

# BACK TO WORK

Disability management and return-to-work strategies in Canada

## IMPROVED RTW PROCESSES WILL STEM WORK DISABILITY: ACOEM

What is likely to become a very important document for stakeholders involved in return to work and disability management was approved by the board of directors of the American College of Occupational and Environmental Medicine (ACOEM) in December. Called *Preventing Needless Work Disability by Helping People Stay Employed*, the report from the Stay at Work & Return to Work Committee of the ACOEM says that “a lot of work disability can be prevented or reduced by finding new ways of handling important non-medical factors that are fuelling its growth.”

The aim of the report is to open up a dialogue among stakeholders in the workers’ compensation and non-work-related disability benefits systems in order to improve the stay-at-work and return-to-work (SAW/RTW) process. This process, the reports says, has largely been overlooked in terms of its importance in handling the non-medical aspects of injury and illness that often determine if a person will remain at or return to work. “Identical medical problems end up having very different impacts on people’s lives,” the report says. “The difference in impact cannot be explained by the biology alone.”

As a result, the 21 physicians who make up the SAW/RTW Committee prepared the report because, given the “insights [they] have gleaned about the preventable nature of much work disability,” they felt “compelled to speak.” The first half of the report describes the

SAW/RTW process, while the second half discusses the factors that lead to needless work disability and what can be done about them, including 16 specific recommendations under four broader recommendations:

- adopt a disability prevention model;
- address behavioural and circumstantial realities that create and prolong work disability;
- acknowledge the powerful contribution that motivation (of doctors, employers, insurers, etc.) makes to outcomes and make changes that improve incentive alignment; and
- invest in system and infrastructure improvements.

### Document relevant to Canada

The report is as relevant to stakeholders in Canada as it is to stakeholders in the U.S. Indeed, the SAW/RTW Committee, chaired by Dr. Jennifer Christian, president and chief medical officer of Webility Corporation and moderator of the on-line Work Fitness and Disability Roundtable discussion group, includes two Canadian members: Dr. David Brown and Dr. Michel Lacerte. Dr. Brown is medical director at CIBC and a partner in the return-to-work consulting firm Clarke, Brown Associates in Toronto. Dr. Lacerte is the owner and medical director of Independent Claims Evaluators Inc. in London, Ont., an associate professor in the Department of Physical Medicine and Rehabilitation at the University of Western Ontario and the author of *Dis-*

*ability Management: Principles and Practices in Industry.*

The focus of the Committee’s work is on “the surprisingly large number” of people who end up off work for a long time, or even permanently, as a result of medical conditions that would “normally cause only a few days of work absence.” The Committee believes much of this work disability is avoidable by addressing a myriad of non-medical factors through an effective SAW/RTW process: “We are in agreement that the word needs to be spread: work disability is potentially preventable, there are good ways to prevent it, and collaboration across professional boundaries is part of the solution.”

The need for all participants in the SAW/RTW system to address the non-medical needs of injured and ill workers is a predominant theme in the re-

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## RECOMMENDATIONS

### Dealing with behavioural issues

■ All participants need to expand their model of SAW/RTW to include appropriate handling of normal human emotional reactions that accompany temporary disability in order to prevent it from becoming permanent. Payers need to devise methods to provide these services themselves or pay for reasonable aids to recovery along these lines.

■ The SAW/RTW process should routinely involve inquiry into and articulation of workplace and social realities, since hidden issues rarely resolve themselves. The bio-psychosocial model of disease currently on the ascendant in medicine takes into account these issues. Better communication pathways between SAW/RTW parties should be established. Screening instruments that flag situations where workplace and social issues should be investigated or addressed should be developed and disseminated.

■ Effective means of acknowledging and treating psychiatric co-morbidities need to be found and widely adopted. Participants in SAW/RTW need to be educated about the interaction between psychiatric and physical problems. Psychiatric assessments of people with slower-than-expected recoveries should become routine. Whether for primary or secondary mental health conditions, payment for psychiatric treatment should be made conditional on the use of evidence-based and cost-effective treatments, as well as demonstrated effectiveness.

■ Develop effective ways and best practices to reduce distortion of the medical treatment process by hidden financial agendas. Treating clinicians should be trained in what to do when they sense hidden agendas. Employers and payers should educate the provider about financial aspects that could distort the process.

port. “The failure to attend to the human needs of people who are normal but lack the resilience and coping skills required by their circumstances probably accounts for much of the system dysfunction we are discussing,” it says. As a result, the Committee’s recommendations with respect to addressing behavioural and circumstantial realities that lead to work disability are perhaps the most compelling (see box at left).

The Committee notes that a number of employers, insurers, health care providers and employees already achieve better-than-expected outcomes in preventing work disability, which the Committee defines as absence from work or not working at full productive capacity as a result of a medical condition. And the key to this success, it continues, is often not rocket science: “In most instances, a simple formula of kindness, straightforward communication, common sense practicality and good management is all that is required to make the system work better and achieve better outcomes for all.”

As well, when it comes to addressing emotional and behavioural needs of injured workers, the Committee again emphasizes the effectiveness of simple measures. That is, most sick and injured people do not need psychiatric care. “They need the kind of simple education, minor supportive counselling and reassurance that would normally be provided by a wise friend, a caring family member, a proactive customer service department, a social worker, an employee assistance program, an ombudsman, or so on,” the report says. “Also, much uncertainty and stress would be removed if treating physicians were pragmatic and clear in pointing out the functional aspects of medical conditions, options and time frames over the course of treatment, and actively empowered people to cope on their own.”

At press time, the report had not yet been publicly released by the ACOEM and was available through its website to ACOEM members only. However, the report is available to the public through the website of the Committee chair’s company, Webility. You can download the report from the home page of [www.webility.md](http://www.webility.md). •

### IMPLEMENTATION OF DUTY TO RE-EMPLOY DELAYED IN MANITOBA

Manitoba is holding off on implementing the duty to re-employ injured workers pending further consultation with stakeholders. That duty was among the amendments included in Bill 25, *The Workers Compensation Amendment Act*. Bill 25 was passed last June and comes into effect, for the most part, on January 1, 2006.

The amendments that come into effect in January bring a number of important changes with respect to injuries and illnesses that occur as of the beginning of the new year:

■ Both employers and injured workers must notify the Workers’ Compensation Board when a worker returns to work.

■ Employers are required to pay injured workers their regular wages and benefits for the full day of injury, not just up to the time the injury took place.

■ The annual maximum benefit earnings of injured workers are no longer capped (and, in 2005, the cap stood at \$58,260). Instead, injured workers receive 90 per cent of their earnings, with no upper limit (and minimum wage earners receive 100 per cent of their earnings). To ease the impact on employers, an interim cap of \$66,500 per worker has been put on assessable earnings for 2006.

■ The wage loss benefits of injured workers are no longer reduced from 90

to 80 per cent of net wages after 24 months, and benefit reductions for workers 45 and older are eliminated.

■ Employers can request a medical review panel in certain circumstances.

A number of other important features of Bill 25 have been put on hold pending further consultation with stakeholders, including the duty to re-employ injured workers. That duty, says a spokesperson from the Workers' Compensation Board, will come into effect in 2007. The duty to re-employ will require employers with 25 full- and/or part-time workers to re-employ a worker who has been with the company for at least one year (see *Back To Work*, May 2005).

Also put on hold is the amendment that expands the mandatory coverage of the Act to include more industries and the amendment that requires employers to pay injured workers for the first 14 days after injury when asked to do so by the WCB (for which the employer is later reimbursed).

For information, go to [www.wcb.mb.ca/new\\_wcb\\_laws.html](http://www.wcb.mb.ca/new_wcb_laws.html). •

## FEDS PROMISE TO ESTABLISH MENTAL HEALTH COMMISSION

The federal government is setting up a Canadian Mental Health Commission, Health Minister Ujjal Dosanjh announced on November 24. The aim of the Commission is to enable greater collaboration among governments and stakeholders in order to better address mental health in Canada — and employers are among the key stakeholders expected to take part. In particular, the Commission will facilitate the exchange of research findings and best practices and develop strategies to help reduce the stigma associated with mental illness.

“This is a significant advance in all

our efforts to improve the lives of those living with mental illness and will contribute to a real national effort to prevent the disabling effects of mental illness through education, early detection and research,” says the Honourable Michael Wilson in a statement released upon the announcement of the Commission. Wilson, a prominent member of the Global Business and Economic Roundtable on Addiction and Mental Health, was appointed as special ministerial advisor on mental health in the federal workplace in February 2005.

The decision to establish the Commission follows up on a recommendation from the Standing Senate Committee on Social Affairs, Science and Technology, chaired by Senator Michael Kirby. In a November 2005 report, the Committee called for a national — not federal — arm's-length commission to ensure that mental health issues remain in the mainstream of public policy debates.

The Commission, as envisioned in Kirby's report, will:

- include an internet-based Knowledge Exchange Centre that will monitor and distribute national and international best practices;
- assess the most effective ways of integrating mental health services into multidisciplinary primary care clinics;
- address the severe shortage of mental health human resources; and
- undertake a national campaign to combat the stigma and discrimination associated with mental illness.

The Committee report is at [www.parl.gc.ca/38/1/parlbus/commbus/senate/com-e/soci-e/rep-e/rep16nov05-e.htm](http://www.parl.gc.ca/38/1/parlbus/commbus/senate/com-e/soci-e/rep-e/rep16nov05-e.htm). •

## ACOEM TAKES STAND ON GENETIC TESTING

Genetic screening is not conceptually different than other types of medical testing and, as such, the rights of individuals will be appropriately

protected by adhering to existing ethical standards, good scientific practices and laws protecting medical confidentiality, the American College of Occupational and Environmental Medicine says.

In a position statement released this month and approved by the ACOEM board of governors on October 27, 2005, the ACOEM says it “recognizes that there is potential for immediate harm from the misuse of genetic screening through discrimination in employability or insurability.” To guard against such misuse, it makes a number of recommendations (see box below).

The full position statement is available at [www.acoem.org/guidelines/article.asp?ID=92](http://www.acoem.org/guidelines/article.asp?ID=92). •

### POSITION STATEMENT

#### Genetic screening

■ Genetic screening may be performed on current or prospective employees when it is clear that the genetic trait directly affects job performance, when the trait being screened for predisposes a worker to a significant, consistent adverse outcome following an otherwise acceptable workplace exposure, or when done as part of a medically confidential general health assessment offered to employees. In all instances, employees should be informed of the screening, have the option to decline non-job-specific screening, be given the test results, and be guaranteed that the test results will not be disclosed to others without their consent. Specific screening test results should not be released to employers, and the disclosure of information derived from such testing should be limited to its impact on the employee's fitness to perform a particular job.

■ Decisions by employers and insurance companies about insurability should not be based on genetic status, nor should genetic screening results be used to make decisions on the issuance or pricing of health care insurance.

## FAILURE TO PURSUE RTW INFO RESULTS IN DISCRIMINATION

Vague requests for further information about an employee's ability to work safely do not fulfil the duty to accommodate, an Alberta court has ruled. **By Susan Stanton, Editor, Employers' Human Rights & Equity Report**

A disabled worker did not fail to participate in the search for accommodation when he did not provide the medical information that his employer said was necessary before it could return him to work, the Alberta Court of Queen's Bench has ruled. Instead, it was the employer that failed to accommodate by not pursuing the needed information more diligently.

Gary Trick had worked in Alberta as a feed sales representative for Federated Co-operatives Ltd. for 16 years when he was diagnosed with bipolar disorder. Unable to work, he went on short- and then long-term disability for 10 months in 2001 while being treated.

The treatment — first by a psychiatrist and then at a day treatment program at the University of Alberta Hospital — was successful. In the fall of 2001, Trick told his employer he was ready to return to work. Federated gave him some medical forms to be filled out by his doctor. The forms asked for details of his illness and an assessment of his fitness to do his job.

Trick tried to get his caregivers at the day treatment program to fill out the forms, but they refused, directing him instead to his psychiatrist. His family doctor also refused to fill out the forms because she had not been involved in his treatment.

In the meantime, Trick was in touch with his rehabilitation case manager at Co-operators Life, Federated's disability insurer. The case manager asked Trick to send the forms to him because Co-operators was responsible for facilitating his return to work.

Co-operators, based in Saskatchewan, then hired the Alberta firm Altius Rehabilitation Group to help Trick with the return-to-work process. The rehab consultant there suggested and formulated a gradual RTW program for Trick, which was presented to Trick's supervisor in early November. It was at that point that Trick learned that his position had been filled and that Federated

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ated may or may not be able to find another position for him, subject to Trick supplying the information necessary to satisfy Federated that he could return to work safely. Apparently, Federated was especially concerned about Trick's ability to drive, although this was not specifically mentioned in the forms Federated had sent to Trick.

Trick followed up with an appointment with his psychiatrist in December 2001. The psychiatrist judged Trick able to return to work and filled out the forms forwarded by the rehab consultant at Altius. Unbeknownst to Trick, these forms were not the same forms that he had been given by the company.

Upon receiving the forms from the psychiatrist via Altius, Trick's case manager at Co-operators phoned Federated to say Trick had been medically cleared to work. He then sent a letter to Trick, with a copy to the employer, telling him he had been medically cleared to return to work with no restrictions. The letter also told Trick that Federated appeared "unable to accommodate [him] for a return to work."

Federated simply filed its copy of the letter and let the matter rest. A few weeks later, Trick phoned his employer to inquire about his return to work. Federated told him it still needed the medical forms outlining "what he could or could not do" before it could determine whether it could accommodate Trick in another position. Left with the impression that there was no job for him and knowing that his disability benefits ended at the end of January 2002, Trick found another job.

### Employee diligently pursued info

Trick complained to the Alberta Human Rights and Citizenship Commission that Federated had discriminated against him on the basis of his mental disability by refusing to accommodate him. A human rights panel dismissed Trick's complaint. It said that Federated was justified in requesting further medical information from Trick and that Trick had failed to "facilitate the transfer of relevant medical information." To that extent, it concluded that Trick had failed to "participate in the search for accommodation."

Trick appealed to the Alberta Court of Queen's Bench and won. The court said Trick had made every effort to get the forms signed, approaching his day treatment caregivers, his family doctor and, finally, his psychiatrist, who agreed to fill out the forms sent to him by Co-operators. "[T]here is no evidence that Mr. Trick refused to provide

any medical information,” noted the court. “The evidence is, in fact, that Mr. Trick tried diligently to obtain the information requested and had no way of knowing that the information he provided was insufficient or required clarification.”

What’s more, the letter from Co-operators responded to both of the employer’s information requests, the court said. The letter said that Trick had been “medically cleared to return to work.” It further specified “what Mr. Trick could or could not do” by stating that there were “no restrictions.”

If the information contained in the letter was insufficient in that it did not specifically address Trick’s ability to drive, the company should have relayed that fact to Co-operators rather than simply filing the letter. “There is no evidence that anyone from Federated made any requests for information that they be satisfied that Mr. Trick could drive without restrictions,” the court said. “How, in these circumstances, could Mr. Trick or any of his advisors have known that Mr. Trick’s ability to drive was still a major concern for Federated and that Federated required further information about Mr. Trick’s ability to drive without restrictions before Mr. Trick could be accommodated?” A “vague request” for more information is simply not enough, the court added, because such a request is “so unclear” that it would be “impossible for [Trick] to meet.”

As well, if Federated wanted more information, it should have directed its requests to Co-operators as well. As Federated’s disability insurer, Co-operators had been hired by the company to act as an agent between Federated and its employees. “By placing Co-operators in this position, it is Federated that must take the responsibility to ensure that Co-operators’ role is clear and, if further information is required,

it is to Co-operators that requests should be made, so that it is well understood what the employer requires,” the court said. That was not done.

Notwithstanding its repeated assertions that it would have accommodated Trick had it received the medical information it considered necessary, Federated did not make a *bona fide* attempt to acquire that information. “The employer cannot avoid its obligations to accommodate by failing to follow up to obtain the information it believes to be neces-

sary,” the court said.

The court awarded Trick compensation for five weeks’ lost wages (from the end of his long-term disability to the time he began his new job), compensation for the difference in wages and pension benefits paid by Federated and his new employer, and general damages for pain and suffering of \$6,000.

**Source:** *Alberta (Human Rights & Citizenship Commission) v. Federated Co-operatives Ltd.*, Alberta Court of Queen’s Bench, July 29, 2005. •

## LEGAL ADVICE

### Tips on requesting accommodation information

By Christine Thomlinson

Employers can learn much from Federated’s experience in *Trick*. Specifically, when analyzing an accommodation request or when examining the employer’s obligation to return an employee to work after a medical leave, employers can keep in mind the following guidelines taken from the *Trick* decision:

- Consider carefully the information needed, and request this information. Many employers rely on standard medical forms that do not elicit the necessary information required for the accommodation process. It is recommended instead that employers use questionnaires or letters making direct inquiries that relate to the situation or employee in question.

- Avoid vague requests for “medical clearance” or “more medical information.” First carefully analyze what information has been received to date, and if more is really necessary, then craft a tailored request specifying the exact nature of the request for more information and an explanation as to its necessity.

- If the employee’s doctor has advised that the employee is medically fit to return to work with no restrictions or modifications, the onus will be on the

employer to show that more information is necessary. This may be necessary if the employer has other contradictory information, but otherwise the above information may be sufficient.

- Be sensitive to the difficulty an employee may face in obtaining necessary medical information or in having medical professionals complete necessary forms or questionnaires. Care should be taken to avoid steps that could be interpreted as punishing employees for the inaction of their doctors.

- Employers will have difficulty laying blame with their third-party insurers for not forwarding necessary medical information. In *Trick*, the insurer was considered the employer’s agent. In such a case, an employer will not be excused if the insurer has failed to pass along relevant medical information. Employers would be wise to ensure that they make clear their expectations regarding the sharing of medical information when establishing their contractual relationships with their insurers.

Notwithstanding the above guidelines, each case of accommodation must be evaluated on its own merits while taking into account the specific circumstances. Employers should always avoid adopting a boiler-plate approach to managing individuals with disabilities.

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## INNOCENT ABSENCE FIRING NOT DONE IN GOOD FAITH

Trying to save money on severance payments does not amount to a *bona fide* occupational requirement justifying the dismissal of a disabled worker, the B.C. Human Rights Tribunal has ruled. **By Cindy Moser**

A forestry company discriminated when it terminated a seriously ill employee on the basis of innocent absenteeism just days before he would have been eligible for a severance package. “In order to save \$65,000 in severance pay, [the employer] took actions which devastated [the employee] emotionally, and excluded him from the financial recognition for his past service and contributions which all of his able-bodied co-workers received,” the British Columbia Human Rights Tribunal commented.

Rod MacRae, 48, worked for over 28 years at Interfor’s mill in Squamish, B.C. In October 2001, he stopped working due to illness, which was subsequently diagnosed as amyotrophic lateral sclerosis (ALS), a progressive neuro-muscular disorder. He eventually went on long-term disability.

MacRae had been off work for a year-and-a-half when the Squamish mill was shut down and all the employees were laid off. The following year, in March 2004, Interfor entered into a voluntary severance agreement with the union, the Industrial Wood and Allied Woodworkers Union of Canada (IWA). Under the agreement, the laid-off employees would receive substantial severance payments at the time Interfor decided to close the mill permanently. As it turned out, that happened in August 2004. All employees on the seniority list on the day the severance agreement was signed in March 2004 received a settlement.

MacRae was not one of these. Just 11 days before the severance agree-

ment was reached, he was dismissed on the basis of non-culpable absenteeism (akin to frustration of contract). MacRae was devastated by the termination, saying that it felt like a “slap in the face.” Instead of thanking him for his years of service and paying him the \$65,000 he would have received under the agreement, the company treated him like “a number” in order “to save a buck,” essentially sending the message that he was “useless.”

### Avoiding severance not a BFOR

MacRae launched a human rights complaint, arguing that he had been discriminated against on the basis of a physical disability. The B.C. Human Rights Tribunal agreed. It did not buy the company’s argument that it had dismissed MacRae for innocent absenteeism. “It is clear that the primary, and indeed only real, reason for the termination of Mr. MacRae’s employment was to avoid the potential of paying him severance pay . . .,” the tribunal said. “It used the doctrine of non-culpable discharge as a means to accomplish this end.”

Indeed, part of the rationale for being able to dismiss an employee for innocent absenteeism is that the employee is not living up to its side of the employment contract; that is, the employee is not showing up for work. However, the tribunal pointed out, the mill was not fulfilling its part of the employment bargain either.

The mill was shut down, with no foreseeable prospect of reopening. It was not providing employment to any

of the Squamish crew, anymore than any of the Squamish crew was providing work. “In the circumstances, it cannot be said that Interfor terminated Mr. MacRae’s employment because he was no longer capable of fulfilling his end of the employment bargain,” the tribunal said. “It terminated him solely in order to prevent him from receiving severance pay.”

That said, the tribunal went on to determine whether saving on severance payments amounted to a *bona fide* occupational requirement. Although Interfor’s desire to save money is an understandable business goal, “that does not mean that, as a human rights matter, its purpose was legitimate,” the tribunal said.

The severance agreement negotiated by the union was designed to reward employees for past service and commitment to the company. Yet, because of his disability, MacRae was being deprived of that recognition. “When economic circumstances force tough decisions, too often it is the disabled who bear the brunt of those decisions,” the tribunal said, concluding that MacRae’s termination was not carried out in good faith or for a legitimate work-related purpose.

Furthermore, Interfor would not have faced undue hardship by keeping MacRae employed until he was eligible for the severance award. “The approximately \$65,000 in severance pay to which Mr. MacRae would have been entitled, while of tremendous significance to him, is a drop in the bucket compared to the total amounts Interfor was obligated to pay out,” the tribunal said. It awarded MacRae the \$64,456 he was owed under the severance agreement, as well as an extra \$12,500 for injury to his dignity and self-respect.

**Source:** *MacRae v. Interfor (No. 2)*, British Columbia Human Rights Tribunal, October 12, 2005. •

## REFUSING MODIFIED WORK NOT “WILFUL MISCONDUCT”

Repeatedly turning down offers of suitable modified work does not amount to “wilful misconduct” justifying dismissal without payment under Ontario’s employment standards law, the Ontario Labour Relations Board says. **By Cindy Moser**

An employee was not engaged in “wilful misconduct” justifying termination, as that term is applied in the context of an employment standards claim, when she repeatedly refused the modified work opportunities offered to her by her employer. The Ontario Labour Relations Board ruled that such misconduct was not “wilful” because she was not consciously and deliberately attempting to cause harm to her employer. Instead, she was suspicious of her employer’s motives.

Kamaljit Batth had worked for Hunter Amenities International for about 10 years, without incident, when in February 2004 she left work due to back pain. She claimed and received benefits from Ontario’s Workplace Safety and Insurance Board. In line with its obligations under the *Workplace Safety and Insurance Act*, Hunter Amenities offered Batth modified work on a number of occasions.

In March 2004, it offered Batth modified hand assembly work that it felt was in line with her restrictions. Batth said she could not do the work, even though it was very light work. She asked to do other work that the company felt was inappropriate. So the company gave her other light work that fell within her restrictions. Two weeks later, Batth said she was unable to do that work as well. At a subsequent meeting, Batth became very upset, raising her voice and pounding her fists on her manager’s desk. She felt that Hunter Amenities did not understand the nature of her back injury or restrictions and was treating her unfairly.

In mid-April 2004, Batth was given some training on two occasions, and each time she was asked to sign off on a “standard operating procedure” form. Batth, who had signed such forms in the past, was suspicious as to why she was the only employee being asked to undertake the training and sign the forms. The company’s explanation that the other employees had undertaken the training while she was off work due to her back injury did not appease her. She felt she was being singled out and set up for termination, so she refused to sign the forms. After the second incident, Batth was suspended for three days.

About a week later, Batth was again given modified work that she refused to perform. Hunter Amenities was getting frustrated. It called a meeting between Batth and her supervisors at which the company received an updated restrictions form. When her supervisors questioned her about her condition, Batth told them to call her doctor if they wanted information. Again, Batth felt she was being mistreated and raised her voice to her supervisors.

The next day, Batth took part in a fact-finding meeting with regards to another Hunter Amenities employee, at which Batth again accused her supervisors of treating her unfairly. The day after that, Hunter Amenities held a meeting with all of its dayshift production employees, including Batth, telling them that due to lack of work, some would be put on a short-term layoff. Batth was told that, due to the slowdown, the company had no modified work to offer her at that time. Again,

Batth felt she was being mistreated and refused to leave the premises without receiving written confirmation of the day’s events. Ultimately, Batth had to be escorted from the premises.

At the end of April 2004, Batth was assigned suitable modified work, which she again refused to perform on the grounds that she could not do it safely. A week later, given her conduct and refusal to perform modified work, the company dismissed Batth.

### Severance owed under ESA

Batth launched an employment standards claim, arguing that her dismissal was an unlawful reprisal under the *Employment Standards Act, 2000* for the comments she made at the fact-finding meeting. She also argued that her dismissal was unjust and that she was owed termination, severance and vacation pay under the Act. The company said the dismissal was not a reprisal and that it was justified because of Batth’s “wilful misconduct.” Under the ESA, statutory dismissal payments are not owed when an employee has “been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer.”

An employment standards officer sided with Batth, saying that her termination was both a reprisal and wrongful. The officer awarded her damages of \$17,260 for loss of employment and emotional pain and suffering due to the unlawful reprisal, as well as termination, severance and vacation pay of \$7,730 due to the wrongful termination without notice.

Upon appeal, the Ontario Labour Relations Board agreed with Hunter Amenities that Batth’s dismissal was not a reprisal for her participation in the fact-finding meeting, and it rescinded the \$17,260 award. However, the

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## LEGAL EASE

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board still found that Batth's dismissal was wrongful in that her repeated refusals to accept the offers of modified work did not amount to "wilful misconduct."

The board emphasized the importance of actions being "wilful" before they can amount to just cause for dismissal under the ESA. Batth's actions did not meet the necessary degree of wilfulness. "Although her behaviour was no doubt very challenging and frustrating to Hunter Amenities, I do not find that Ms. Batth was consciously and deliberately engaging in misconduct so as to refuse to perform her work or so as to attempt to cause harm to Hunter Amenities," the one-person board said.

It was possible that Batth honestly believed she could not do the work and equally possible that Hunter Amenities honestly believed that she could. In other words, there was a difference of opinion regarding "the complex issue" of whether or not certain work fell within Batth's physical restrictions, the board said. In this context, Batth's reluctance and ultimate refusal to do the work, as well as her subsequent inappropriate conduct during her meetings with her supervisors, did not amount to wilful misconduct.

"Rather, this conduct arose from her concerns regarding her back injury and her suspicions and frustrations over the work she was being requested to perform, which culminated in her coming to believe that she was being mistreated and set up for termination," the board concluded. The board's finding means the officer's wrongful termination award of \$7,730 stands.

**Source:** *Hunter Amenities International Ltd. v. Batth*, Ontario Labour Relations Board, July 13, 2005. •

## WHO offers guide to mental health policies

The World Health Organization (WHO) has published a guideline on developing workplace mental health policies and programs. Released in November, *Mental Health Policies and Programmes in the Workplace* is a 98-page document that details the four steps involved in mental health policy development: analyzing mental health issues, developing the policy, developing strategies to implement the policy, and implementing and evaluating the policy.

Canadian experts in workplace mental health played an important role in the development of the guide. The work of Dr. Gaston Harnois, director of the PAHO/WHO Collaborating Centre at the Douglas Hospital Research Centre in Montreal, is specifically acknowledged, and more than 15 other Canadians are thanked for their contributions.

The guide can be downloaded from [www.who.int/mental\\_health/policy/en](http://www.who.int/mental_health/policy/en) (and it's the last guide listed on the page under "Mental Health Policy and Service Guidance Package).

## BCIT researchers testing accommodation toolkit

A research team at the British Columbia Institute of Technology (BCIT) is looking for rehabilitation professionals and others who have regular dealings with people with disabilities to test out a new "toolkit" that is designed to aid in the development of rehabilitation and accommodation plans for aging employees with disabilities. The toolkit helps professionals develop intervention strategies based on an older employee's psychological readiness to pursue optimal workplace outcomes through accommodations. For more information, contact Anna Lee, a research assistant in BCIT's Health Tech-

nology Research Group, at (604) 412-7661 or [anna\\_lee@bcit.ca](mailto:anna_lee@bcit.ca).

## Deadline extended for papers on mental health

The deadline has been extended for submitting a paper to the *Canadian Journal of Community Mental Health's* special issue on work and mental health. The deadline is now March 2, 2006. For information, visit [www.wlu.ca/cjcmh](http://www.wlu.ca/cjcmh) or e-mail [carolyn\\_dewa@camh.net](mailto:carolyn_dewa@camh.net). •

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