Office of the Employer Advisor Nova Scotia Society

October 31, 2013

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

Dear Nancy Stacey:

RE: Minor Revisions to Program Policies Related to Contractors and Subcontractors

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.

Employers expressed concern about the policy consultation process. On June 3, 2013 the WCB released the Program Policy Background Paper and requested feedback by July 5, 2013. Despite Policy 10.3.11 that gives the Board authority to post a draft policy and related background information on the WCB website for 30 days to allow for stakeholder input, the decision to proceed with minimum consultation limits stakeholder participation.

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 assessments, meaningful and inclusive consultation ought to be a desirable objective for the Workers' Compensation Board.

Employers welcome the opportunity to participate in a two-stage process in the future.

Issue #1: Minor Revisions to Program Policies

- The WCB is concerned that the WCAT decision will have the following impacts: (1) fewer workers will have workers' **compensation coverage**; (2) reduced capacity to the WCB to **collect assessment premiums** in arrears

- According to WCB's criteria, the definition of sub/contractor is not a "minor issue".

Recommendation: The OEA recommends that the WCB initiate and sustain constructive relationships with stakeholders by engaging in a two way process of dialogue that creates opportunities for understanding stakeholder concerns.

The Program Policy Background Paper is subtitled: "*Minor revisions to program policies related to contractors and subcontractors*". The WCB has published a Policy Consultation Strategy that defines major versus minor policy issues. According to that document, a policy issue is considered minor if it satisfies one or more of the following criteria:

- Housekeeping change (i.e corrections to grammatical errors, policy reference number updates, etc.)
- No change in policy intent
- No financial impact on the system
- No impact on benefit or rate levels
- No impact on entitlement
- Issue appears neutral – no strong views either way have been expressed

The OEA submits that the definition of sub/contractor is not a "minor issue" and this position is supported by the following statements, at page 6, of the Program Policy Background Paper:

> If no action is taken, the WCB believes that the more restrictive interpretation arising from the Appeal System will "stick"
>
> This interpretation will have the following impacts: (1) fewer workers will have workers' **compensation coverage**; (2) reduced capacity to the WCB to **collect assessment premiums** in arrears

If the definition of sub/contractor necessarily entails (i) compensation coverage; and (2) collection of "assessment premiums" then it does not meet the WCB's definition of a "minor" policy issue.

Recommendation: The OEA recommends that the WCB initial and sustain constructive relationships with stakeholders by engaging in a two way process of dialogue that creates opportunities for understanding stakeholder concerns.

Issue #2: Assumptions Respecting Universal Coverage

- Universal coverage is not a basic principle of workers' compensation in Nova Scotia.
- The WCB is concerned that the more restrictive definition of subcontractor arising from the Appeal System will "stick".
- This means that "fewer workers will have workers' compensation coverage".

Recommendation: Assumptions respecting universal coverage should be tested through stakeholder consultation.

At p.6 of the Policy Consultation document the WCB states:

> If no action is taken, the WCB believes that the more restrictive interpretation arising from the Appeal System will "stick"
>
> This interpretation will have the following impacts: (1) fewer workers will have workers' compensation coverage; (2) reduced capacity of the WCB to collect assessment premiums in arrears

A similar statement is found at page 5:

> At the time of its approval in 1999 [Policy 9.3.1], this policy served to codify this decade's long practice, with the intent of ensuring as much work activity as possible is covered by the *Act.*

Universal coverage is not a basic principle of workers' compensation in Nova Scotia. The legislative drafters determined that some industries would be mandatory and others, generally low risk, would be excluded. Respectfully, the Board's stated objective – *to ensure as much work activity as possible is covered under the Act* – falls under the authority of the legislature, not the administrators of legislation.

Furthermore, WCB has not consulted with stakeholders respecting this issue. We submit that the Program Policy Background Paper ought to frame issues, such as maximizing coverage under the Act, as a question: *Do employers agree with the premise that more coverage under workers' compensation, rather than a private market alternative or the individual choice to assume liability, is desirable?*

The consultation document positions an assumption (that more coverage is desirable), as though it is a forgone conclusion. Respectfully, policy consultation ought to entail interest and concern for the opinions and positions of all stakeholders.

Recommendation: Assumptions respecting universal coverage should be tested through stakeholder consultation.

Issue #3: The OEA Agrees with the Appeal System Decision

- According to WCAT, a subcontractor provides a service which is necessary or integral to fulfilling the main contract.
- To include ancillary or indirect service providers under the reporting requirements leads to absurd results.
- The proposed subcontractor reporting requirement essentially "forces" independent operators and small business to seek voluntary coverage under workers' compensation.

Recommendation: WCB adopt the WCAT definition of subcontractor that requires a principal to report services providers who are **integral to fulfilling the main contract**.

It is our understanding that the WCAT decision referenced in the Program Policy Background Paper is WCAT 2010-656-AD; 2012-196-AD; and 2012-665-AD. In that decision, the Workers' Compensation Appeals Tribunal adopted the reasoning of the Hearing Officer:

> …a subcontractor provides a service which is necessary or integral to **fulfilling the main contract**, while some **service providers provide ancillary or indirect services**. Such services are not directly connected to the service being provided to a client. To include such service providers as subcontractors would lead to absurd results. Therefore, she excluded such service providers from the definition of subcontractor.

In this decision, the Tribunal distinguishes between integral and ancillary service providers. The OEA agrees with this distinction because including all ancillary services providers essentially eliminates the three person rule under the General Regulations. In our view, this is an "end run" around the legislation n and an example of, in WCAT words, an "absurd result".

Section 15 of the General Regulations states that every business or undertaking is excluded from the application of the Act until at least three workers are at the same time employed in the business or undertaking. This is what is referred to as the "3 person rule". However, the "3 person rule" does not apply in the circumstances outlined under section 16 of the General Regulations:

> Where a business or undertaking is being carried on
>
> (a) partly by the employer and partly by one or more contractors; or
> (b) entirely by two or more contractors of an employer
>
> the business or undertaking **is not excluded** from the application of the Act after the time **three or more workers are at the same time employed in the business or undertaking**

If WCB takes the position that <u>all</u> employers must report the labour portion of all contracts that are integral and incidental to the business or undertaking then, to mitigate financial liability, employers will demand that small business operators, who are excluded under the three person rule, provide a Clearance Letter. This "forces" small business to seek out voluntary coverage under workers' compensation. In effect, it is an end run around the exclusion in section 16 of the General Regulations for the purpose of ensuring that more workers have workers' compensation coverage.

<u>Recommendation</u>: THE OEA recommends that the WCB adopt the WCAT definition of subcontractor that only requires a principal to report services providers who are integral to fulfilling the main contract.

<u>Issue #4: Who is a Principal?</u>

- WCB's interpretation of the words "principal" and "employer" expands the scope of authority beyond what the legislation allows.
- According to the legislation, principals are employers for the purpose of sections 140 and 141 of the Act but not all employers are principals.
- This is a relevant distinction because it limits the WCB's assessment authority under section 140 and 141 to "principals".

<u>Recommendation</u>: WCB's use the word principal should be consistent with section 140 of the Act.

In this section, Employers shall demonstrate that the WCB's interpretation of the words "principal" and "employer" expands the scope of authority beyond what the legislation allows in sections 2(n) and 140(1) of the Act.

Section 140(1) of the Act provides WCB with specific authority respecting liability for assessments:

> Where a **contractor** undertakes any work for a **principal** in an industry to which this Part applies, both the contractor and the principal are liable for any assessment the Board may levy in respect of any work performed for the principal by the contractor.

In section 140(1), the legislature intentionally used the word "principal" rather than the word "employer" because there is a relevant distinction between a "principal" and an "employer" under the Act. The OEA submits that WCB is incorrectly replacing the word "principal" with the word "employer" which expands the scope of WCB's assessment authority.

For example, at page two of the Program Policy Background Paper, the WCB states:

> As part of carrying out their operations many **employers** hire **persons or firms**, in addition to their employees, to carry out work for their business. Generally speaking the **hiring employer is considered a "principal**" and the person that has been hired is a "contractor".

We disagree with this statement. If we import the language of section 140(1) into this statement it should read as follows:

> As part of carrying out their operations many ~~employers~~ **principals** hire ~~persons or firms~~ **contractors**, in addition to their employees, to carry out work for their business. Generally speaking the hiring ~~employer~~ **principal** is considered a "principal" and the person that has been hired is a "contractor".

The OEA submits that:

1. Every principal (subject to the Act) who hires a contractor is an employer for the purpose of sections 140 and 141; however
2. Not every employer who hires a contractor is a principal.

This position is consistent with the definition of "employer" under section 2(n) of Act. The legislation states that "employer" means the principal, contractor and subcontractor referred to in sections 140 and 141. Therefore, a "principal" is an employer for the purposes of section 140 and 141 of the Act, if the principal is in a mandatory industry and hires a contractor.

Essentially, principals are employers for the purpose of sections 140 and 141 but not all employers are principals. To further illustrate the point, section 2(n)(iv) states that "employer" includes a municipal corporation. It is correct to state that all municipal corporations are employers under the Act but it is not correct to state that all employers are municipal corporations.

This is a relevant distinction because it limits the WCB's assessment authority to "principals" who hire contractors. In our opinion, the Board's effort to assess all employers who hire contractors, by calling all employers principals, exceeds authority under the legislation.

Turning to the relevant WCAT decision referenced in the Program Policy Background Paper, in WCAT 2010-656-AD; 2012-196-AD; and 2012-665-AD the Workers' Compensation Appeals Tribunal adopted the reasoning of the Hearing Officer:

> …a subcontractor provides a service which is necessary or integral to **fulfilling the main contract**, while some service providers provide ancillary or indirect services. Such services are not directly connected to the service being provided to a client. To include such service providers as subcontractors would lead to absurd results. Therefore, she excluded such service providers from the definition of subcontractor.
>
> …it makes sense that 'contractors hired by the **firm** only includes those who have been retained to help carry out a **specific contract** and not the various vendors and general service providers with which the firm may deal to maintain its general operations.

In this case, the Hearing Officer and WCAT drew a distinction between the words "firm" and "employer". In our view, the correct terminology is "principal" rather than "firm" because that is consistent with the language set out under section 140 of the legislation.

WCB appears to take the position that every employer in a mandatory industry is a "principal" for the purpose of assessments. The OEA respectfully submits that the legislation does not support that argument. The legislation supports the position that all "principals" are required to submit contractor reports (and contractors submit subcontractor reports).

Recommendation: The OEA recommends that the WCB use the word "principal" in a manner that is consistent with section 140 of the Act.

Issue #5: The Error is Contained in Policy

- The WCB has incorrectly used the word "principal" throughout the policy consultation documents.
- For example, WCB states that a covered **employer** which hires contractors is considered a **principal.** Section 2 and section 140 of the Act state that a covered **principal** which hires contractors is considered an **employer.**

Recommendation: Revise the policy documents under consideration in this consultation to reflect the correct use of the terms "principal" and "employer".

The OEA submits that the WCB carried this error into policy documents. The following two examples are intended to illustrate the problem which appears in both the original drafting and the proposed changes for every policy identified in this consultation.

Example #1

The proposed changes to section 2 of Policy 9.1.3R read as follows:

> A covered **employer** which hires contractors is considered a **principal**. A covered employer who is a contractor may hire subcontractors.

Importing the language under sections 2(n) and 140(1) of the Act, this section should read as follows:

> A covered **principal** which hires contractors is considered an **employer**. ~~A covered employer who is a contractor may hire subcontractors.~~

We note that the second sentence is not necessary because businesses, firms, undertakings and employers may hire contractors without a statement in WCB policy. The word 'principal" appears to be used correctly throughout the remainder of the policy draft.

Example #2

The proposed changes to Policy 9.5.4R1 (sections 1 and 2) read as follows:

1. Where a covered **employer** has hired contractors or subcontractors during the year, a listing of all contractors or subcontractors hired by the employer must be submitted to the WCB by the last day of March following the assessment year.
2. **Employers** who fail to report contractor or subcontractor information to the Workers' Compensation Board by the last day of March following the assessment year, shall be levied a $50 charge.

These sections should read as follows:

1. Where a covered ~~employer~~ **principal** has hired contractors or subcontractors during the year, a listing of all contractors or subcontractors hired by the ~~employer~~ **principal** must be submitted to the WCB by the last day of March following the assessment year.
2. ~~Employers~~ **Principals** who fail to report contractor or subcontractor information to the Workers' Compensation Board by the last day of March following the assessment year, shall be levied a $50 charge.

The OEA submits that it is incorrect for WCB to adopt the position that all employers are principals under the *Workers' Compensation Act*. Taking that position leads to the "absurd results" referenced by WCAT in the relevant tribunal decision. In reality, most, if not all, covered employers hire contractors or subcontractors during the course of conducting business. To state that all employers are to be assessed on the labour portion of all work performed by sub/contractors (subject to the rules articulated) essentially eliminates the three person rule. The OEA views this as an end run around the exemption in legislation.

Recommendation: The OEA recommends revision of the policy documents under consideration in this consultation to reflect the correct use of the terms “principal” and “employer”.

Summary of Issues

In summary, the OEA identified five major issues in relation to this policy consultation:

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- According to WCB’s criteria, the definition of sub/contractor is not a “minor issue”.

Recommendation: The OEA recommends that the WCB initiate and sustain constructive relationships with stakeholders by engaging in a two way process of dialogue that creates opportunities for understanding stakeholder concerns.

Issue #2: Assumptions Respecting Universal Coverage

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Recommendation: Assumptions respecting universal coverage should be tested through stakeholder consultation.

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- To include ancillary or indirect service providers under the reporting requirements leads to absurd results.
- The proposed subcontractor reporting requirement essentially “forces” independent operators and small business to seek voluntary coverage under workers’ compensation.

Recommendation: THE OEA recommends that the WCB adopt the WCAT definition of subcontractor that only requires a principal to report services providers who are integral to

Issue #4: Who is a Principal?

- WCB’s interpretation of the words “principal” and “employer” expands the scope of authority beyond what the legislation allows.

- According to the legislation, principals are employers for the purpose of sections 140 and 141 of the Act but not all employers are principals.
- This is a relevant distinction because it limits the WCB's assessment authority under section 140 and 141 to "principals".

Recommendation: WCB's use the word principal should be consistent with section 140 of the Act.

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- The WCB has incorrectly used the word "principal" throughout the policy consultation documents.
- For example, WCB states that a covered **employer** which hires contractors is considered a **principal.** Section 140 of the Act states that a covered **principal** which hires contractors is considered an **employer.**

Recommendation: That the WCB undertakes a revision of the policy documents under consideration in this consultation to reflect the correct use of the terms "principal" and "employer".