

Legal VIEW

What's an acceptable modified work plan?

The courts weigh in on requirements for modified work proposals

By: William Ostapek, WCB Secretary and General Counsel



For many years, Alberta employers have voluntarily offered injured workers modified work when those workers were capable of carrying out suitable workplace duties.

When properly structured, modified work enables workers to make a safe and gradual return to work, while allowing employers to manage a portion of their workers' compensation costs.

Defining suitable employment

In *In-Line Contracting Partnership v Alberta (Workers' Compensation Appeals Commission)*, 2018 ABQB 529, Alberta's Court of Queen's Bench recently provided guidance on what constitutes "suitable employment" in the context of an offer of modified work. In that case, after determining that the worker was permanently disabled, WCB asked the employer whether it was prepared to provide permanent modified work that accommodated the worker's disability. In response, the employer offered the worker modified duties described as "light duties in the field as they are available, based on the latest medical restrictions." The worker refused the offer of modified work. WCB found the modified work proposed by the employer to be suitable and deemed the worker capable of earnings provided for in that position. This decision was upheld on internal review.

On appeal, the Appeals Commission overturned WCB's decision, ruling that the offer of modified work made by the employer was not a real position and was too vague to be considered "suitable." Because the description of the modified work contained insufficient detail about the tasks to be performed or the location of the work, the Appeals Commission found it impossible to determine whether it was within the worker's physical abilities.

The conditions of modified work proposals

The Court of Queen's Bench dismissed the employer's subsequent application for judicial review. The Appeals Commission's finding that modified work proposals must be based in reality so they can be properly assessed was found by the court to be reasonable. The court also supported the Appeals Commission's finding that modified work proposals must represent a real job position with a full description of duties, including physical, vocational and location requirements. Although not directly related to the outcome of the case, the court observed that WCB policies referred only to temporary modified work and did not appear to contemplate permanent modified work.

With employers now subject to a statutory obligation to reinstate injured workers to employment (effective September 1, 2018), modified work has increased importance as part of an effective reinstatement plan. Under section 88.1 of the *Workers' Compensation Act*, all Alberta employers are now required to accommodate disabilities arising from workplace accidents to the point of undue hardship. As noted in the *In-Line Contracting* case, employers must provide a sufficiently detailed proposal for modified work in order for WCB to properly assess whether the modified work accommodates any disability suffered by the worker. Such proposals must make reference to a real position and should include a full description of the duties to be performed as well as the physical, vocational and location requirements of the position.

Temporary and permanent modified work is now a legislated requirement

Finally, the court's comments about the absence of a past policy specifically referencing permanent modified work should have no significant ongoing effect, particularly for claims arising after September 1, 2018, as both temporary and permanent accommodation through modified work is now required by legislation. WS