

RETURNING TO WORK FOLLOWING A SERIOUS INJURY

SUCCESS LIES IN THE HANDS OF THE REHABILITATION TEAM

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Following a serious personal injury, one of the most challenging and often underestimated aspects of attempting to reintegrate an injured party into their pre-accident life, is returning the injured party to their pre-accident employment.

The case manager, the vocational specialist and other health care professionals, who are part of the rehabilitation team, play a critical role in preparing the injured accident victim for a successful return to the workplace.

There is a great deal of misunderstanding surrounding an injured person's rights in regard to returning to their former employment. In addition, the issues of employer prejudice, co-worker prejudice, together with the psycho-social aspects affecting the injured person themselves, all play a role in complicating the return to work.

Added to these difficulties is the potential that a return to work may affect long term disability benefits, Canada Pension Plan Disability Benefits, Income Replacement Benefits (in motor vehicle accident cases), and any other private disability coverage a person may have. It therefore goes without saying that a return to employment has to be carefully planned, having regard to all of these

factors. Improper preparation for the return to work, a poor return to work plan, improper monitoring and unrealistic goals can be fatal to a successful return to employment.

A successful return to the workplace also requires a collaborative effort between the health care, rehabilitation and vocational specialists, the injured party's legal counsel, and the insurance adjusters.

GETTING THE INJURED VICTIM READY FOR A RETURN TO WORK

The rehabilitation specialist, vocational specialist or case manager has the initial and difficult task of preparing an injured party for the return to employment.

Following an injury, many people are hesitant and fearful about returning to work. They are worried about how they will be treated by their employer and their co-workers. They are concerned about re-injuring themselves. They are worried about how they may compare to any replacement employee who may have been covering their job while they were away. They worry about whether they will be as effective in their job as they were prior to the accident, and if not, whether this will lead to them losing their job. Following an injury, many injured people are suspicious that their employer is simply waiting for them to fail, so that the employer has an easy reason for letting that employee go. These are all

legitimate concerns, and ones which need to be completely canvassed with the injured party, (with appropriate supports where necessary), prior to returning an injured person to their former employment. In some cases, psychological or social work support will need to be initiated in order to help prepare the injured party for a return to work.

An injured party needs to be prepared for the difficulties they may face when they return to work, such as increased pain, fatigue, and potential reduced productivity. It is not unusual, when an injured person first attempts to return to work, that the employee becomes easily discouraged, or pessimistic about being able to maintain their job, particularly when their symptoms reappear or become exacerbated as soon as they attempt to work. This in turn leads to a further reduction in their performance. It is this vicious circle which often undermines a successful return to the workplace.

The rehabilitation/vocational specialists need to prepare the injured party for the difficulties which are inevitable when they attempt to return to their job. The injured party must understand that these are normal occurrences, and ones the employee must attempt to work through. The rehabilitation/vocational specialists will have to reinforce that message each time the patient becomes discouraged or frustrated as a result of the reappearance or exacerbation of their symptoms. However, there is a fine line between encouraging an injured party to work through their pain or limitations, and determining that a person's disability is of such a

nature that it will continuously prevent them from returning to their normal occupation.

RETURN TO WORK AS PART OF THE REHABILITATION PLAN

In cases where it is unclear, due to a person's injury, whether they will be able to return to their regular job following an accident, the return should be gradual and carefully monitored.

In most cases it is prudent to treat the initial return to work as a "work trial", which is part of the overall rehabilitation process. Most insurers are quite familiar with this approach to the initial return to work, however such an approach necessitates the co-operation and agreement of all insurers from whom the injured party is receiving benefits arising from their inability to work. This would include the accident benefits insurer (in a motor vehicle case), the LTD insurer, the Canada Pension Plan, and any other private insurance carrier.

The rehabilitation/vocational specialist or case manager will need to obtain appropriate medical documentation to support that the initial attempt to return to work should be treated as part of the rehabilitation process. A defined graduated return to work plan should be prepared, and counsel for the injured party will have to secure the agreement of all potential insurers (who are paying benefits to the

injured party) to the work trial and schedule. This is required so that the benefits which the injured party is receiving are not jeopardized during the work trial, and in the event that the return to work plan is not successful.

While a person is completing the work trial, ideally all benefits should continue. In situations where the employer will pay the injured party during the work trial, the loss of income benefits, LTD benefits, CPP disability benefits may be adjusted accordingly. Great care must be taken by the injured party's counsel not to jeopardize ongoing benefits simply because an injured party is attempting to return to work. It is not appropriate for insurers to take the position that just because someone is ready to attempt a return to their employment that any loss of income benefits should immediately cease.

When an injured party attempts to return to work, there is no way of knowing in advance that the attempt will be successful. Most disability insurance policies have provisions requiring the insurer to support vocational reintegration or retrain an injured person. Counsel can often get the insurer to agree to the "work trial" by citing this obligation of the insurer. It is always more difficult to get benefits reinstated once they have been terminated. In addition, if the work trial is successful, then the insurer adjuster can always justify supporting the work trial to their superiors, by showing that it worked in returning the injured party to employment, with the ultimate benefit to the insurer being that the claimant ceases claiming disability benefits.

OTHER BARRIERS TO VOCATIONAL RE-INTEGRATION

One difficulty which often arises is that certain employers will not take an injured employee back to work until they have been cleared by their medical practitioners to perform “all of the normal duties of their previous occupation”. Where an employer imposes this type of restriction, a successful return to work becomes more complicated. Frequently, a person who is returning from a serious injury will not be able to return to all of their normal duties, or even if they can, they may not be able to initially perform those duties for the duration of a normal work day. In these situations, it is important to sit down with the employer and attempt to work out either modified duties and/or a graduated work schedule, in order to optimize the potential success of the return to employment. If an employer is not prepared to accommodate an employee in this manner, then the employee will only be able to return to their pre-accident job when they are fully capable of performing all of their regular duties. Obviously, this dramatically reduces the chances of returning an injured person to their pre-accident employment. The de-conditioning which accompanies a long absence from work makes it unrealistic to expect, following a serious injury, that a person will be able to immediately return to their pre-accident employment at their previous level of ability and capacity.

Some injured parties will never be able to return to their pre-accident capacity, and if their employer is not prepared to accommodate them in any way, then the only recourse may be to look for a more accommodating employer, or alternatively

retraining into another occupation which fits within the injured party's medical restrictions.

RETURN TO WORK CHECKLIST:

- 1) Prepare the injured person psychologically for the return to work (see above).
- 2) Engage a vocational specialist to assist in the process.
- 3) The vocational specialist, rehabilitation coordinator and/or case manager should meet with the employer to properly understand all of the elements of the person's job including the physical duties, psychological demands and any other nuances of the job.
- 4) The injured party's counsel or the vocational specialist, rehabilitation coordinator and/or case manager should meet with the employer to get the employer on board with the return to work plan and the accommodations which need to be made for the employee.
- 5) Consider physical aids or other accommodations the injured person may require to make the return to work more successful. This may include modifications to the work station, accommodated seating, pacing techniques and/or more frequent breaks, gradual increases in work schedule and physical tolerances.
- 6) Co-ordinate with counsel who will in turn co-ordinate with disability insurers to ensure benefits are not interrupted.

- 7) Ensure that the initial return to work attempt is considered part of the injured person's rehabilitation efforts.
- 8) Ensure that the return to work plan is graduated both in terms of modified duties and modified hours where appropriate.
- 9) Careful monitoring of the plan is required while the person is engaging the in return to work plan. Appropriate supports need to be in place so that the person does not quit or fail in their attempt. Appropriate modifications to the plan may be necessary as the return to work plan is proceeding.

WHAT HAPPENS IF A PERSON ATTEMPTS TO RETURN TO WORK BUT CANNOT CONTINUE

In certain circumstances, despite the best efforts of the injured party and the vocational/rehabilitation team, the injured party will not be able to return to their previous occupation. If the return to work plan was set up as a "work trial", there should be no problem, as benefits from the various insurers will not have been interrupted. Consequently, these benefits will continue as they did prior to the work trial. The work trial itself may identify other areas of rehabilitation that must be undertaken before the injured party can again attempt to return to work. Alternatively, the work trial may demonstrate permanent restrictions which will require either permanent modified employment, or retraining into another occupation.

It is important that counsel acting for the injured party carefully review each of the insurance policies which are paying disability benefits to the injured party. Many policies contain limitations on the number of days a person may return to work on a “temporary basis” before they will no longer be considered to be disabled from work.

For example, section 11(1) of the Statutory Accident Benefits Schedule (SABS) states:

“A person receiving an income replacement benefit may return to or start an employment at any time during the 104 weeks following the onset of disability in respect of which the benefit is paid without affecting his or her entitlement to resume receiving benefits under this Part if, as a result of the accident, he or she is unable to continue in the employment.”

Therefore, in a motor vehicle accident case, there is no restriction on the ability to attempt a “work trial” or temporary return to work within the first two years following the accident. After 104 weeks, the situation will be different.

If person is receiving Canada Pension Plan Disability benefits, they may earn up to \$4700 (in 2010) without having to report these earnings to Service Canada. The Canada Pension Plan also has a system of automatic reinstatement of CPP disability benefits for anyone who attempts to return to work, and within two years of returning, are unable to continue working because of the same or a related disability. There is no limit on how many times you can request a reinstatement of benefits, provided you meet the requirements.

The automatic reinstatement program therefore provides a financial safety net for people who are on CPP disability, and want to attempt to return to work. The request for reinstatement must be made within 1 year of the date the person stopped working due to a recurrence of the disability.

It is also important to consider other options which may be available to injured parties under government disability plans such CPP Disability. For example, a person receiving CPP Disability benefits may,

- volunteer or attend school without affecting their benefits
- participate in a paid work trial for up to three months and continue to receive CPP disability benefits
- participate in a vocational rehabilitation program, if they meet the selection criteria.

May private disability plans have similar provisions. It is very important for legal counsel to carefully review the wording of all policies which give rise to disability coverage, and ensure that a return to work, even on a modified or temporary basis, does not jeopardize entitlement to ongoing benefits.

CONCLUSION

The return to work plan for an injured party is complicated and contains many potential pitfalls if the plan is not carefully structured, implemented and monitored.

The success of any return to work plan depends on a coordinated effort between the injured party's rehabilitation, vocational, legal and insurance representatives. Each has an important role to play in ensuring that the return to work is as successful as possible.

Because many people, in part, define themselves by their occupation, the goal of returning an injured party back to gainful employment is one of the most critical goals to achieve in the overall rehabilitation process.

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