October 31, 2013

Caroline Read
Policy Analyst
Workers' Compensation Board of Nova Scotia
PO Box 1150
Halifax, Nova Scotia B3J 2Y2

Dear Caroline Read:

RE: Compensability of Workplace Stress

Please accept this submission on behalf of the Office of the Employer Advisor Nova Scotia Society and the undersigned employers.

The OEA NS is an independent society that provides employers with the following services: advocacy; education programs; current issues consultation; information regarding application and administration of WCB and OHS legislation, policies, procedures and practices; assistance with rate assessments; claims management and return to work; development of workplace policies; and WCB/OHS appeal support.

Between May and September 2013, the OEA held 13 consultation sessions with 278 employers and employer associations. Accounting for the membership of representative associations, the OEA consultations captured 24,854 (46.08% of total) assessed and non-assessed employers in Nova Scotia. Representation from non-assessed employers occurs where provisions in collective agreements require an employer to adjudicate claims according to WCB policy, despite an exemption from coverage under legislation.

Sector	Employers Represented at Consultation	% of Total Employers in NS
Agriculture	2,400	4.45%
Business	12,200	22.62%
Construction	6,110	11.33%
Education	81	0.15%
Forestry	640	1.19%
Government	22	0.04%
Health	1,747	3.24%
Manufacturing	110	0.20%
Professional Services	7	0.01%
Retail	132	0.24%
Transportation / Aviation	1,405	2.61%
Total	24,854	46.08%
NS Employers	53,933	

During the five months of consultation, the OEA met with senior staff and executive members of the WCB, employer representatives from the WCB Board of Directors, and OEA board members.

In this submission we shall make recommendations respecting the following five issues:

1. Issues arising from WCB Consultation Process
2. WCB Cannot Circumvent Legislation with Policy
3. Changes to Policy 1.3.6 Are Not Necessary – This Isn't a Federal Issue
4. Primary Risk - Lack of Clarity Respecting the Words "Reasonably and Objectively" Assessed
5. Primary Risk – "Extreme Workplace Harassment" is Not Defined

Issue #1: Issues Arising from WCB Consultation Process

- Employers expressed concern about the policy consultation process.
- The approach WCB selected is disproportionate to the potential impacts of the proposed policy

Recommendation: The OEA recommends that the WCB build confidence with stakeholders by engaging in a process of dialogue that creates opportunities for understanding stakeholder concerns. As payers of the System, Employers want to be consulted.

i. Implement consultation in alignment with WCB's *Vision, Mission and Values* which includes building confidence in the WCB by engaging workers and employers.
ii. Timeframes for consultation should be proportionate to the impacts of a proposed policy. The OEA submits that one month for consultation is insufficient to inform employers, elicit feedback, and provide a considered response. Meaningful consultation on a minor issue may require a 12-week time frame; longer for major issues.
iii. WCB should broaden the purpose of policy consultation. Employers may want to comment on the language of a policy draft, communicate possible unintended consequences, and provide feedback respecting implementation. In the case of psychological injury, if a policy is adopted by the Board employers request an opportunity to engage in meaningful consultation respecting implementation.
iv. Generally, the WCB ought to consider whether government is engaged in simultaneous consultation respecting issues relating to Occupational Health and Safety.

Employers expressed concern about the policy consultation process. The approach WCB selected is disproportionate to the potential impacts of the proposed policy. The decision to proceed with one stage of consultation emphasizes the disconnection between the government agency and business in Nova Scotia. The WCB made significant investments in building future

capacity through the creation of a service delivery model that intended to build stronger relationships with workplaces across Nova Scotia. Given the degree of interaction between the WCB and employers on matters related to claims adjudication, meaningful and inclusive consultation was necessary on this issue. Employers welcome the opportunity to participate in the development of all significant new policies in the future.

The OEA submits that consistent decision-making should be a key priority of the Workers' Compensation Board. That result is best achieved by a policy that sets out unambiguous criteria for the adjudication of psychological injury claims. In our view, the proposed Draft Policy does not define key terms which must be interpreted to determine eligibility for compensation. This uncertainty furthers inconsistent and unpredictable decisions that impose costs on the system. Unpredictability generates uncertainty and appeals.

In this submission, the OEA shall present WCB with options that mitigate the primary risk associated with the Draft Policy – legislative and appeal interpretations.

Employers and representative associations participated in OEA consultations in record numbers. The recommendations contained herein, represent the most salient issues identified by employers through our consultations. We ask the WCB not to underestimate the message from employers through this engagement.

Recommendation: The OEA recommends that the WCB build confidence with stakeholders by engaging in a process of dialogue that creates opportunities for understanding stakeholder concerns. As payers of the System, Employers want to be consulted.

v. Implement consultation in alignment with WCB's *Vision, Mission and Values* which includes building confidence in the WCB by engaging workers and employers.
vi. Timeframes for consultation should be proportionate to the impacts of a proposed policy. The OEA submits that one month for consultation is insufficient to inform employers, elicit feedback, and provide a considered response. Meaningful consultation on a minor issue may require a 12-week time frame; longer for major issues.
vii. WCB should broaden the purpose of policy consultation. Employers may want to comment on the language of a policy draft, communicate possible unintended consequences, and provide feedback respecting implementation. In the case of psychological injury, if a policy is adopted by the Board employers request an opportunity to engage in meaningful consultation respecting implementation.
viii. Generally, the WCB ought to consider whether government is engaged in simultaneous consultation respecting issues relating to Occupational Health and Safety.

Issue #2: WCB Cannot Circumvent Legislation with Policy

- The draft policy is proposing to broaden the definition of "accident".
- The words "acute reaction to a traumatic event" are unambiguous.
- "Cumulative reaction to multiple traumatic events" is inconsistent with the meaning of s.2(a).
- All policies adopted under the Act must be consistent with the Act and the regulations.

Recommendation: Circumventing legislation via policy exceeds WCB authority and the OEA recommends that WCB reconsider the approach chosen to address this issue. Where a policy adopted by the Board is inconsistent with legislation, appeal participants may avail themselves of s.183(5A) of the Act which states that a policy adopted by the Board is only binding on the Appeals Tribunal where the policy is consistent with the Act.

It is our position that the proposed policy on "cumulative stress" is inconsistent with section 2 of the *Workers' Compensation Act*.

Section 2(a) of the Act states:

"accident" includes

(i) a wilful and intentional act, not being the act of the worker claiming compensation,
(ii) a chance event occasioned by a physical or natural cause, or
(iii) disablement, including occupational disease, arising out of and in the course of employment,

but does not include stress other than an acute reaction to a traumatic event (Emphasis Added)

The draft policy is proposing to broaden the definition of "accident" under the Act to include a cumulative response to multiple traumatic events. Although section 2(a) of the Act clearly states that an accident only includes stress if it constitutes "an acute reaction to a traumatic event", the draft policy is suggesting that that phrase should be interpreted to cover a cumulative reaction to multiple traumatic events.

A plain reading of section 2(a) of the Act and the Draft Policy reveals inconsistencies. Section 2(a) is very clearly worded to exclude cumulative stress from the definition of "accident". Stress is only compensable if it is: "an acute reaction to a traumatic event". By using the singular language such as "a" and "event", the plain and ordinary meaning of this section is clearly to exclude stress that is caused by a culmination of events.

It is evident that the language of the Draft Policy that proposes that an accident include a cumulative response to multiple traumatic events is inconsistent with the plain and ordinary meaning of section 2(a) which is to cover only those stress claims that arise from “an acute reaction to a traumatic event”.

All policies adopted under the Act must be consistent with the Act and the regulations. This requirement is explicitly stated in section 183 of the Act:

> 183(1) For the purpose of this Act, “policy” means a written statement of policy adopted by the Board of Directors and designated by the Board of Directors in writing as a statement of policy, and “policies” has a like meaning.
>
> (2) The Board of Directors may adopt policies consistent with this part and the regulations to be followed in the application of this Part or the regulations.

Based on this analysis, there is an argument to be made that that the Draft Policy is inconsistent with section 2(a) of the act and therefore, invalid. Changing the eligibility requirements of s.2(a) constitutes a fundamental change that must be implemented by an amendment to the statute. If the WCB choose to adopt a Policy that is inconsistent with the legislation then appeal participants may avail themselves of s. 183(5A) of the Act which states that a policy adopted by the Board is only binding on the Appeals Tribunal where the policy is consistent with this Act.

The WCB has suggested that other jurisdictions with a similar exclusion in legislation have adopted “cumulative reaction to traumatic events” without challenge. The OEA submits that this conclusion should be approached with caution for the following reasons:

(i) appeal systems operate differently in other jurisdictions and in some instances (i.e. Ontario) policy issues are resolved at tribunal and judicial review before the court of appeal is rare; and

(ii) the absence of a change is not indicative of the risk. The exclusion (“acute reaction to a traumatic event”) was added to the Workers’ Compensation Act in 1996 but it took 17 years before the right facts presented an opportunity for a charter challenge.

Issue #3: Changes to Policy 1.3.6 Are Not Necessary - This Isn’t a Federal Issue

- The psychological injury issue before the Nova Scotia Court of Appeal does not concern GECA. The worker is seeking compensation under the provincial Workers’ Compensation Act.
- Policy 1.3.6 has been reviewed by the Nova Scotia Court of Appeal and survived judicial “checks and balances”

Recommendation: Leave Policy 1.3.6 alone.

Policy 1.3.6 compensates federal government employees for psychological injuries arising out of and in the course of employment. The policy was adopted in 2005 and sets out unambiguous adjudication criteria for both an acute reaction to a traumatic event and gradual onset stress. In the Program Policy Background Paper, WCB takes the position that the GECA Policy "could benefit from some minor wording change to bring it in line with the current environment" (at p.5). The OEA disagrees with this statement for the following reasons:

Policy 1.3.6 has been reviewed by the Nova Scotia Court of Appeal (the relevant cases are outlined under Issue #4). This means that three judges from the highest court in the province have provided judicial guidance and direction respecting the criteria adopted by WCB. Since the Policy adopted by WCB in 2005 has survived judicial "checks and balances" there is little room for "grey areas". In the words of Morneau Shepell, the "moving target" (legislative and appeal interpretations) is finally sitting still. Policy 1.3.6 is on solid ground.

When WCB states that the policy could benefit from "some minor wording change" the Board is actually changing the adjudication criteria. One word (for example: "and" versus "or") changes the criteria and by extension changes what is considered compensable under Policy 1.3.6. The OEA submits that a "minor" word change can have a significant impact. Changing the test sanctioned by the Court of Appeal and potentially increasing the volume of claims is not viewed by the OEA as a "minor" change.

The proposed changes also create a third category of compensable psychological injury titled "cumulative reaction to traumatic events". It is notable that this third category is an unnecessary creature of policy language. With all due respect, it appears to have been created by WCB to ensure language consistency between the provincial draft policy (which introduces cumulative reaction to traumatic events as a solution to the Dale matter before the NSCA) and federal Act policy that was adopted in 2005.

Furthermore, the inclusion of a third category of compensable stress (cumulative reaction) under the federal Act actually creates a new distinction between provincial and federal act employees. The proposed Policy Draft for adjudicating psychological injury claims under the *Workers' Compensation Act* would provide for the adjudication of the following:

(i) an acute reaction to traumatic event; and
(ii) cumulative reaction to traumatic event(s).

The proposed changes to Policy 1.3.6 under the Government Employees Compensation Act provides for the following:

(i) an acute reaction to traumatic event;
(ii) cumulative reaction to traumatic event(s); and
(iii) gradual onset stress.

Under the proposed framework there is a distinction in that federal government employees who work in Nova Scotia are compensated for a category of stress (gradual onset) that employees

under the jurisdiction of the *Workers' Compensation Act* are not entitled to. The OEA submits that WCB's approach potentially creates a future problem for provincial act stakeholders.

It is also notable that the WCB has not identified a gap in the adjudication of claims for federal government employees because "cumulative reaction to traumatic events" is currently adjudicated under gradual onset stress. The creation of a third category of compensable stress is a legal fiction whose purpose is to address a provincial problem.

In our view, the WCB's rationale for proposing minor changes to Policy 1.3.6 is weak. The current issue before the Nova Scotia Court of Appeal concerns a worker covered under the provincial Act who is seeking leave to appeal the constitutionality of the statutory definition of "accident". This issue has no application to workers covered under the Government Employees Compensation Act (GECA). Cumulative reaction to traumatic events is already compensable under gradual onset stress because traumatic events, by definition, are "unusual" and "excessive". Our experience respecting the adjudication of gradual onset claims supports this conclusion. Therefore, there is no need to revise Policy 1.3.6.

Issue #4: Primary Risk - Lack of Clarity Respecting the Words "Reasonably and Objectively" Assessed

- The words "reasonably and objectively assessed" are not defined
- All objective standards are not created equal
- A jurisdictional scan indicates that WCB is an outlier. The majority of Boards include a qualifier in the definition of traumatic event – the traumatic event must be uncommon with respect to the inherent risks of the occupation
- The words "unusual and excessive in comparison to the work-related events or stressors experienced by an average worker in the same or similar occupation" have survived judicial "checks and balances" in Nova Scotia

Recommendation: Add language that requires unusual and excessive in comparison to the work-related events or stressors experienced by an average worker in the same or similar occupation.

In the Draft Policy, the WCB proposes the following definition of 'traumatic event(s)"

> "Traumatic Event(s)" defined as a direct personal experience of an event or directly witnessing an event that, **reasonably and objectively** assessed, is:
>
> - Sudden;
> - Frightening or shocking;

- Having a specific time and place; and
- Involving actual or threatened death or serious injury to oneself or others or threat to one's physical integrity

The words "reasonably and objectively assessed" represent an objective standard. Generally, an "objective" standard means that the traumatic event is assessed "from the perspective of a reasonable neutral observer" and a "subjective" standard means that the traumatic event is assessed "from the perspective of the individual". It is relevant to this analysis that all objective standards *are not created equal*. The meaning of a specific objective standard is determined by the words used to qualify the position of the neutral observer.

When WCB presented stakeholders with a Draft Policy, the government agency selected the words "reasonably and objectively assessed" and determined that no qualifiers would be used to describe the position of the neutral observer. The OEA submits that this decision creates financial risk.

In the actuarial report titled "Estimated Cost Impact of Proposed Changes to Psychological Injury Policy", Morneau Shepell concluded at page 1:

> In our view, the primary risks associated with the proposed policy are twofold; subsequent **legislative interpretations and appeal decisions** expanding the scope of the coverage beyond what was thought to be the original intent, and incidence in Nova Scotia that is materially higher than elsewhere. (Emphasis Added)

Morneau Shepell then state:

> The risk of expanding coverage is primarily a legal or operational issue and is not necessarily driven by adopting a clear policy outlining what the legislation covers.

The OEA is concerned about this second statement because our analysis supports a different conclusion. While we might agree that the process of drafting consistent and coherent legislation is becoming more complicated, the conclusion "that expanding coverage is not necessarily driven by adopting clear policy" does not follow. It is a function of legislative drafting, policy writing and legal precedent to provide clarity. Legislation and policy exist alongside statutory rules of interpretation and case law. The primary risk associated with subsequent legislative interpretations and appeal decisions can be mitigated by considering the policy language adopted in other jurisdictions and the relevant case law.

The OEA conducted a jurisdictional scan to determine the policy language adopted by other provinces and territories for non-GECA stress claims:

British Columbia	s.5.1 *Act* Subject to subsection (2), a worker is entitled to compensation for a mental disorder that does not result from an injury for which the worker is otherwise entitled to compensation, only if the mental disorder (a) either (i)

<table>
<tr><td></td><td>is a reaction to one or more traumatic events arising out of and in the course of the worker’s employment, or (ii) 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 the worker’s employment</td></tr>
<tr><td>Manitoba</td><td>Non-Compensable Psychological Injuries

Psychological injuries that occur as a result of burn-out or the daily pressures or stressors of work will not give rise to a compensable claim. The daily pressures or stressors of work do not fall within any part of the definition of accident because there is no chance event, no wilful and intentional act and no traumatic event.</td></tr>
<tr><td>New Brunswick</td><td>Acute reactions may be caused by sudden and unexpected traumatic events such as:
A direct personal observation of an actual or threatened death or serious injury;
An actual experience of or threat of serious injury or violence;
Witnessing or experiencing a horrific accident;
Witnessing or being involved in a hostage taking; or
Witnessing or being involved in an armed robbery.
In the vast majority of cases, but not all cases, the traumatic event experienced by the worker typically is unusual and excessive in comparison to the work-related events or stressors experienced by an average worker in the same or similar occupation.</td></tr>
<tr><td>Newfoundland and Labrador</td><td>Traumatic Event

A sudden and unexpected traumatic event is one which is considered uncommon with respect to the inherent risks of the occupation and is usually horrific, or has elements of actual or potential violence.

Examples of traumatic events include but are not limited to
Witnessing a fatality
Being the victim of an armed robbery or hostage-taking incident,
Being subjected to physical violence
Being subjected to death threats where there is reason to believe the threat is serious</td></tr>
<tr><td>Northwest Territories and Nunavut</td><td>Acute reaction: A sudden and severe reaction by a worker to a single or a series of work-related, traumatic events that have a psychiatric or psychological response.
…

The event must arise out of and during the course of employment and be:</td></tr>
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based on reasonable and credible evidence;
objectively traumatic;
unexpected in the usual or daily course of the worker’s employment or work environment;

...

The WSCC will consider claims for psychiatric or psychological disability arising out of and during the course of employment under the following conditions.

The circumstances giving rise to the claim do not result from the usual pressures and tensions reasonably expected by the nature of the worker’s occupation and duties …

</td></tr>
<tr><td>Ontario</td><td>
In order to consider entitlement for traumatic mental stress, a decision-maker must identify that a sudden and traumatic event occurred. A traumatic event may be the result of a criminal act, harassment, or a horrific accident, and may involve actual or threatened death or serious harm against the worker, a co-worker, a worker’s family member, or others.

In all cases, the event must arise out of and in the course of employment, and be

Clearly and precisely identifiable
Objectively traumatic, and
Unexpected in the normal or daily course of the worker’s employment or work environment

…
</td></tr>
<tr><td>Prince Edward Island</td><td>
“Traumatic event” means a sudden, unexpected, horrific and unusual event that is excessive in comparison to the work related events or stressors experienced by an average worker in the same or similar occupation
</td></tr>
<tr><td>Saskatchewan</td><td>
Acute Cause Criteria

1.Generally, for acute cause claims to be accepted all three of the following criteria must be met:

(a) there is a specific, dramatic or sudden event which the worker personally witnessed and/or was involved in;

(b) the event will be unexpected for the type of employment and generally accepted to be traumatic (shocking, horrific, involving risk of harm or self or others); and

(c) the onset of the effect is often immediate or close in time to the event
</td></tr>
<tr><td>Yukon</td><td>
Traumatic Event: a sudden and unexpected traumatic event is one which is considered uncommon with respect to the inherent risks of the
</td></tr>
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	occupation and is usually horrific, or has elements of actual or potential violence…

The jurisdictional scan indicates that WCB of Nova Scotia is an outlier in that the majority of Boards include a qualifier in the definition of traumatic event – **the traumatic event must be uncommon with respect to the inherent risks of the occupation.** The OEA submits that a qualifier is important because, in the context of psychological injury adjudication the words "reasonably and objective assessed" have not been considered by the Court of Appeal.

Is there an opportunity for WCB to mitigate the "primary risk" identified by Morneau Shepell? The answer is yes because the Nova Scotia Court of Appeal has considered the following words: "the work-related events or stressors are unusual and excessive in comparison to the work-related events or stressors experienced by an average worker in the same or similar occupation".

Although this standard applies to the adjudication of gradual onset stress under Policy 1.3.6 for federal government employees, it is the standard that New Brunswick applies to the adjudication of a traumatic event and it could be incorporated into our definition in Nova Scotia.

Embanks v. Nova Scotia (Workers' Compensation Appeals Tribunal), 2008 NSCA 28

In 2008, the Nova Scotia Court of Appeal considered the following question: In deciding the worker's gradual onset stress claim under GECA is it wrong to assess the nature of workplace events and stressors from an objective point of view?

At paragraphs 2,8 and 41 Nova Scotia Court of Appeal concluded:

> 2. WCAT correctly decided that compensable gradual onset stress requires that there have been work-related events or stressors that are **unusual and excessive viewed objectively, that is, in comparison to those experienced by an average worker in the same or similar occupation.**
>
> 8. For the reasons which follow, my view is that WCAT correctly applied the objective approach to determining whether there were workplace events or stressors sufficient to support a claim for gradual onset stress under GECA and that such an approach was the correct one, both under Policy 1.3.6 and under the general law applying to GECA claims in Nova Scotia. **This approach is consistent with and furthers the underlying purposes and scheme of the statute**.
>
> 41. In summary, WCAT did not err by considering whether stressors experienced by the worker had been unusual and excessive on an objective basis in the sense that they are compared to the work-related events or stressors experienced by an average worker in the same or similar occupation. This requirement, now embodied in Board Policy 1.3.6, **sets out the better view of the law that applies even in the absence of the Policy**.

In the *Embanks* case, the Nova Scotia Court of Appeal dealt with the interpretation of the words "unusual and excessive in comparison to the work-related events or stressors experienced by an average worker in the same or similar occupation". The OEA submits that the primary risk associated with the proposed policy (subsequent legislative interpretations and appeal decisions expanding the scope of the coverage beyond what was thought to be the original intent) may be mitigated by choosing an objective standard that would avoid interpretations that may expand the scope of coverage beyond what was thought to be the original intent.

Bishop v. Nova Scotia (Workers' Compensation Appeals Tribunal), 2012 NSCA 95

In 2012, the Nova Scotia Court of Appeal considered meaning of the words "an average worker in the same or similar occupation". The Court found that WCAT was wrong to assess the worker's stress exposures to those of others **in the same workplace**. Instead, the Court of Appeal found that the policy requires a comparison of stressors experienced by an average worker **in the same or similar occupation**.

Bishop is important to this discussion because it established the correctness of a specific rule. The Court of Appeal held that it is correct to compare stressors (events) experienced by a worker in Cape Breton and with stressors (events) experienced by workers in coal mines across North America.

Since the Nova Scotia Court of Appeal has interpreted the meaning of the words "the work-related events or stressors are unusual and excessive in comparison to the work-related events or stressors experienced by an average worker in the same or similar occupation" the primary risk identified by Morneau Shepell is mitigated. Therefore, it would be prudent for WCB to incorporate this objective standard into the Draft Policy.

Issue #5: Primary Risks – "Extreme Workplace Harassment" is Not Defined

- It is not necessary to identify "extreme workplace harassment" as an example of a traumatic event.
- In the alternative, if WCB determines that the words "extreme workplace harassment" will be added to policy then the words should be defined. In the absence of a definition, decision-makers have no criteria to determine eligibility.
- This is a primary risk – open to appeal interpretation.

Recommendation: Remove all references to "extreme workplace harassment".

In the alternative, adopt the definition of harassment used by WSIB Ontario:

- Being the object of harassment includes physical violence or threats of physical violence

(e.g the escalation of verbal abuse into traumatic physical abuse)
- Being the object of harassment that includes being placed in a life-threatening or potentially life-threatening situation (e.g. tampering with safety equipment; causing the worker to do something dangerous).

In the Draft Policy, the WCB provides the following examples of a traumatic event:

Examples of Traumatic events may include, but are not limited to

- Incidents of **extreme workplace harassment**
- Actual or threatened violent physical assault
- Witnessing or being involved in a hostage taking / armed robbery
- Witnessing or experiencing a horrific accident

In our view, it is not necessary to include "extreme workplace harassment" as an example of a traumatic event. Generally, "events" which are compensable under psychological injury policies entail threats to physical integrity or witnessing a horrific accident. This is a common element of traumatic, cumulative and gradual onset psychological injury. To provide examples in policy is unnecessary.

In the alternative, should the WCB decide to include the words, "extreme workplace harassment" a definition is necessary. The OEA submits that the absence of a definition is an example of a "primary risk" identified by Morneau Shepell.

The primary risk is associated with subsequent legislative interpretations and appeal decisions expanding the scope of coverage beyond what was thought to be the original intent of the proposed policy. This risk can be mitigated with a definition. The OEA conducted a jurisdictional scan to determine the policy language adopted by other provinces and territories that identify workplace harassment in their psychological injury policies.

Ontario and Northwest Territories define harassment in their psychological injury policies as follows:

- Being the object of harassment includes physical violence or threats of physical violence (e.g. the escalation of verbal abuse into traumatic physical abuse)
- Being the object of harassment that includes being placed in a life-threatening or potentially life-threatening situation (e.g. tampering with safety equipment; causing the worker to do something dangerous).

This definition is consistent with our history of traumatic event adjudication in that the event represents a threat to physical integrity. In the absence of a definition, the type of conduct that will qualify as "extreme workplace harassment" remains to be seen.

However, from a consolidated regulatory perspective it may be prudent for WCB to consider the definition of workplace “violence” under section 2(f) of the Violence in the Workplace Regulations:

> “violence” means any of the following: (i) threats, including a threatening statement or threatening behaviour that gives an employee reasonable cause to believe that the employee is at risk of a physical injury, (ii) conduct or attempted conduct of a person that endangers the physical health or physical safety of an employee.

One reason policy writers define a word or phrase is to provide clarity by including or excluding a meaning the word would or would not ordinarily have. The Centre for Occupational Health and Safety defines “bullying and harassment” as follows:

> (a) Includes any inappropriate vexatious conduct or comment by a person towards a worker that the person knew or reasonably ought to have known would cause that worker to be humiliated, offended or intimidated, but
> (b) Excludes any reasonable action taken by an employer or supervisor relating to the management and direction of workers in the place of employment.

The above noted examples of “harassment” illustrates that the “ordinary” meaning varies. Harassment may be “inappropriate vexatious conduct” or “traumatic physical abuse”. The OEA submits that a definition is necessary to either (a) exclude some meaning that it is not intended; and/or (b) include some meaning it might not ordinarily have. If the words “extreme workplace harassment” are not defined then decision-makers have no criteria to determine eligibility for a traumatic psychological injury. The absence of a definition supports Morneau Shepell’s position that **legislative interpretations and appeal decisions** are a primary risk. The absence of a definition is the “moving target”. The OEA takes the position that a definition mitigates that risk.

Recommendation: The OEA recommends that the WCB remove all references to “extreme workplace harassment”.

In the alternative, the OEA recommends that the WCB consider adopting the definition of harassment used by the Worksafe Insurance Board of Ontario:

- Being the object of harassment includes physical violence or threats of physical violence (e.g. the escalation of verbal abuse into traumatic physical abuse)
- Being the object of harassment that includes being placed in a life-threatening or potentially life-threatening situation (e.g. tampering with safety equipment; causing the worker to do something dangerous).

Summary of Issues

The OEA identified five major issues associated with this policy consultation:

Issue #1: Issues Arising from WCB Consultation Process

- Employers expressed concern about the policy consultation process.
- The approach WCB selected is disproportionate to the potential impacts of the proposed policy

Recommendation: The OEA recommends that the WCB build confidence with stakeholders by engaging in a process of dialogue that creates opportunities for understanding stakeholder concerns. As payers of the System, Employers want to be consulted.

i. Implement consultation in alignment with WCB's *Vision, Mission and Values* which includes building confidence in the WCB by engaging workers and employers.
ii. Timeframes for consultation should be proportionate to the impacts of a proposed policy. The OEA submits that one month for consultation is insufficient to inform employers, elicit feedback, and provide a considered response. Meaningful consultation on a minor issue may require a 12-week time frame; longer for major issues.
iii. WCB should broaden the purpose of policy consultation. Employers may want to comment on the language of a policy draft, communicate possible unintended consequences, and provide feedback respecting implementation. In the case of psychological injury, if a policy is adopted by the Board employers request an opportunity to engage in meaningful consultation respecting implementation.
iv. Generally, the WCB ought to consider whether government is engaged in simultaneous consultation respecting issues relating to Occupational Health and Safety.

Issue #2: WCB Cannot Circumvent Legislation with Policy

- The draft policy is proposing to broaden the definition of "accident".
- The words "acute reaction to a traumatic event" are unambiguous.
- "Cumulative reaction to multiple traumatic events" is inconsistent with the meaning of s.2(a).
- All policies adopted under the Act must be consistent with the Act and the regulations.

Recommendation: Circumventing legislation via policy exceeds WCB authority and the OEA recommends that WCB reconsider the approach chosen to address this issue. Where a policy adopted by the Board is inconsistent with legislation, appeal participants may avail themselves of s.183(5A) of the Act which states that a policy adopted by the Board is only binding on the Appeals Tribunal where the policy is consistent with the Act.

Issue #3: Changes to Policy 1.3.6 Are Not Necessary - This Isn't a Federal Issue

- The psychological injury issue before the Nova Scotia Court of Appeal does not concern GECA.
- The worker is seeking compensation under the provincial Workers' Compensation Act.
- Policy 1.3.6 has been reviewed by the Nova Scotia Court of Appeal and survived judicial "checks and balances"

Recommendation: Leave Policy 1.3.6 alone.

Issue #4: Primary Risks - Lack of Clarity Respecting the Words "Reasonably and Objectively" Assessed

- The words "reasonably and objectively assessed" are not defined
- All objective standards are not created equal
- A jurisdictional scan indicates that WCB is an outlier. The majority of Boards include a qualifier in the definition of traumatic event – the traumatic event must be uncommon with respect to the inherent risks of the occupation
- The words "unusual and excessive in comparison to the work-related events or stressors experienced by an average worker in the same or similar occupation" have survived judicial "checks and balances" in Nova Scotia

Recommendation: Add language that requires unusual and excessive in comparison to the work-related events or stressors experienced by an average worker in the same or similar occupation.

Issue #5: Primary Risks – "Extreme Workplace Harassment" is Not Defined

- If the words "extreme workplace harassment" are not defined then decision-makers have no criteria to determine eligibility for a traumatic psychological injury.
- This is a primary risk – open to appeal interpretation.

Recommendation: Remove all references to harassment from the policy.

Recommendation: In the alternative, adopt the definition used by Ontario.

  - Being the object of harassment includes physical violence or threats of physical violence (e.g. the escalation of verbal abuse into traumatic physical abuse)
  - Being the object of harassment that includes being placed in a life-threatening or potentially life-threatening situation (e.g. tampering with safety equipment; causing the worker to do something dangerous).