

 Yukon Workers' Compensation Health and Safety Board	Part:	Return to Work and Rehabilitation		
	Board Approval:	Original signed by Chair	Effective Date:	Jan 1, 2010
	Number:	RE-02-4	Last Revised:	
	Board Order:	2008	Review Date:	

**DUTY TO CO-OPERATE, PART 4 OF 4:
PENALTIES FOR NON CO-OPERATION**

When referencing any of the return to work policies, it is important to recognize the responsibilities of the employer and worker within the context of the complete return to work process. Therefore, the whole return to work model must be considered in its entirety and not only the specific guidelines under an individual policy.

GENERAL INFORMATION

Returning an injured worker to work is a goal that requires the joint commitment and co-operation of all members of the Case Management Team – the worker, employer, health care providers, the Yukon Workers’ Compensation Health and Safety Board (YWCHSB) and other team members (for full description of the team, see YWCHSB policy, “Return to Work – Overview”). Employers pay assessment premiums to establish a compensation fund designed to compensate those workers who are injured at work. The YWCHSB is obligated by the *Workers’ Compensation Act* S.Y. 2008 (the “Act”) to “maintain a solvent compensation fund managed in the interests of workers and employers”.

Failure to comply (employer or worker) with the provisions of the *Act* causes inefficiencies and unnecessary costs to the system. The YWCHSB is obligated to take steps to reduce these inefficiencies in the interests of the compensation fund and all parties involved and as such, may levy penalties or suspend, reduce or terminate benefits to encourage compliance.

PURPOSE

This policy explains the penalties that the YWCHSB may impose upon workers or employers when they are not meeting their responsibilities and obligations under the *Act* relating to the duty to co-operate in the early and safe return to work of an injured worker.

DEFINITION

- 1. Case Management Team:** A team that assists the injured worker with their recovery, early and safe return to work plan **and**, if needed, vocational rehabilitation. The team always includes the injured worker and YWCHSB. Employers have a duty to co-operate in their injured worker's early and safe return to work and will be encouraged to use participation on the Case Management Team to facilitate that duty. The team can also include up to two representatives of the injured worker¹ (as desired by the injured worker), disability manager and the health care community. Other members may be added depending on their specific roles and responsibilities.

PREVENTION

Preventing workplace injuries is the responsibility of everyone in the workplace. When injuries do occur it is important for workers and employers to minimize the impacts by focusing on keeping the worker, when possible, or returning the injured worker to safe and productive work as soon as it is functionally appropriate for the worker to do so. Prevention of recurrences and further injuries once injured workers have returned to work is of utmost importance.

POLICY STATEMENT

The YWCHSB will encourage injured workers, health care providers, employers and other parties to work co-operatively as a Case Management Team and to explore all reasonable, creative and flexible solutions to design plans that will facilitate the worker staying at work, when possible, or facilitate the worker's early and safe return to work when the worker, functionally, cannot stay at work.

Section 40 of the *Act* sets out the obligations of workers and employers in the early and safe return to work process of an injured worker (see YWCHSB policy "Duty to Co-operate, Part 2 of 4: Roles and Responsibilities").

When the employer or the worker does not fulfill the required obligations in relation to the early and safe return to work process, the system breaks down and fails to progress efficiently. It is incumbent upon the YWCHSB to manage these inefficiencies in the best interests of the employer and the worker and take corrective steps to encourage compliance.

¹ Note that the only type of representative who may make decisions on behalf of the worker is a lawyer retained by the worker or a worker's representative with power of attorney and/or power of personal attorney.

1. Penalties for worker non-co-operation

Subsection 40(6) of the *Act* states that where the YWCHSB determines that a worker has failed to comply with the duties outlined in section 40, the YWCHSB may suspend, reduce or terminate the worker's compensation. Those duties are to:

- a) contact the pre-injury employer as soon as possible after the injury occurs and ensure effective communication throughout the period of recovery or impairment;
- b) participate actively and communicate fully in the rehabilitation process and fulfill the commitments of the rehabilitation plan;
- c) assist the employer, as may be required or requested, to identify suitable and available employment;
- d) accept suitable employment when identified; and
- e) give the YWCHSB any information requested concerning the return to work including information about any disputes or disagreements which arise during and after the safe return to work process.

2. Suspension, Reduction or Termination of Benefits

At the beginning of the Early and Safe Return to Work (ESRTW) process, the YWCHSB will inform the worker, in writing where possible, of the worker's responsibilities under section 40 of the *Act*.

If the YWCHSB determines that a worker is not co-operating in ESRTW activities, the main goal is to gain, or regain, the worker's co-operation. This is done in the first instance by determining the reasons for non-co-operation. Where, in the opinion of the YWCHSB, the worker does not have a legitimate reason for not co-operating, the YWCHSB will inform the worker, in writing, of the benefits of ESRTW, their responsibilities under the *Act*, the finding of non-co-operation and the consequences of this finding.

For example, the YWCHSB may apply the provisions of this policy in situations such as when an injured worker voluntarily resigns from their pre-injury job or is terminated or suspended for just cause by the pre-injury employer.

Duty to Co-operate, Part 4 of 4: Penalties for Non Co-operation

Where there has been a finding of non-co-operation under section 40 of the Act, the worker's loss of earnings benefits shall be reduced or suspended, as determined appropriate by the YWCHSB, for the period of non co-operation.

The YWCHSB may decide to terminate a worker's loss of earnings benefits for non-co-operation. Termination of loss of earnings benefits is **final**. See the Appeals section of this policy for information on a worker's right to appeal.

3. Penalties for employer non-co-operation

Subsection 40(4) of the *Act* states that where the YWCHSB determined that an employer has failed to comply with its obligations under section 40, the YWCHSB may levy a monetary penalty on the employer, as determined by Order of the Board of Directors. The employer's duties under section 40 are to:

- a) contact the worker as soon as possible after the injury occurs and maintain communication throughout the period of the worker's recovery or impairment;
- b) provide support, participate and provide information on return to work opportunities;
- c) provide suitable and available employment in accordance with the re employment obligation; and
- d) give the YWCHSB any information requested concerning the worker's work, including information about any disputes or disagreements which arise in the early and safe return to work process.

At the beginning of the ESRTW process, the YWCHSB will inform the employer, in writing where possible, of the employer's responsibilities under section 40 of the *Act*.

If the YWCHSB determines that an employer is not co-operating in the ESRTW process and does not have a legitimate reason, the employer will be notified (verbally, if possible, and in writing) of the obligation to co-operate in early and safe return to work, the finding of non co-operation, and the consequences of this finding.

Where there has been a finding of non-co-operation under section 40 of the *Act*, the YWCHSB shall levy a financial penalty on the employer not exceeding the cost to the YWCHSB of providing the worker's benefits, and may levy a penalty equal to the costs of return to work and vocational rehabilitation services during the period of non co-operation.

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Duty to Co-operate, Part 4 of 4: Penalties for Non Co-operation

Where the pre-injury employer fires or suspends an injured worker subsequent to the injury and without just cause, the YWCHSB shall levy a financial penalty on the pre-injury employer not exceeding the cost to the YWCHSB of providing the worker's benefits, and may levy a penalty equal to the costs of return to work and vocational rehabilitation services during the period of non co-operation.

The non co-operation penalty(s) is an amount owing to the YWCHSB at the time that it is levied and shall be added to the pre-injury employer's assessment and payment will be enforced under section 88 of the *Act*. While section 74 of the *Act* allows the YWCHSB to collect assessments from a principal, contractor, or subcontractor, a principal, contractor, or subcontractor referred to in section 74 of the *Act* who is not the pre-injury employer will not be held liable for a non co-operation penalty charged against the pre-injury employer.

4. Objection to Penalty

Penalties for non-co-operation are not suspended when an appeal is launched. In these cases, the penalty is still levied. However, the employer's objection is considered before the penalty is enforced.

5. Misrepresentation by Parties

Any misrepresentation by any of the parties during the early and safe return to work process will be considered as non co-operation. Before any decision is rendered for misrepresentation, the party will be given an opportunity to respond. Depending on the nature of the misrepresentation, the case may be referred for criminal prosecution. (see YWCHSB policy, "Fraud").

APPLICATION

This policy applies to the Board of Directors, President/CEO and staff of the YWCHSB and to the Workers' Compensation Appeal Tribunal. It applies to all employers and workers covered by the *Act*, regardless of date of injury.

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EXCEPTIONAL CIRCUMSTANCES

In situations where the individual circumstances of a case are such that the provisions of this policy cannot be applied or to do so would result in an unfair or an unintended result, the YWCHSB will decide the case based on its individual merits and justice in accordance with YWCHSB policy "Merits and Justice of the Case". Such a decision will be considered for that specific case only and will not be precedent setting.

APPEALS

Decisions made by the YWCHSB under this policy, can be appealed in writing to the YWCHSB Hearing Officer in accordance with subsection 53(1) of the *Act*, or any decision made under subsection 14(2) or subsection 40(6) of the *Act* may be appealed directly to the Workers' Compensation Appeal Tribunal (WCAT).

A notice of appeal must be filed within 24 months of the date of the decision by the YWCHSB, in accordance with section 52 of the *Act*.

ACT REFERENCES

Sections 14, 40, 52, 53, 74 and 88

POLICY REFERENCES

EN-02, "Merits and Justice of the Case"

GN-05, "Fraud"

RE-02-3, "Duty to Co-operate Part 3 of 4 - Functional Abilities"

HISTORY

RE-02-4, "Return to Work, Duty to Co-operate: Part 4 of 4: Penalties for Non Co-operation", effective July 1, 2008, revoked January 1, 2010

Chair