

# ***Bill 14 and Your Duty to Accommodate***



## **Employees' Responsibilities: Human Rights & Workers Compensation A WCB Process Perspective**

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# Introduction

- Human rights and workers compensation are about processes
- These processes overlap
- Many other processes can be involved such as Collective Agreements, disability benefits, etc.
- **Know the starting point, which processes apply and who to utilize**



This presentation is made in the framework of Workers' Compensation ("WC"), WC Vocational Rehabilitation ("VR") and WC sponsored Return to Work Programs ("RTW").

As per Supreme Court of Canada decisions, WC legislation may supercede Human Rights legislation processes e.g. WC appeals under certain circumstances.

WC processes often occur in tandem with Duty to Accommodate ("DTA") and other processes, as opposed to a linear flow chart approach especially in WC claims.

The WC processes are usually the first to be initiated and have the most impact if done properly. Employers should be proactive and supportive – this is not about claims management or cost control.

# Overview of Presentation

- I. Bill 14 – An overview of mental disorders legislation
- II. Basic Concepts – duty to accommodate vs. vocational rehabilitation and return to work
- III. Employer responsibilities – An overview of responsibilities under Workers Compensation
- IV. What is the employee's duty in the Workers Compensation return to work process and as within the Bill 14 framework?
- V. Employee Privacy – Medical privacy and the employer's need to know in the Workers Compensation return to work process
- VI. Rehabilitation and Return to Work in the DTA context – Compelling attendance in rehabilitation and return to work efforts
- VII. Getting Employee Cooperation - Options for employers – What if there is non-compliance with rehabilitation and return to work efforts?

# Terminology

- **CA** – Collective Agreement
- **DTA** – Duty to Accommodate
- **FCE** – Functional Capacity Evaluation
- **GRTW** – Graduated Return to Work
- **HR** – Human Rights
- **IME** – Independent Medical Examination
- **JDA** – Job Demands Analysis

Cont.

# Terminology - Continued

- **MARP** - Medical And Return-to-Work Planning Assessment
- **RTW** – Return to Work
- **RD** – Review Division
- **RSCM II** – Rehabilitation Services and Claims Manual (2 versions)
- **SLE** – Selective / Light Employment
- **VR** – Vocational Rehabilitation

# Terminology - Continued

- **WC** – Workers' Compensation
- **WCAT** – Workers' Compensation Appeal Tribunal
- **WCB** – WorkSafeBC

Cont.





# Bill 14 – An Overview of Mental Disorders Legislation

- Plesner Case – BC Court of Appeal
- The B.C. Court of Appeal struck down the application and interpretation of mental stress claims in British Columbia in the Plesner case
- The Court found that those suffering from mental disability were treated differently from those suffering from physical disability, and that the differential treatment constituted discrimination under Section 15 (of the Charter of Rights and Freedoms)

# Bill 14 – An Overview of Mental Disorders Legislation - Continued

- On May 31, 2012, the B.C. legislature passed Bill 14, the *Workers Compensation Amendment Act, 2011*.
  - Bill 14 criteria amended section 5.1 of the *Workers Compensation Act*, changing coverage for mental disorders caused by work where the employee's mental disorder:

Cont.

# Bill 14 – An Overview of Mental Disorders Legislation - Continued

1. is a reaction to one or more traumatic events arising out of and in the course of employment, or
2. is predominantly caused by a significant work-related stressor, including bullying or harassment, or a cumulative series of significant work-related stressors, arising out of and in the course of employment

Cont.

# Bill 14 – An Overview of Mental Disorders Legislation - Continued

3. the employee's mental disorder must be diagnosed by a psychologist or psychiatrist (previously a physician's diagnosis was sufficient) and be one of the conditions described in the most recent American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM IV")



# Basic Concepts

## DTA vs. VR and RTW

- The Workers' Compensation Act is the starting point for WC claims that result in accommodation issues
- Is there a Collective Agreement in place?
- What rights are prescribed in these?
- What process is in effect or being utilized?
- Is more than one occurring?
- Are they occurring in tandem?

# Basic Concepts - Continued

## Why is this important today?

- ✓ Accommodation may be part of a bigger process
- ✓ The WCB can be utilized to a far greater extent (and should be)
- ✓ The WCB claim process can help all parties by offering resources and expertise
- ✓ Mental Disorder claims are complex – **do you have the expertise or does the WCB?**



# Basic Concepts - Continued

- Leading case - *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 (*Figliola*) – caution – may be revisited
- Supreme Court came out against human rights complainants trying to litigate their claims in multiple forums
- WC Appeal system allows for human rights issues to be considered, in part

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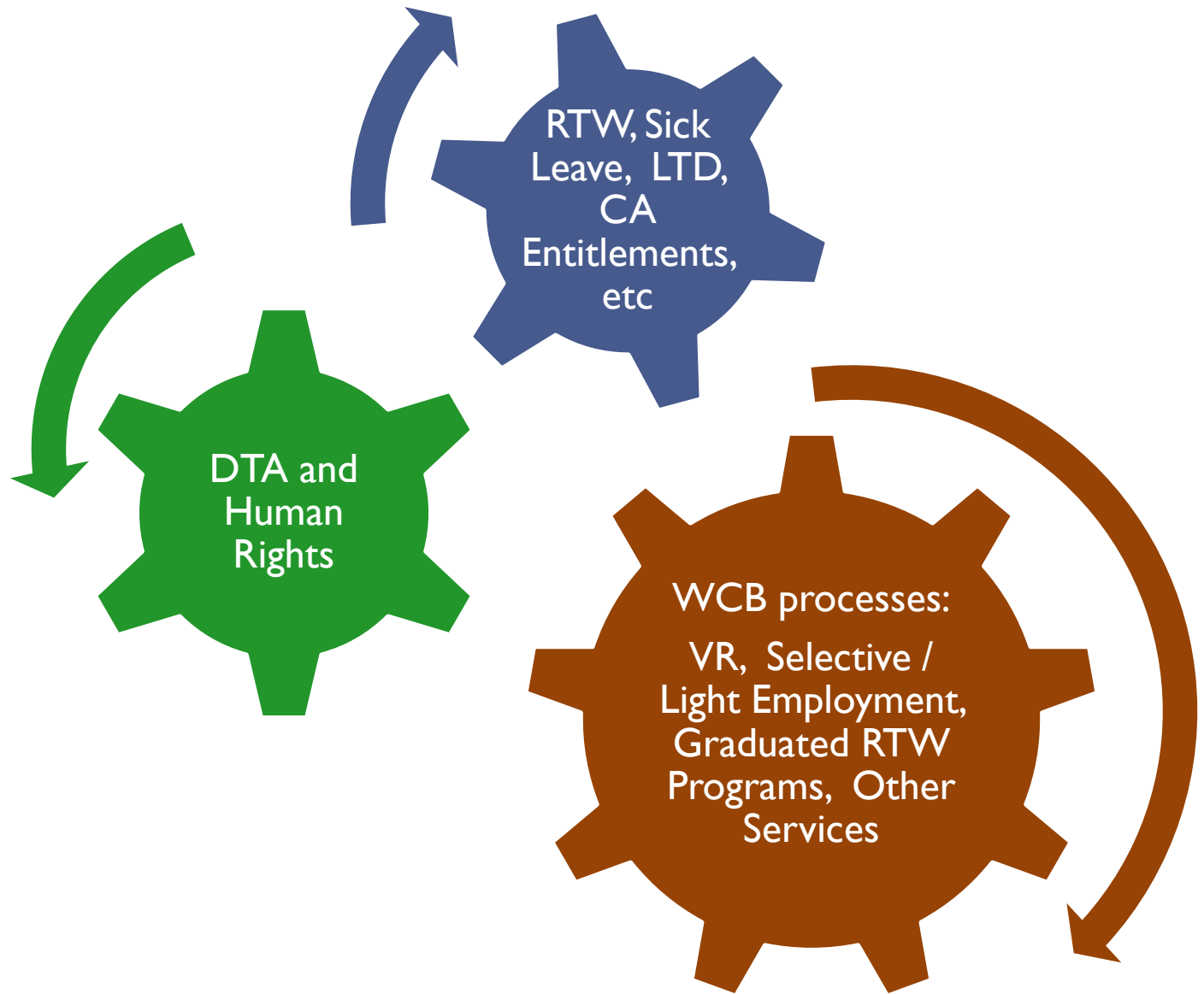
# Basic Concepts - Continued

- No forum shopping – however – consider the facts, circumstances, tribunal mandate, and if there would be injustice?
  - WC does not have exclusive jurisdiction over human rights issues
  - One (RD) out of two levels of WC appeal can address human rights issues
  - What issues were addressed by WCB and on appeal?
- Cont.

# Basic Concepts - Continued

- Three (3) key tests are:
  - ❑ Was there concurrent jurisdiction to decide the issues,
  - ❑ Was the previously decided legal issue essentially the same as what is being complained of to the Tribunal, and
  - ❑ Was there an opportunity for the complainants to know the case to be met and have the chance to meet it, regardless of how closely the previous process procedurally mirrored the one the Tribunal prefers or uses itself.

Cont.



# Basic Concepts - Continued

- The process determines, in part, the law to be applied subject to Part 4 of the Code, “If there is a conflict between this Code and any other enactment, this Code prevails” – however – the WC Review Division can determine HR issues.
- The Workers’ Compensation Appeal Tribunal cannot determine HR issues.

Cont.

# Basic Concepts - Continued

- Sections 3, 4 and 13 (1) of the British Columbia Human Rights Code (“the Code”) prescribe some of the employer responsibilities and employee rights
  - The employer’s DTA is independent of the process, rights and responsibilities under the WC Act and Policy
  - Mental Disorders vs. mental disabilities – be careful of which process you are in and which definitions apply
- Cont.

# Basic Concepts - Continued

- “Mental disorder” refers to the medical condition
- “Disability” is a legal term used in WC, insurance and human rights legislation (See *Morris v. BC Rail*, [2003] BCHRT 14 (Lyster))

Cont.





# Employer Responsibilities

## An Overview of Responsibilities Under Workers' Compensation:

- The Supreme Court of Canada has rendered a number of important decisions: *Central Alberta Dairy Pool* (undue hardship tests), *Meiorin* (BFOR) and *Renaud* (employee responsibilities and accommodation to point of undue hardship test for employers)
- Other sources of legal obligations are BC Human Rights Code, human rights tribunals and WCAT precedent panel decisions, Workers' Compensation Act, Rehabilitation Services and Claims Manual, BC Labour Relations Code, etc.

# Employer Responsibilities - Continued

- Per the WC Act and Policy, there must be individualized assessment – especially in mental disorders claims
- Duration of disability is irrelevant
- Employers must seek out what limitations are present, depending on the process

Cont.

# Employer Responsibilities - Continued

- **Extra care should be taken in cases where an employee has a mental disability**
- Employee denials and relapses are the accepted part of the return to work processes in mental disability claims
- Safety issues and unreasonable standards should not be used to defeat the WC processes

# Employer Responsibilities - Continued

- WC processes are triggered in such circumstances as (non-exhaustive list):
  - ❑ Employee expresses a desire to return to work e.g. after a WC claim ends or is long
  - ❑ The employer is about to take action that will negatively impact the employee
  - ❑ Employer concerns about employee behaviour

Cont.

# Employer Responsibilities - Continued

- ❑ An employer is aware of the need for a RTW but requires further medical information
- ❑ There are ongoing claims and / or new claims
- ❑ A claim has been re-opened

Cont.

# Employer Responsibilities - Continued

- The WCB and Employer then need to:
  - ascertain whether the employee has a psychological medical condition (e.g. mental disorder)
  - what the employee's limitations and restrictions are
  - what process is appropriate e.g. VR or Selective / Light employment

Cont.

# Employer Responsibilities - Continued

- Forms of VR and RTW may include:
  - Training
  - Assistive devices
  - Bundling of duties
  - Modifying duties
  - Changing hours
  - Modifying hours, shifts, flex time, etc
  - Ergonomic or physical layout changes

Cont.

# Employer Responsibilities – Continued

What if WCB Sponsored VR Rehabilitation is Occurring – is there is a DTA?

- VR is not a bar to RTW or DTA processes occurring – both must considered
- VR, RTW, SLE, etc needs to be coordinated through the WCB
- Employers have responsibilities in all of these areas, the WC will often take the lead

Cont.



# **Employer Responsibilities - Continued**

## **Vocational Rehabilitation Basic Process**

**Phase 1** – return to same job with same employer

**Phase 2** – modified or different job, same employer

**Phase 3** – different job, new employer, same industry

**Phase 4** – different job, new employer, all industries

**Phase 5** – consider new occupational skill development



# Employee Responsibilities

- The employee must be willing to attempt VR and / or a RTW via WC unless it negatively impacts on the disability or is contraindicated by the physician
- A perfect or ideal RTW or VR plan is not required

Cont.

# Employee Responsibilities - Continued

- The employee must communicate with the employer as required
- The employee should communicate concerns or issues
- Accepting a lower wage rate may be required subject to Loss of Earnings assessments, etc

Cont.

# Employee Responsibilities - Continued

- The employee may have to accept offers of retraining
  - The employee may have to accept temporary work
  - Agreeing to a Functional Capacity Evaluation, Independent Medical Examination, and other testing is not normally an employee responsibility or requirement
- Cont.

# Employee Responsibilities - Continued

- Providing a diagnosis is not an employee responsibility in a DTA but usually required in WC
  - Mental Disorder claims are very unique and fact dependent. There is no standard template, flow-chart, process, etc.
  - Does the employee understand their rights and obligations? Is their diagnosis a barrier to comprehension?
- Cont.

# Employee Responsibilities - Continued

**Options** – What Can the Employee do to  
Get Back to Work? Major WCB Options:

- A. Selective / Light Employment
- B. Vocational Rehabilitation
- C. Other Programs – Job Demands Analysis,  
Graduated Return to Work, etc

# Employee Responsibilities - Continued

## A. Selective / Light Employment 34.11 of the RSCM II:

“Selective / light employment is a temporary work alternative, offered by an employer, that is intended to promote a worker’s gradual restoration to the pre-injury level of employment” and “Selective/light employment is typically offered at or soon after the date of injury, generally prior to the Board’s involvement on the claim.”

Cont.



# Employee Responsibilities - Continued

Selective/Light employment differs from graduated return to work programs:

- GRTWs are normally initiated after the worker has participated in medical treatment or rehabilitation programs
- Selective / Light employment often applied as a compulsory program

Cont.

# Employee Responsibilities - Continued

- Refusal may lead to suspension of WC claim – “Should the Board determine that the worker’s refusal is unreasonable, benefit entitlement is determined under section 30 of the Act.”
- *All this may be occurring even before the DTA process has begun – has the WCB’s role been exhausted?*

Cont.

# Employee Responsibilities - Continued

## B. CII – 85.00 – Vocational Rehabilitation and Section 16 of the WC Act

“To aid in getting injured workers back to work or to assist in lessening or removing a resulting handicap, the Board may take the measures and make the expenditures from the accident fund that it considers necessary or expedient, regardless of the date on which the worker first became entitled to compensation.”

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# Employee Responsibilities - Continued

- Not compulsory
- Discretionary benefit
- Employers should support VR
- May be offered more than once
- 5 step process
- Employee required to cooperate once VR initiated

Cont.

# Employee Responsibilities - Continued

## VR Principles:

“Vocational rehabilitation should be initiated without delay and proceed in conjunction with medical treatment and physical rehabilitation to restore the worker’s capabilities as soon as possible.”

Cont.

# Employee Responsibilities - Continued

## C. Other Options:

WorkSafeBC Return to Work Support  
Services

[http://www.worksafebc.com/health\\_care\\_providers/programs\\_and\\_services/return\\_to\\_work\\_support\\_services/default.asp](http://www.worksafebc.com/health_care_providers/programs_and_services/return_to_work_support_services/default.asp)

Cont.

# Employee Responsibilities - Continued

## Services Offered:

- ☐ Job site visit
- ☐ Graduated Return to Work Planning
- ☐ Graduated Return to Work Monitoring
- ☐ Job Demands Analysis

# Employee Responsibilities - Continued

- Workers are referred for Return to Work Support Services by a WorkSafeBC officer, usually following recommendations received from various health care providers.





# Employee Privacy

**Medical privacy and the employer's need to know in the Workers' Compensation return to work process:**

- The Act, Policy, Practice Directives and the Collective Agreement should be the primary source to be reviewed, where applicable
- What part of the WC process are you in?
- Higher standard for privacy for mental disabilities

# Employee Privacy - Continued

- Consent is required for: collection, use and disclosure of medical information subject to the *Privacy Act*. RSBC 1996, c. 373, the Collective Agreement, WC Act and Policy, etc
- WC consent requirements are in addition to CA, privacy legislation, etc

Cont.

# Employee Privacy - Continued

- Regardless of the status of a WC claim, the employer and employee must cooperate – especially where VR is occurring
- Is more medical required – know the RSCM!
- An employee's refusal to remit medically necessary documents will usually end the employer and WC involvement, as well as terminating VR and WC benefits

# Employee Privacy - Continued

- Employees are required to cooperate with all WWC requests for medical information, especially in VR
- Employers are entitled to all medical information, as part of an appeal, where Disclosure has been sought
- Employers are required to varying amounts of medical as part of VR, depending on the stage

# Employee Privacy - Continued

- The WCB and indirectly the employer may need the following information as part of the VR process:
  - Medical evidence showing the presence of a disabling condition
  - Medical evidence of limitations and restrictions
  - Medical evidence assisting in the development of an accommodation
  - Medical evidence supporting a proposed accommodation

Cont.

# Employee Privacy - Continued

- There are different requirements for different types of leave, WCB and DTA
- Each case is unique – each process is unique
- Know the requirements for each

Cont.

# Employee Privacy - Continued

- Is a MARP needed?
- **Medical And Return-to-Work Planning (MARPP) Assessment** - focuses on providing diagnostic clarification, establishing appropriate treatment options, and making return-to-work recommendations to injured workers via WCB

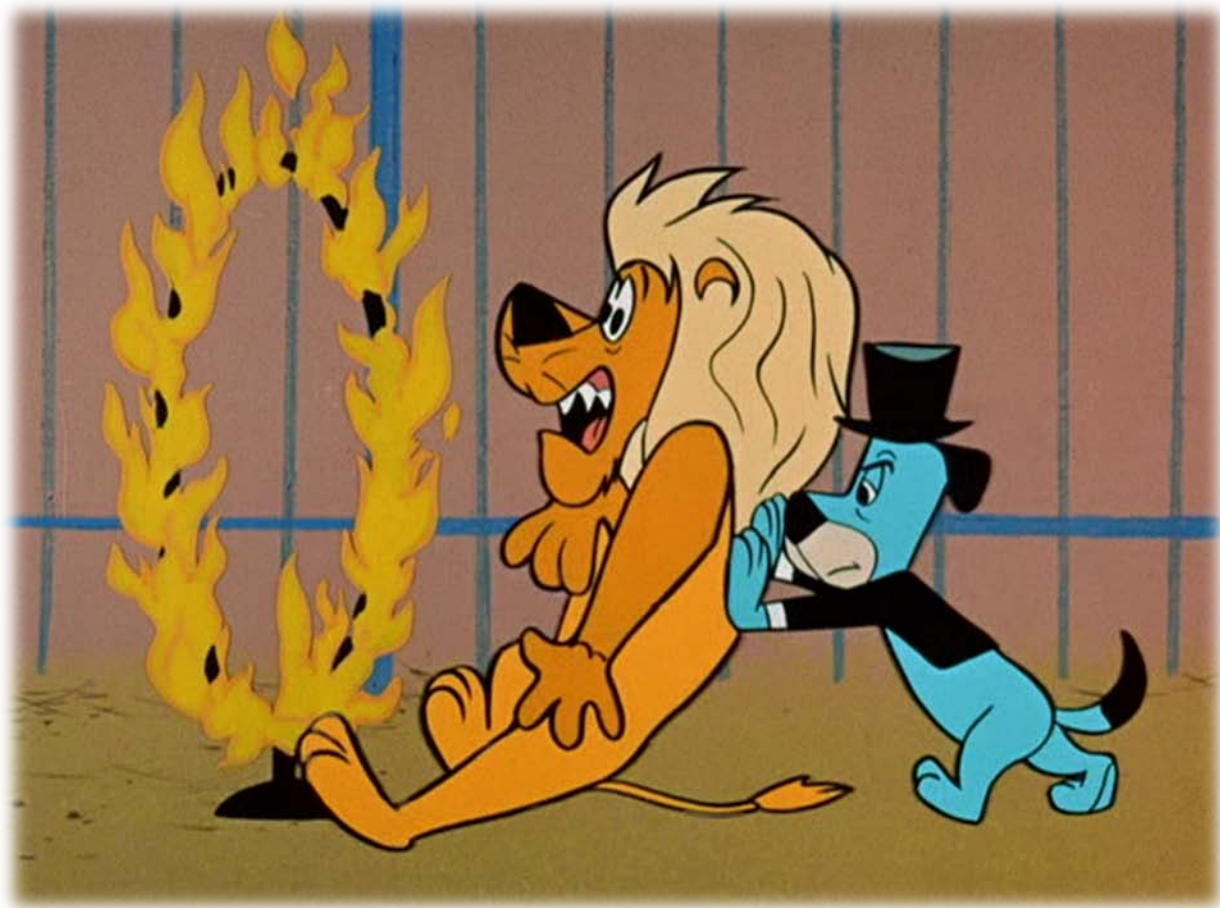
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# Employee Privacy - Continued

See:

[http://www.worksafebc.com/health\\_care\\_providers/programs\\_and\\_services/marp\\_assessment\\_service/default.asp](http://www.worksafebc.com/health_care_providers/programs_and_services/marp_assessment_service/default.asp)



# Rehabilitation and Return to Work in the DTA Context

## Compelling attendance in rehabilitation and return to work efforts

- “Compelling” participation is the wrong approach by employers
- “Compliance” is the wrong term
- Is the employee in the right process???
- What part of WWC Policy is being applied?
- Are the employee’s limitations and restrictions correct?
- Is the employee even aware of their responsibilities?  
How do you know?

# Rehabilitation and Return to Work - Continued

- The WCB and the employer should determine if the mental disability accounts for the perceived lack of cooperation
- The WCB should determine if further medical evidence is required – is the diagnosis correct?
- Does the employee's physician support the VR, RTW, GRTW, etc? Why or why not?

Cont.

# Rehabilitation and Return to Work - Continued

- The WCB – not the employer - can compel attendance in VR once the process has commenced and depending on the stage
- The WCB can compel attendance in SLE
- The employee has to cooperate with a JDA
- The employee has to cooperate with WC medical referrals



# Getting Employee Cooperation

**Options for employers –**

**What if there is non-compliance with rehabilitation and return to work efforts?**

- Process determines options – which one is it
- Is a re-referral to WCB Vocational Rehabilitation warranted?
- What did the MARP indicate?
- Is a Job Demands Analysis required?
- Is all the medical in?
- Does the employee's diagnosis act as a barrier?

# Getting Employee Cooperation - Continued

- Is there a need to have a second psychological assessment or referral?
- Does the WC claim need to be re-opened?
- Where an employee has not cooperated, and there are no disability related barriers to comprehension or participation, the WCB processes are usually suspended or terminated



# Getting Employee Cooperation - Continued

- Disability award (“pension”) determinations may be affected
- Need to consider what the Collective Agreement states, DTA law, etc.
- These should be considered during WCB involvement from the outset

Cont.

# Getting Employee Cooperation - Continued

- WC and human rights obligations are not sequential – they may need to occur in tandem
- Are the right people involved?
- Again – caution – is the disorder preventing comprehension and cooperation?

Cont.

# Questions?



# Closing Quote



***“Never look down on someone unless  
you’re helping them up.”***

***Reverend Jesse Jackson***

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