all WCB stakeholders because it states the duty to cooperate is limited to the ESRTW. And the issue with limiting the duty to cooperate to the ESRTW is, as stated above, **the ESRTW is limited to the "acute phase of the injury."** This suggests that the duty to cooperate does not apply in any other context.

3. Return to Work

A. Distinction between RTW and ESRTW

From an operational perspective, it is unclear how WCB stakeholders benefit from creating a distinction between RTW and ESRTW. This section of the policy defines these terms as concepts as follows:

RTW	**ESRTW**
"RTW is the act of re-introducing (or maintaining) injured workers to safe, timely and productive work that eliminates or minimizes wage loss, as soon as it is safe to do so."	*"ESRTW is the processes and plans implemented concurrent to active medical treatment during the acute phase of an injury to facilitate stay at work (when possible) and return to work with the injury employer. ESRTW starts as soon as a worker is injured and continues throughout the worker's recovery period."*

The concepts of RTW and ESRTW are largely duplicative. RTW already encompasses the principles of ESRTW, making the introduction of a new term unnecessary and confusing. By redefining an established concept with different terminology, the WCB risks creating ambiguity and, inevitably, more disputes.

At this stage, every effort should be made to eliminate ambiguity to minimize future disputes, ensuring both stakeholder confidence in the process and the efficient use of the WCB's limited resources. A significant increase in appeals related to the duty to cooperate would delay all other appeals, likely resulting in rushed decisions to meet demand. This, in turn, undermines the WCB's ability to fulfill the objectives set out in the amended section 1A.

Further complicating matters, the definition of ESRTW provided above includes several caveats that will only add confusion, particularly in GPI claims. For instance, the definition explicitly limits ESRTW to the "acute phase of the injury." However, as previously discussed, what constitutes the "acute phase" in GPI claims is unclear. This is especially problematic when the "work disruption" prerequisite for the "happening of the accident" occurs years after the alleged workplace harassment.

Consider a worker who experiences workplace bullying and harassment severe enough to qualify as a "significant workplace stressor" on January 1, 2025. If they continue working but do not take a leave of absence until January 1, 2027, when the "work disruption" finally occurs, when exactly is the "acute phase of the injury"? The worker could have been receiving mental health treatment from 2025 to 2027, but without a formal work disruption or WCB-acknowledged medical aid, there is no "happening of the accident" under the Act.

This lack of clarity is critical because the terminology used to describe ESRTW differs from that used in the Act for GPI claims. The policy framework appears designed for discrete physical injuries with clear-cut "accidents," yet GPI claims do not fit into such a rigid structure. Without clearer definitions, this approach risks misalignment with the realities of psychological injury claims.

This section also only references the duty to cooperate specifically in the context of ESRTW where it states: *"During ESRTW, the Act requires workers and employers cooperate in returning the worker to suitable and available work that, where possible, restores the worker's pre-injury earnings."*

By limiting the duty to cooperate specifically to the ESRTW, you are inviting stakeholders to conclude that they do not have a duty to cooperate in other contexts. This is irreconcilable with the objectives outlined in section 1A above, and clarity should be provided on this point.

B. Distinction between Duty to Cooperate in ESRTW v Re-employment

The paper states that prior to the duty to cooperate, there was no duty in the *Act* requiring an employer to cooperate in the return-to-work process during the recovery (acute) phase of an injury.

Mr. Foster provided the definition of "still recovering" during the March 27, 2025, webinar, but such is not expressly stated in the draft policies. If the duty to cooperate is limited to the "acute phase of the injury", it needs to be expressly stated what that means in the policy.

Additionally, it is incorrect and misleading to say that employers had no obligation in the *Act* to cooperate in the return-to-work process during while they are recovering from an injury. Stating such invites confusion from employers, and risks undermining employer confidence in the administration of the WCB regime.

The Re-Employment section of the *Act* (section 90 – 101) apply broadly. **There is nothing in section 89 of the *Act* which would precludes the duty to accommodate (which includes the duty to cooperate) from applying during the "acute" phase of the injury.** For ease of reference, section 89 of the *Act* reads as follows:

> **Application and interpretation of Sections 90 to 101**
> **89 (1)** Sections 90 to 101 do not apply to

> (a) any employer that, in the opinion of the Board, regularly employs fewer than twenty workers or such other number of workers less than twenty as the Board may prescribe by regulation;
> (b) any class or subclass of employers or workers exempted by the Board by regulation by reason of the nature of the industry; or
> (c) the construction industry, unless included by the Board by regulation.
>
> (2) Sections 90 to 101 apply only to injuries occurring on or after the coming into force of Sections 90 to 101.
>
> (3) For the purpose of Sections 90 to 101,
> (a) "alternative employment" means employment that is comparable to the worker's pre-injury work in nature, earnings, qualifications, opportunities and other aspects;
> (b) "suitable work" means work which the worker has the necessary skills to perform, is medically able to perform and which does not pose a health or safety hazard to the worker or any co-workers

There is no part of section 89 which would prevent the *Act* from placing obligations on employers during the acute or recovery phase of an injury beyond the caveats in section 89(1).

While the policy paper correctly explains the duty to re-employ in section 90, **the duty to accommodate is entirely separate from the duty to re-employ.** That's why it's codified separately in section 91, which, for clarity, reads as follows:

> **Duty to accommodate**
> **91 (1)** The employer shall, in order to fulfil the employer's obligations pursuant to Sections 89 to 101, accommodate the work or the workplace to the needs of a worker who requires accommodation as a result of the injury to the extent that the accommodation does not cause the employer undue hardship.

Again, there is nothing in the text of section 91 which precludes it from applying in the acute or recovery phase of an injury. **And without legislation to the contrary, section 91(1) does apply to the acute and recovery phase of an injury.**

Therefore, if a worker was injured, but could attempt a return to work during the acute and recovery phase of an injury, section 91(1) of the act required (note the use of "shall") employers to accommodate workers.

We interpret the aim of section 89A as attempting to provide additional legislative mechanisms to compel compliance. **Our issue is your policy paper is misrepresenting the existing legislative framework, which is causing confusion amongst employers**. As noted above, we urge you to add language clarifying the true purpose of section 89A, and we suggest the following language be incorporated in preamble to policy 5.7.1:

> While section 91 of the *Act* and common law have long recognized the duty to cooperate as part of the duty to accommodate, the addition of section 89A explicitly codifies this obligation within the *Act*. By formalizing the duty to cooperate, this amendment enhances the Board's

> ability to ensure that all parties and stakeholders fulfill their responsibilities under the *Act*, thereby supporting the timely and equitable resolution of claims.

By clarifying the true purpose of section 89A and its relationship to the existing duty under section 91, the policy 5.7.1 can ensure employers fully understand their obligations, reducing confusion and promoting fair and consistent application of the law.

C. "What's the difference for workers?"

This section makes it clear that the duty to accommodate also places obligations on workers to cooperate with their employer during ESRTW. However, the policy paper and draft policies fail to provide any guidance on *how* this cooperation will be enforced or facilitated.

Our office frequently encounters claims where workers are reluctant to communicate with their employers. This reluctance stems from various reasons and is a recurring challenge in claims adjudication. Even when workers are willing to engage, they often have specific communication preferences, such as insisting on texting, which may not always support a smooth return to work.

While the policy paper outlines the necessity of the duty to cooperate and the WCB's intended goals, it lacks clarity on how these policies will be applied in practice. To ensure consistency across cases, regardless of the worker, employer, or case manager involved, the Board must provide concrete guidance on implementation.

Policy 5.7.1 - Return to work - Overview

Definitions

A. Definition of "Return to Work Team"
Policies 5.7.1, 5.7.2, and 5.7.3 define the "*Return to Work Team*" as follows:

> **"Return to Work Team"** means a team that assists the worker with their recovery, safe and timely return to work plan and, if needed, vocational rehabilitation. The team always includes the worker and the WCB. Employers have a duty to cooperate in their workers' safe and timely return to work and will be encouraged to use participation on the Return to Work Team to facilitate that duty. The team can also include a representative of the worker (chosen by the worker), case manager and health care providers. Other members may be added depending on their specific roles and responsibilities.

The policy paper and associated policies (5.7.1, 5.7.2, and 5.7.3) repeatedly emphasize the employer's role in the return-to-work process, particularly within the newly defined ESRTW framework.

However, despite this emphasis, the employer is not presumed to be a member of the Return-to-Work Team. While employers have a legal duty to cooperate and *may* be included, their participation is not automatic in this definition. This omission contradicts the policies' stated focus on employer responsibility and weakens the consistency and clarity of the return-to-work framework.

It is also deeply concerning that the definition states that "*the team can also include a representative of the worker (chosen by the worker)"* **but is silent on if the employer can do the same.** Does the employer also have a right to bring a definition of their choosing? If they do, this should be explicitly referenced in the definition.

This ties in with the need for a procedural shift in how the parties are perceived, as shown above. If the employer is to be a *party,* and not simply a *premium payer,* then the parties, workers and employers, need to be treated equally.

Anything less undercuts the procedural fairness of the entire process. The parties either have the same rights, or they do not. That should be clear throughout the totality of the messaging from the WCB.

2. Guiding Principles

This section of policy 5.7.1. states:

> Workers are eligible for return-to-work services if:
> **a) They have an accepted workers compensation claim;** and
> b) Their workplace injury is preventing them from performing their regular job duties, as supported by objective information [*Emphasis added*].

It is unclear how this applies in the context of GPI claims. Is it the case that a worker can only access return-to-work services if their claim has already been accepted by an Eligibility Specialist? Additional guidance is needed on this point to avoid further confusion.

3. Return to Work hierarchy of objectives

This section of policy 5.7.1 states:

> At the highest level, RTW efforts are provided according to the following sequential hierarchy of objectives to return the worker to:
>
> a) Return to the same job with the same employer.
> b) Return to a similar or comparable job with the same employer.
> c) Return to a different but suitable job with the same employer.
> d) Return to work in a similar or comparable job with a different employer.
> e) Return to work in a different but suitable job with a different employer.
> f) Retraining for jobs that are suitable and reasonably available.
> g) Self-employment.

The terms used here are not consistently used throughout the policy paper and the draft policies and clear definitions are not provided. For example, "*suitable and available"* work is referenced in policy 5.7.3. and guidance given, but there is no definition of "*similar or comparable"* or "*different but suitable."* Mr. Foster provided some guidance on this point during the March 27, 2025, webinar, but such is not explicitly stated in the policy.

Given this broad verbiage, the WCB is inviting inevitable conflict about whether proposed duties are "*similar or comparable"* or "*different but suitable."* Those terms are broad, and open to interpretation.

We strongly recommend expounding upon this policy language to clearly define what is meant by "*similar or comparable"* versus "*different but suitable."* There needs to be some clarification as to *how* case managers will determine how jobs will be categorized and classified not the hierarchy above.

If that does not occur, this is a certainty to be the subject of appeals, which further strains the WCB's adjudicative system which has its own negative ramifications as canvassed above.

Additionally, the WCB needs to turn its mind to how much weight will be given to worker – or employer – preferences. Because there *will* be preferences. There will be instances where a worker *can* do their pre-injury job, but they may prefer a less taxing "*different but suitable"* job. Conversely, there will be situations where employers may prefer workers to a "*similar but comparable"* but the worker prefers a "*different but suitable"* job. Clarity needs to be provided on how WCB will navigate these disputes.

We also question the inclusion of "self employment" in the hierarchy. **An employer does not have the right to tell a worker to become self-employed.** It is unclear what probative benefits the WCB, employers, or workers gain by its inclusion in the hierarchy. We suggest that it be removed, given that the most likely outcome is fostering more confusion amongst WCB stakeholders.

4. Duty to Accommodate

This section states that:

> As per S. 91 of the Act, injury employers with a duty to cooperate in early and safe return to work (ESRTW), as well as those with re-employment obligations, are required to accommodate the injured worker to the extent that the accommodation does not cause the employer undue hardship.

This is technically true, but misleading. For the reasons canvassed above, **section 91 is not limited to these situations. There is no statutory language limiting it to those situations. Without statutory language limiting to those situations, it applies more broadly than the is stated here.**

6. Re-employment

This section states the following:

> Re-employment is different from the duty to cooperate in ESRTW in that: 1) it applies only to the employers that meet the criteria described above; and 2) re-employment becomes effective once the worker has completed ESRTW by recovering/reaching medical stability with respect to their work-related injury. An employer's duty to re-employ is then triggered if/when the WCB advises the employer the worker is fit to perform the essential duties of their pre-injury work, or suitable work on a permanent basis.

This is technically an accurate accounting of the application of section 90 of the *Act.* **However, the Board needs to be extremely careful in their messaging to both employers and workers**

because the duty to accommodate under the *Humans Right Act* applies more broadly than is being referenced here. The duty to accommodate is not limited to "*when/if the WCB advised the employer is fit to perform the essential duties of their pre-injury work, or suitable work on a permanent basis."*

Given the intersectionality, the WCB should consider placing a caveat in the preamble for section 5.7.1, clarifying that nothing in the policy diminishes, lessens, or amends the requirements and responsibilities placed on employees under other legislation

While it is not strictly the job of the WCB to caution workers or employees in that regard, doing so will more greatly inform the parties of their rights and should better empower parties to more effectively facilitate ESRTW planning.

Policy 5.7.2 - Early and Safe Return to Work - Roles and Responsibilities

How does the duty to inquire fit into the duty to cooperate? Who is responsible for making sure an employer has sufficient information to facilitate an ESRTW?

The confusion around referring to the duty to cooperate as a "new" duty stem, in part, from the policy's lack of clarity on how the duty to inquire fits within it.

In a typical duty to accommodate scenario, which includes both the duty to cooperate and the duty to inquire an incumbent duty to inquire to determine what tasks a worker is medically able to perform.

This policy states that the WCB's role is to facilitate communication among the "return to work team." However, it remains unclear who is ultimately responsible for ensuring the employer has sufficient information. The roles of the WCB, the worker, and the employer are outlined, yet none explicitly address this responsibility.

While the duty to inquire may be implied, it needs to be explicitly stated. The "role of the worker" currently requires them to provide the WCB with all relevant information about their ESRTW. This section should also require them to provide the same information to the employer to ensure the employer can fulfill its obligations and effectively facilitate an ESRTW.

This is critical, given the policy places the responsibility for drafting an ESRTW plan on the employer, and the employer faces penalties if an ESRTW is insufficient.

1. Role of the WCB

This section states that the WCB's role is to "*establish and communicate regularly and effectively with the Return-to-Work Team*." However, our office has repeatedly encountered avoidable delays in claims management and appeals when WCB staff are out of the office.

For example, if a case manager is on vacation for two weeks, are they required to ensure their files are managed in their absence to maintain regular communication with the return-to-work team? Given that the duty to cooperate emphasizes increased communication between parties, it is

counterproductive for that communication to be put on hold simply because WCB staff are unavailable.

To fulfill its role, the WCB must implement appropriate resources and procedures to ensure continuity. This is especially important given the increased responsibilities that section 89A of the Act places employers and workers.

The WCB needs to be held accountable, just as much as workers and employers. If we are to transcend the perception of workers being "*clients"* and employers being "*premium payers*", that shift begins with the WCB and their commitment to higher standards in service delivery. **Our office has encountered scenarios where WCB representatives have refused to answer questions about the decision they render.** Had this happened after July 15, 2025, it would have been impossible for the employer to comply with their duty to cooperate obligations because of the WCB's dereliction and abdication of their duties, of their "role" listed here in the policy.

Therefore, the following question arises, which the WCB must answer if they are to be trusted with the confidence of employers and workers - **what steps are the WCB taking to hold themselves accountable under the new duty to cooperate?** Will WCB decision makers receive supplementary training? Will certain standards have to be met? Given the importance of their role, how will the WCB embrace the responsibilities incumbent upon them if the aims of section 89A and these new policies are to be executed in practice?

2. Role of the Worker

This section states that the duty to cooperate requires a worker to cooperate in an ESRTW to work by: "*initiating early contact with the injury employer."*

This responsibility requires clarification, because this is not happening in practice. Our office routinely encounters instances where workers do not report an injury for several months after an accident. If a worker reports an injury eight months after an accident, is that *"early?"* What constitutes "*early*" in the context of claims -particularly- GPI claims?

There will inevitably be situations where workers report claims where they have not initiated early contact with the injury employer. In those cases, will workers be penalized from the outset of a claim for not promptly filing their claim?

3. Role of the Employer

This section states that employers must "maintain appropriate communication with the worker throughout their recovery as per the ESRTW plan." However, it is unclear whether the WCB will act as the arbiter of what constitutes "appropriate communication."

Our office frequently encounters situations where workers attempt to dictate specific communication methods while their claims are being adjudicated. For example, a worker may insist on texting, while the employer prefers phone calls.

In such cases, how will the WCB resolve disputes? Will case managers be responsible for informing workers that they cannot mandate texting, or will they direct employers to communicate exclusively by text? While the WCB may intend to allow case managers some flexibility in adjudicating claims, the policy should clarify how these disputes will be handled, because they will inevitably arise.

Additionally, this section states that employers must provide "all relevant information concerning the worker's RTW" to the WCB. **This wording assumes that employers always have access to such information, which is often not the case**.

As mentioned earlier, the policy does not clearly establish who is responsible for ensuring employers receive the necessary information. This lack of clarity can hinder an employer's ability to facilitate a worker's return to work, particularly in situations where a worker contacts the WCB before informing their employer.

4. Accommodation and undue hardship

This section outlines the employer's duty to accommodate and the concept of undue hardship but provides little clarity on the employer's limitations. **It does not specify that employers are not required to create new positions, that accommodation does not have to align with a worker's personal preferences, or how the impact on coworkers' factors into the analysis.**

To ensure all stakeholders fully understand the rights and responsibilities of employers, the WCB should consider adding further detail on these limitations.

Additionally, this section states: *"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."*

This statement is unclear. If the WCB is "assisting" the employer in overcoming undue hardship, does that mean the employer is still ultimately responsible for the cost? And what does "assist the worker directly" entail? Clarifying these points would help ensure a more transparent understanding of the WCB's role in the accommodation process.

5. Penalties for Worker and Employer Non-cooperation

There are several questions and ambiguities in this section which need to be addressed. First, how will parties be notified of disputes relating to disputes about alleged non-cooperation? Will both parties always be given notification of such, and will they have a chance to respond to alleged non-cooperation?

Additionally, this section states: *"In assessing whether cooperation has taken place, the WCB generally looks to the pattern of actions and behaviours of the workplace parties."* A pattern typically refers to more than one event. Are repeated breaches of the duty to cooperate a precondition to a penalty being levied? **What specific criteria or thresholds are used to determine whether an employer is non-cooperative?**

5.2 Employer non-cooperation

We seek clarification of the following:

> Compelling reasons for injury employers being unable to co-operate are generally limited to circumstances such as a summer or holiday shutdown, general layoff, strike or lockout, and/or corporate reorganization. In the case of small employers, such circumstances may also include a death in the family or an unexpected illness or accident. These circumstances are typically of short duration.

What constitutes a "small employer?" This passage suggests that smaller employers would be additional leeway than would be afforded to larger employers. Will the WCB implement a definition of what constitutes a "small" "medium" or "large" employer?

In many instances, particularly in the GPI context, the worker may not be willing to speak with certain individuals from the employer's organization. This could be particularly true in the instances of smaller organizations or business. If the Worker refused to accept contact from the employer, can the employer delegate someone else to contact the worker?

The quoted passage above also qualifies "compelling reasons" as being limited to "circumstances are typically short in duration." But the examples given were a general layoff, strike or lockout, or corporate reorganization. All those things can be lengthy in process. If there is a lengthy strike for example, is it still a "compelling reason" even though it is not "short in duration"?

What about service provider non-cooperation?

The policy is silent on what happens if service providers, consultants, family physicians, nurse practitioners, or other relevant entities are non-cooperative in their dealings with workers, employers, or the WCB itself.

There will be instances where a worker may say, "*I'd love to cooperate, but my Nurse Practitioner says X."* Or where the Board may say, "*I'm sorry, I can't sign off on this ESRTW until I hear from the OT, and she's on vacation for three weeks."*

Thought needs to be given to how the WCB expects to navigate such issues and that needs to be indicated somewhere in the policy. There will be situations where service providers are non-compliant. That will inevitably impact the WCB's ability to provide service, and workers and employers ability to cooperate. Clarity is needed on how the WCB intends to navigate these scenarios.

6.1 Union

During the March 27, 2025, webinar, participants were advised that the WCB has no capacity to "penalize" unions. While that may technically be true, additional language would be useful to clarifying the nature of their involvement and their obligations.

For example, consider adding a section "d) Support the WCB's ESRTW strategy" or a comparable language, which would further empower case managers to marshal union involvement.

Policy 5.7.3 - Early and Safe Return to Work – Plans and Functional Abilities Information

1. Early and safe return to work (ESRTW) plan

This section states the following:

> ESRTW plans should be developed by the employer, with support from the WCB. The WCB will review ESRTW plans for "reasonableness", confirm the plan with the worker (and other relevant workplace parties), and make any necessary adjustments.
>
> A reasonable ESRTW plan typically meets the following criteria:
>
> a) Includes worker and other workplace parties' input where appropriate;
> b) Starts on, or as close to, the date of injury as possible;
> c) Includes a path to the worker's pre-injury work;
> d) Identifies suitable and available work in accordance with the RTW hierarchy of objectives;
> e) Respects the worker's restrictions and functional abilities. This may include, for example, the identification of the need for modifications, adaptive technologies, modified duties, or modified hours; f) Includes regular communication, both within the workplace, and with the WCB;
> g) Sets out how the plan will be monitored and adjusted as needed;
> h) Defines the salary to be earned by the worker during the ESRTW plan; and
> i) Has an end date consistent within the timelines set out in Policy 2.4.7R1- Normal Recovery Times.

A key problem with this is **employers will not always have enough information to develop an ESRTW plan with complies with requirements a - i above when they are initially made aware of a claim.**

This will be particularly so with GPI claims, which can be brought significantly after the fact. In the GPI claims our office has encountered, we have seen an uptick in the adjudication of historical GPI claims, because Eligibility Specialists are liberally relying upon section 83(5) of the *Act,* **effectively creating a framework where employers must defend claims several years old.** This is an issue because if an employer gets a call saying, "*X is raising a complaint from 2023"* - under this policy, the employer would be expected to cobble together a ESRTW plan which may be impossible due to the passage of time.

It is unclear how an employer is expected to prepare a document which complies with the above requirements. To comply with these requirements, **employers would always have to have enough information to fully understand the worker's restrictions and functional abilities.** Routinely, employers do not have documentation to this effect, and encounter barriers in receiving the appropriate documentation. **This is why, as noted above, not having the duty to inquire formalized in these draft policies is troubling.**

Will the WCB be preparing an ESRTW form? Or will it be incumbent upon employers (regardless of their level of experience in navigating the WCB regime), to create a document which satisfies the above?

2. Suitable and available work

This section states that: "*Available work is work that exists with the employer at the time of the work-related injury at the work site, or at a proposed worksite, arranged by the employer, comparable to the worksite at the time of the work-related injury."*

We submit that "available work" should instead be defined as work that exists *at the commencement of the ESRTW plan.* In cases where there is a time gap between the injury and the worker's return to work, the focus should be on whether suitable and available work exists at the time of return, not whether the worker's pre-injury job is still available. If alternative suitable work is available, that should be sufficient for the WCB's purposes.

5. Functional abilities limitation

This section states that:

> Employers' requests for disclosure of functional abilities information shall be limited to that which is required for the purpose of aiding in the worker's ESRTW and **will not contain medical or diagnostic information**. With the consent of the worker, the employer or employer representatives may disclose the functional abilities information provided by the health care provider to a person assisting the ESRTW of the worker. [*Emphasis added*]

The particulars of a worker's medical restrictions are medical information. And section 10(1) of the *Act* requires recognizing what injury is work related. Given that medical information and confirming the work-related diagnosis is relevant to the adjudication of a claim and understanding how to facilitate an ESRTW, that should be clarified in this policy language.

Conclusion

Thank you for reviewing our submissions. We would be happy to meet with you or speak at your convenience if you wish to discuss anything we have addressed above.

Sincerely,

Mary E. Morris

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