



Egregious conduct – Policy 04-05, Part II, Application 4

Background

A new subsection was added to s.56 of the *Workers' Compensation Act (WCA)* that may affect the benefits WCB pays an injured worker when the employer withdraws or terminates modified work. The existing s.56(14) directs WCB to put the worker on full wage loss benefits in those circumstances.

The new s.56(15.1) provides an exception to that rule, so that when an employer withdraws or terminates modified work because of the worker's egregious conduct, s.56(14) does not apply. Instead, WCB is directed to pay benefits in accordance with s.56(13)(a) as if the worker was continuing to work.

Overview of changes

Here's a summary of what we propose:

- A definition of “egregious conduct” based on Canadian case law, that clarifies there is a high threshold when deciding if the conduct was egregious. Behaviour such as breaching company rules is bad and will probably warrant disciplinary action, but only behaviour that is outstandingly or flagrantly bad meets the definition of egregious conduct.
- Several examples of behaviours that may be considered egregious conduct.
- Clarification that a disciplinary suspension of temporary modified work is not considered a withdrawal of modified work that would trigger application of s.56(14), provided the suspension period is a reasonable period consistent with the employer's normal practices.
- Several non-substantive wording changes in the policy application for gender neutrality, eliminating duplication, or grammatical corrections.

See attached draft Policy 04-05, Part II, Application 4, for additional details.

Bill 47 legislative changes

Here is an excerpt of the new provisions that came into effect on January 1, 2021 [bolded items are new]:

Compensation for disability

56(13) *Where work is made available to a worker who is temporarily partially disabled and the Board is satisfied that the worker is medically and physically capable of doing the work and that, considering all the circumstances, it is fair and just to expect the worker to accept the work, the following applies, notwithstanding subsection (12):*



- (a) *if the worker accepts the work, the Board shall pay periodic compensation to the worker if, in doing the work, the worker suffers an earnings loss that is caused by the residual disability, and in that case the compensation must be in an amount that is a proportionate part of 90% of the worker's earnings loss, based on the Board's estimate of the degree to which the earnings loss is caused by the residual disability;*
- (b) *if the worker refuses the work, the Board shall continue to pay periodic compensation to the worker in accordance with clause (a) as if the worker had accepted the work.*

*(14) Notwithstanding subsection (13), if the worker's **employment** is subsequently terminated or the work is withdrawn by the employer, the Board shall pay compensation for temporary total disability until the Board determines the worker is capable of other suitable employment.*

(15) Subsection (13) applies regardless of whether the work is in an industry to which this Act applies.

(15.1) Notwithstanding subsections (13) and (14), if the worker's employment is subsequently terminated, or the work is withdrawn by the employer, due to the worker's egregious conduct the Board shall continue to pay periodic compensation to the worker in accordance with section 13(a) as if the worker was continuing to work.

We welcome your feedback, ideas and suggestions.

This posting is open until February 15, 2021.

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APPLICATION 4: TEMPORARY MODIFIED WORK PROGRAMS

1. *When does WCB place workers in temporary modified employment?*

A worker, while still recovering from a compensable injury, may benefit from temporary modified employment that helps the worker return to the pre-accident level of employment. In such cases WCB will seek and promote modified work opportunities for the injured worker.

When a worker is offered suitable modified employment that is appropriate to **his or her** their physical and medical condition, WCB determines whether it is reasonable for the worker to accept the employment. If it is reasonable, WCB adjusts the worker's compensation benefits accordingly.

2. *What is temporary modified work?*

Temporary modified work includes any changes, restrictions, or limitations to a worker's regular job duties required as a result of a work-related injury. This includes changes in:

- tasks or functions - such as changes in the worker's regular tasks including redesigning, reorganizing, or eliminating tasks
- hours or work schedules - such as changes in the number of hours, shift cycles, or volume of work
- environment or work area - such as changes in location or access to the work area, restrictions to avoid exposure to heat, cold, or chemicals, etc.
- equipment - such as changes to the equipment used, including acquiring new equipment or modifying existing equipment to accommodate a work-related injury; this also includes the addition of personal protective devices (such as a filtration mask, etc.)

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*Temporary modified work
(continued)*

Temporary modified work may also include a suitable training opportunity, work which is normally performed by others, or work which has been specifically designed or designated as a modified work program.

For WCB purposes, preventative changes such as ergonomic adjustments to equipment, are not considered modified work if no work-related injury has occurred.

3. *What is suitable modified work?*

For work to be considered **suitable modified employment**, the following conditions must be met.

The work:

- accommodates the worker’s compensable medical restrictions so the worker can perform the duties without endangering **his/her/their** recovery or safety, or the safety of others
- contributes to the worker’s physical and vocational rehabilitation by keeping the worker active and involved in the workplace
- promotes the gradual restoration to the worker’s pre-accident level of employment
- must be a meaningful and productive part of the employer’s operations
- does not create financial hardship for the worker (for example, shift changes that require additional childcare costs, unreasonable travel to another location, etc.)

See also Application 2, Question 14.

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4. *How does WCB determine if modified work is suitable?*

~~When determining if proposed modified work is suitable,~~ WCB will consult with the injured worker, employer, and physician to evaluate the proposal.

The evaluation is based on, but not limited to, a detailed description of the job being offered, including the physical requirements, and detailed medical information outlining the worker's physical restrictions and medical requirements that must be accommodated in a modified work plan.

5. *How are benefits calculated for modified work?*

If, ~~after evaluating the proposal,~~ WCB considers it reasonable for the worker to accept the modified work, compensation benefits will be adjusted in accordance with s.56(13) of the WCA. The basis of calculation is:

(a) the worker's pre-accident biweekly net earnings calculated in accordance with the WCA and the *WC Regulation*,

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(b) the worker's biweekly post-accident net earnings calculated in accordance with the WCA and the *WC Regulation*.

The temporary partial disability benefit will be a proportionate part of 90% of the earnings loss [the difference between (a) and (b)], based on WCB's estimate of the degree to which the earnings loss is caused by the remaining disability.

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6. *What if the worker refuses the modified work?*

~~When-If~~ the worker refuses to accept the modified work that is available, WCB will consider the reasons for refusal. If, ~~after evaluating the proposal,~~ WCB ~~still~~ considers it reasonable ~~that for~~ the worker ~~to~~ accept the employment, the worker's compensation benefits will be adjusted effective the date of the decision, as if the employment had been accepted.

The following are examples of possible reasonable grounds for refusal:

- medical evidence indicates ~~that~~ the worker is not able to perform the required duties
- a significant discrepancy between the proposed and actual requirements of the work so that the actual requirements do not meet the conditions described in Question 3, above

If the modified work does not meet WCB conditions for suitable work, WCB will try to arrange appropriate changes. If this is not possible, WCB will reinstate total temporary disability benefits for as long as necessary.

7. *How long do modified work programs usually last?*

Normally, a modified work plan will not last longer than 6 months. However, the length of the program depends on the worker's recovery. Revisions to the modified work may be made as the worker's medical condition changes, until the worker is considered medically fit to return to pre-accident employment or permanent work restrictions are identified.

If the medical prognosis changes and the worker is expected to have permanent work restrictions, WCB will re-evaluate the modified work program to determine whether it is still an appropriate part of the long-term rehabilitation plan.

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8. *What if the modified work program ends?*

If the modified work program ends before the worker is fully recovered, ~~WCB will consider the worker's remaining disability, the loss of earnings that result from the remaining disability and the reasons the program ended.~~

~~Any~~ on-going entitlement will depend on the remaining disability, the level of work restrictions and ~~the reason the modified work program ended. See below, and also whether the termination of the modified work program resulted from circumstances beyond the worker's control. (See Question 6; (worker refuses modified work), Question 9 (egregious conduct), and but also see Question 1012; (strikes and lockouts).~~

If the modified work program ends because the employer ~~has~~ terminated the worker's employment or ~~has withdrawn~~ ~~withdrew~~ the modified work, ~~WCB will, in accordance with~~ s.56(14) of the WCA ~~directs WCB to;~~ pay the worker temporary total disability benefits until WCB determines that the worker is capable of other suitable employment. WCB's determination will take into consideration the worker's remaining work restrictions and their impact on the worker's competitiveness in the labour market, as well as any other relevant factors. ~~For the purpose of s.56(14), WCB does not consider it a withdrawal of modified work if the employer temporarily suspends the worker for disciplinary reasons, provided the period of suspension is a reasonable period consistent with the employer's normal practices.~~

~~Effective January 1, 2021, s.56(14) does not apply when the employer terminated or withdrew the modified work because of the worker's egregious conduct (see Questions 9 and 10, below).~~

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Each case will be judged on its own merits.

9. What is the exception for egregious conduct, and how does it affect workers' temporary disability benefits?

Effective January 1, 2021, there is an exemption under s.56(15.1) which provides that when an employer withdraws or terminates modified work because of a worker's egregious conduct the direction under s.56(14) to pay the worker temporary total disability benefits does not apply. Instead, WCB is directed to pay benefits in accordance with s.56(13)(a) as if the worker was continuing to work.

This means that the worker is not placed on temporary total disability benefits when the modified work ends and:

- if the worker's earnings while on modified work resulted in no compensable earnings loss, the worker is not eligible for any temporary wage loss benefits when the modified work ends
- if the worker's earnings on modified work were supplemented by temporary partial disability benefits, WCB will continue to pay the temporary partial disability benefit while the temporary disability lasts

In the second scenario, the worker is still eligible for continuing temporary partial disability benefits even if the benefit was paid on assignment to the employer while the modified work was in place.

Although the worker may not be eligible for wage loss benefits, the worker continues to be eligible for medical aid and any other appropriate benefits. In all cases, WCB will monitor the worker's recovery and will adjust benefits as necessary. The egregious conduct provision in 56(15.1) applies only to temporary disability benefits and does not affect benefit eligibility if the injury results in permanent disability.

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10. What is egregious conduct?

Canadian courts have considered the phrase “egregious conduct” and have defined it as conduct that is “flagrantly bad” or “staggeringly bad, or obviously wrong, beyond any reasonable degree”.

Egregious conduct does not include all bad or wrong behaviour. This means that termination for cause may be appropriate disciplinary action but it is not in and of itself proof of egregious conduct. To trigger the financial consequences of s.56(15.1), the worker’s conduct must be outstandingly or flagrantly bad to a reasonable person. For example, testing positive for alcohol or drugs in the workplace may be against company policy and be grounds for disciplinary action, but it is not, by itself, egregious. However, being severely intoxicated in the workplace and causing serious injury to another worker could be egregious conduct.

In determining what constitutes egregious conduct, factors may include, but are not limited to:

- the prior practices of the workplace, the worker and societal expectations (i.e., it cannot be a previously condoned behavior)
- if the behaviour is staggeringly bad at a societal level (versus solely a violation of company policy)
- repeated actions that are wilfully disobedient and seriously incompatible with the worker’s duties

The following are examples of behaviours that could be considered egregious conduct:

- Violence causing physical or psychological injury
- A documented pattern of aggressive, threatening

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(continued)

behaviour, where the employer has followed the progressive discipline process

- Sexual harassment or assault involving threats and/or violence (coercion)
- Deliberate and aggressive destruction of property belonging to the employer, coworkers, or customers
- Fraud, embezzlement, theft (where the theft is more than a minor, low cost item or a misunderstanding about what is permitted)
- Visibly apparent impairment while at work, endangering the safety of the worker and others, where there is no mitigating circumstance such as addiction requiring accommodation.
- A deliberate and flagrant breach of a safety rule that could reasonably be expected to result in serious injury to the worker or others, where the safety protocol was well known to the worker and consistently enforced by the employer

In addition to the above list, WCB will consider any other circumstances of a similar severity.

WCB's decision regarding egregious conduct is made only for the purpose of applying s.56(15.1). It does not affect the employer's ability to set its own company policies or its right to discipline its workers for actions that are contrary to those policies.

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91 *What are the reporting requirements when modified work is made available?*

All accidents are to be recorded as required by Occupational Health and Safety regulations and First Aid Regulation.

No Time Loss

If a worker's employment is modified beyond the day of the accident to accommodate a compensable injury, the accident must be reported to WCB, even if there is no time loss or loss of earnings.

WCB will be satisfied with the worker accepting a modified work program immediately, provided the attending physician, employer, and worker agree on suitable modified employment. WCB will review the suitability of the program when the accident reports are received.

Time Loss

All injuries with time loss for more than the day of the accident must be reported to WCB in accordance with the WCA.

Usually, WCB will review proposed modified work plans before the injured worker returns to modified employment. If, however:

- a) the worker misses only a short period beyond the day of the accident and is declared medically fit to return to modified employment before a WCB claim has been established, and
- b) the attending physician, employer, and worker agree on suitable modified employment,

then the worker may begin the modified work program. WCB will review the suitability of the program when the accident reports are received.

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10 *What happens during a*
12. *strike or lockout?*

WCB considers temporary modified work unavailable through no fault of the worker during legal strikes and/or lockouts of the worker’s bargaining unit. Any ongoing entitlement will depend upon the remaining disability and level of work restrictions.

Rehabilitation and medical services continue with any modifications necessary to achieve employability.

(Note: In cases of no time loss injuries, if a worker’s temporary modified work program is interrupted by a labour dispute, WCB may consider the claim as no time lost for reporting purposes.)

11 *What happens when there*
13. *are business disruptions during a local or provincial state of emergency?*

When a local or provincial state of emergency is declared under the *Emergency Management Act*, and the state of emergency prevents employers from continuing to provide temporary modified work, WCB will determine ongoing entitlement based on the remaining disability and level of work restrictions.

For additional information see Policy 07-02, Part II, Application 2, Question 14.

12 *When is this policy*
14. *application effective?*

This policy application (Application 4 – Temporary Modified Work Programs) is effective **September 1, 2018**~~September 1, 2018~~**January 1, 2021**, except when noted otherwise in a specific policy section(s).

[Document History](#)

Previous versions

- [Policy 0405 Part II, Application 2 - April 2018](#)

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- [Policy 0405 Part II, Application 2 - December 2016](#)
- [Policy 0405 Part II, Application 2 - August 2015](#)
- [Policy 0405 Part II, Application 2 - April 2004](#)
- [Policy 0405 Part II, Application 2 - January 2004](#)
- [Policy 0405 Part II, Application 2 - June 2003](#)
- [Policy 0405 Part II, Application 2 - January 2002](#)
- [Policy 0405 Part II, Application 2 - September 2001](#)
- [Policy 0405 Part II, Application 2 - October 1997](#)
- [Policy 0405 Part II, Application 2 \(consolidated manual 1st Issue\) - February 1997](#)

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