

See Section 25(2) of the OSH Act and Section 71(2) of the MSI Act.

Attendance by a WorkSafe or Resources Safety inspector

Upon being notified of an unresolved safety and health issue by an employer, safety and health representative or an employee, a WorkSafe inspector will attend the workplace 'forthwith'. WorkSafe's aim is to respond in the metropolitan area within two hours and for the remainder of the state within 24 hours. With unresolved issues at mines, a Resources Safety inspector shall attend a mine site 'without delay'.

The inspector, on being requested to attend a workplace, will enquire whether the parties have consulted each other according to the steps set out in the workplace 'relevant procedure'. Where there is not one, consultation must take place according to the procedure set out in Regulation 2.6 of the OSH Regulations or Regulation 2.5 of the MSI Regulations.

In reviewing the unresolved safety and health issue, an inspector:

- can take such action as they consider appropriate to resolve the issue. This may take the form of issuing a prohibition or improvement notice; or
- may take no action indicating that, in his or her opinion, the matter does not involve a contravention of the OSH Act, OSH Regulations, MSI Act or MSI Regulations.

See Section 25(2) of the OSH Act and Section 71(2) of the MSI Act.

6.3 Refusal to work

Under the OSH Act and MSI Act, employees may refuse to undertake some work where they have 'reasonable grounds' to believe there is a risk of imminent and serious injury or harm to health.

This ability, under the legislation, to refuse to undertake some work provides a means for a worker to remove themselves from an immediate risk of serious injury or harm. However, the employee must have reasonable grounds for believing the work is unsafe.

It is not always possible to be specific about what may constitute an immediate threat. Realistically, it relates to situations where there are concerns about the real probability of an accident, injury or harm occurring.

Factors to take into account when considering a refusal to work

Under Section 26(1a) of the OSH Act and Section 72(1a) of the MSI Act, there are certain factors that should be taken into account when considering whether or not reasonable grounds exist to support a belief that continuing to work would result in exposure to the risk of imminent and serious injury or harm to health. These factors include:

- whether a WorkSafe or Resources Safety inspector has attended the workplace as per Section 25(1) of the OSH Act or Section 71(1) of the MSI Act;
- what measures, if any, the WorkSafe or Resources Safety inspector required be taken to remove the risk;
- whether the measures specified by the WorkSafe or Resources Safety inspector have been implemented to remove the cause of the risk; or
- whether the WorkSafe or Resources Safety inspector has determined that no action is required under the legislation.

See Section 26 of the OSH Act and Section 72 of the MSI Act.

Once a risk of an immediate injury or harm to health has been identified, the steps to follow are:

Step one: notify the employer and safety and health representative (if there is one)

An employee who refuses to perform work must immediately notify their employer or mine manager and safety and health representative, where one exists.

The employer can give the employee other work to do, away from the danger – see the following step.

The employee is not to leave the workplace without the employer's approval, excepting where they have 'reasonable grounds' to believe that to remain there would result in exposure to a risk of imminent and serious injury or harm. In these situations, they are not required to wait for the employer's approval to leave the workplace.

Step two: resolve the issue according to the relevant procedure

Once the employer has been notified, the reason for the refusal to work automatically becomes an 'issue' to be resolved according to the 'relevant procedure' ie the issue resolution procedure.

Prompt consultation should take place. This may result in immediate resolution of the issue, or a confirmation of the action to cease work in the area.

See Sections 26(2) of the OSH Act and Section 72(2) of the MSI Act.

See Sections 26(2a) and 26(2b) of the OSH Act and Section 72(2a) and 72(2b) of the MSI Act.

See Section 24 of the OSH Act and Section 70 of the MSI Act.

Alternative work

An employee who refuses work:

- is not required to do it while the employer and the safety and health representative or, where there is not one, the employees attempt to resolve the issue;
- may be given 'reasonable' alternative work. This work must be away from the immediate risk. Additionally, the employee must be competent and capable of performing the alternative work for it to be considered reasonable. The factors that should be considered in determining whether alternative work is reasonable include:
 - the type of work available;
 - where the work is available;
 - the level of expertise required to perform the work; and
 - the instruction and training necessary prior to undertaking the work;
- may be required to remain in a safe place in the vicinity of the workplace while the issue is either resolved or reasonable alternative work is found;
- cannot be forced to do alternative work where there are reasonable grounds to believe that to do so would create an unsafe situation; and
- should be paid the same pay and other benefits they would normally receive where they perform alternative work. While the matter of payment should not affect the issue resolution process, the parties should be aware of the requirements of the OSH Act in regard to continuity of pay and benefits.

Before an employee commences any alternative work, where relevant, there should be consultation between the employer and the safety and health representative or, where there is not one, the employees to avoid or minimise the possibility of any disputes.

See Section 27 of the OSH Act and Section 73 of the MSI Act.

See Section 28 of the OSH Act and Section 74 of the MSI Act.

See Sections 28(1a), 26(2a) and 27 of the OSH Act and Sections 74(1a), 72(2a) and 73 of the MSI Act.

See Sections 28A and 26 of the OSH Act and Sections 74A and 72 of the MSI Act.

Pay and entitlements

An employee who refuses to work under Section 26(1) of the OSH Act or Section 72(1) of the MSI Act (ie because they have reasonable grounds to believe they would be exposed to a risk of imminent and serious injury or harm) is entitled to the same pay or benefits he or she would have received had the work continued.

An employee who leaves the workplace without the employer's approval (as required under the OSH Act and MSI Act) or who refuses alternate work (as also provided under the OSH Act and MSI Act) is not entitled to pay and other benefits for the period of that absence.

A dispute on the entitlements to pay and/or other benefits may be referred to the OSH Tribunal. However, this only applies where an employee has refused to work where they had reasonable grounds to believe there was an imminent or serious threat of injury or harm.

'Disentitled employees' not to receive pay

Under the OSH Act and MSI Act, there are two circumstances where an employee may be viewed as a 'disentitled employee' and not be entitled to pay or other benefits when they have refused to work, that is:

- where they do not have reasonable grounds to believe that to continue working would expose themselves or any other people to a risk of imminent and serious injury or harm, which is required under Section 26(1) of the OSH Act and Section 72(1) of the MSI Act, as applicable; or
- where they refuse to work on the grounds that another employee has done so, ie where they do not have grounds under Section 26(1) of the OSH Act or Section 72(1) of the MSI Act to stop work but do so in support of another employee who refuses to work.

An employee who meets the requirements of Section 26 of the OSH Act or Section 72 of the MSI Act, (ie does have reasonable grounds for believing there is a risk of imminent and serious injury) and is entitled to payment under Section 28(1) of the OSH Act or Section 74(1) of the MSI Act, has fulfilled the stop work provisions and is therefore not a disentitled employee.

An employee who is deemed to be a disentitled employee in accordance with Section 28A(1) of the OSH Act or Section 74A(1) of the MSI Act, and accepts pay or other benefits for any period not worked while so classified, commits an offence.

An employer who pays or provides other benefits for any period not worked by an employee while they are deemed to be a disentitled employee in accordance with Section 28A(1) of the OSH Act or Section 74A(1) of the MSI Act also commits an offence.

The above information is provided as a general guide only. Any dispute about these matters will be determined by the OSH Tribunal.

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