WORK SAFE. FOR LIFE.
WORKERS' COMPENSATION BOARD OF NOVA SCOTIA

Minor Revisions to Contractor Policies:

Final Program Policy Decision and Supporting Rationale

Date: January 16, 2014

I - Introduction:

In September 2012 the WCB Board of Directors (the "Board") added the topic of the clarification of the meaning of the terms "contractor" and "subcontractor", in WCB program policies, to the Revolving Program Policy Agenda. The topic was added to the agenda because the Appeal System[1] had adopted an interpretation of the terms that was more restrictive than the WCB's long-standing interpretation of the terms. If a more restrictive interpretation of the terms became ingrained in the compensation system, fewer persons or firms would be considered contractors or subcontractors. This means the contractor and subcontractor provisions in the *Workers' Compensation Act* (the "*Act*") and program policy would apply to fewer employers and workers. As a result, fewer workers would have compensation coverage and fewer employers would be protected by the *Act* from being sued for the costs of a workplace injury.

On June 6th, 2013 the document entitled "*Program Policy Background Paper: Minor revisions to program policies related to contractors and subcontractors"* and draft program policies were mailed to individuals on the key stakeholder mailing list and initially posted to the WCB website for a period of 30 days. At the request of employer stakeholders, the deadline for submissions was extended to October 31, 2013. The policies impacted by the revisions are:

- *Policy 9.1.3 Coverage for Contractors and Subcontractors which Employ less than Three Workers*
- *Policy 9.5.4R Late Reporting of Year-End*
- *Policy 9.8.4 Holdback of Assessment Premium from Contractors and Subcontractors*

Applying criteria contained in the WCB Policy Consultation Strategy, the WCB Board of Directors believed it was appropriate to consider amendments to the contractor policies to be a minor policy issue. This is because proposed revisions to the above policies did not change, limit, or expand any requirements. Rather, they are intended to clarify the WCB's traditional interpretation of the terms and ensure the scope of the application of the contractor provisions in the legislation and program policy remains the same. As a minor policy issue, a one-stage consultation process was used.

The Policy Background Paper can be found on the WCB website at www.wcb.ns.ca under Policy in the Consultation Archive.

On December 18th, 2013 the WCB Board of Directors approved revisions to the WCB contractor policies. Please see Appendix C for the revised program policies.

The remainder of this report provides:

- key issues raised by stakeholders during consultation on the proposed policy revisions;
- analysis and WCB response to feedback from stakeholders;
- a summary of feedback received during consultation (see Appendix A); and
- the WCB's final policy decision as reflected in the final version of the program policy in Appendix C.

[1] WCB Internal Appeals, Workers Compensation Appeal Tribunal.

II - Suggested Policy Changes/Issues Raised During Consultation and WCB Response

The WCB received six stakeholder submissions in response to the consultation on revisions to the contractor policies. Injured worker and labour stakeholders made two submissions and four were received from employer stakeholders. One of the employer submissions, from the Office of the Employer Advisor (OEA), was endorsed by 54 employers or employer organizations.
For a detailed overview of input received from stakeholders, please see Appendix B – Minor Revisions to Contactor Policies - Consultation Summary.

As discussed in the policy background paper, the revisions to the contractor policies do not change policy intent. They also do not add, remove, or change any policy requirements. The revisions are primarily designed to ensure workers of contractors continue to have coverage and employers are protected by the *Act* from being sued for the costs of a workplace injury. The WCB appreciates the effort made by stakeholders to provide feedback in response to this consultation. However, much of the feedback received dealt with issues or topics that were outside the scope of the consultation on the definition of contractor and subcontractor. The issues the WCB considered outside the scope of the consultation include:

- Concerns about the WCB Consultation Strategy. The WCB Board of Directors understands some stakeholders have concerns about how recent consultations were implemented and will consider the feedback when undertaking future consultations.
- Requests for legislative or regulatory change. The Board of Directors recognizes the importance of engaging stakeholders in legislative/regulatory change considerations.
- Concerns about the overall intent of the contractor policies, in particular *Policy 9.1.3 Coverage for Contractors and Subcontractors which Employ less than Three Workers.* Some stakeholders feel the policy implements universal coverage. The WCB does not believe this is the case and the rationale is explained later in this paper. However, stakeholders may choose to identify this issue for potential policy development during the next policy issue identification process.

After considering the feedback received, the Board of Directors has decided changes to the draft policies are not required.

◄Consultation Process

Feedback received:

> ***#1.*** *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 initiate and sustain constructive relationships with stakeholders by engaging in a two way process of dialogue that creates opportunities for understanding stakeholder concerns.

***#2.** While it is noted that these policy changes are "minor" in nature, this is not aligned with the WCB definition of minor as there are potential financial, administrative and productivity impacts. As there is insufficient detail to determine the specific impacts that these policy changes may have on our industry, we recommend that this policy be discussed in greater detail with leaders in the construction industry before being implemented.*

Analysis and Response

The WCB's approach to policy consultation is set out in the WCB Policy Consultation Strategy. The first step in the policy consultation process is deciding on the scope of a policy issue. That is, in the policy topic a "minor" or "major" policy issue? To assist them in making this decision, the Board of Directors applies the criteria in the Strategy. Please see the criteria for minor and major policy issues in Appendix B.

Generally a policy issue is considered minor if it satisfies one or more of the following: 1) there is no change in policy intent; 2) policy change is not expected to have an impact on the financial health of the compensation system; 3) change is not anticipated to affect assessment or benefit rate levels; and 4) the issue appears neutral (no strong views either way have been expressed).

The primary reason the Board of Director's considered the proposed revisions to the contractor policies to be a minor policy issue is because they do not change the original intent, interpretation, or application of the policies. In turn, it was felt there is no impact on the financial health of the compensation system or assessment/benefit levels. The WCB will not apply or implement the requirements any differently after the policy revisions than it did before the Appeal System decisions. In particular:

- Covered employers (considered "principals" in this context) have been required to report the contractors they use to the WCB on an annual basis since 2002 (*Policy 9.5.4R*). If they do not, they are subject to a $50 fine.
- Since at least 1999[2], when *Policy 9.1.3* was approved, principals in mandatory industries with more than 3 workers, who hire contractors who are in a mandatory industry and have with less than three workers, have been required to pay assessment premiums for the labour portion of the work performed by the contractor. The WCB's inclusive interpretation of the terms contactor and subcontractor[3] dates back to the 1980s. Until the recent Appeal System decisions, the WCB believed this interpretation was reflected in the contractor policies.

[2] The practice of deeming these works to be the works of the principal for assessment premium purposes has been in place since the 1980s and was codified in policy in 1999.

[3] the WCB has traditionally considered a person to be a contractor of a principal if: they are hired to perform work or services for a principal that is incidental or integral to the principal's business; there is a labour component to the work or services carried out; and some part of the labour component is carried out at the principal's work site (or a site determined by the principal). A subcontractor, in the WCB context, is a person or firm hired by a contractor and has the same basic meaning as a contractor.

Additionally, during WCB Policy Issue Identification consultations in the last 10 years, no stakeholders identified contractors as topic area in need of policy development or revision. Given that stakeholders had not raised concerns with the policies and the changes were not affecting policy requirements, the Board of Directors believed it was reasonable to consider the proposed revisions to be neutral.

Bearing in mind the feedback provided by stakeholders, the WCB recognizes that the policy background paper could have more clearly explained that the Board of Directors was not seeking to consult on whether or not the *policy intent* in the contractor policies (in particular *Policy 9.1.3*) was appropriate. Rather, the objective of the consultation was to ask stakeholders if the proposed definitions of contractor and subcontractor *adequately reflect the intent* of the policies. In future, the WCB will more clearly explain the scope and purpose of policy consultations in consultation documents, and be mindful of the points raised during this consultation when determining if a policy issue is minor or major.

Feedback received

> #**3.** *Our recommendation, in addition to those contained within the OEA submission, would be to work with the larger industries to understand the unique circumstances within each industry that may require further special policy considerations. This would enable the development of policy that better anticipates and guides practices to proactively consider industry specific circumstances. The process, with regard to this policy, was seriously flawed. We therefore recommend that large industries, like construction, be part of the process from the earliest possible point and engaged as a partner.*
>
> ***#4.*** *Our recommendation is that WCB bring stakeholders together for a meaningful discussion on potential alternative models and/or policies that protect workers and mitigate against the potentially negative impacts on employers that this policy in its current iteration will have.*

Analysis and Response

WCB policy applies to all workers and employers covered by the *Act*. While it is important to understand and consider the impacts of policy on particular groups, occupations, and industries when developing policy, generally the Board of Directors does not believe it is appropriate to design policy for specific groups or industries. This can lead to different rules for different employers or workers. That being said, the WCB is pleased that stakeholders are engaged and eager to participate in policy consultations. Stakeholders can participate at 3 key points:

- 1. Policy issue identification. Generally every few years the Board of Directors asks stakeholders to identify issues for potential policy development. These issues are analyzed and prioritized. The Board of Directors approves a final listing of program policy topics (the "policy agenda") to be worked upon. There are instances, like contractors, where an issue is added to the Policy Agenda at a later date due to environmental factors – in this case Appeal System decisions.
- 2. Being represented on a small working group of key stakeholder representatives who assist in identifying and clarifying issues related to a specific major policy topic. This is considered Stage 1 consultation for major policy topics. The WCB seeks to include a

balance of employer and injured worker/labour representatives on the working group. Typical participants are injured worker associations, labour unions, the Office of the Worker Counselor, the Office of the Employer Advisor, and employer organizations or associations.

- 3. Provide written submission in response to policy background papers and draft policy revisions. Stakeholders can provide specific written feedback on draft policy revisions on an individual worker or employer basis or through a representative organization.

As well, WCB staff are pleased to meet with stakeholder organizations during policy consultations to clarify policy issues and answer questions.

Feedback received

> #**5.** *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.*

Analysis and Response

The WCB recognizes that *Policy 10.3.11 – Policy Consultation* sets out a minimum consultation period of 30 days. Over the years, a 30 day policy consultation period has been used, with occasional stakeholder requests for extensions. The WCB agrees that 30 days may not always be appropriate, especially during certain times of the year. In future the WCB will specifically consider whether or not 30 days is an adequate time period for stakeholders, and use a longer period if appropriate.

◄Universal Coverage

Feedback received

> #***6.*** *The time has come for the Board of Directors to present a legislative package to the Government to reform the workers' compensation system. The concept of universal coverage is one of the Meredith Principles upon which our system is founded. All system stakeholders are in agreement universal coverage is necessary (See WSIS Stakeholder Session Agreement Point, January 10, 2007). Universal coverage would eliminate the need for this policy as all workers and all employers would be covered, regardless of whether they are a principal, contractor, or subcontractor.*
>
> #***7.*** *In the longer-term, we also believe the Act should be also amended to ensure universal coverage of Workers Compensation for all working people, as outlined in the Stanhope Manifesto and is the case in most other jurisdictions. If this was the case, this question about how broadly or narrowly to interpret the terms of contractor and subcontractor would be unnecessary.*

Analysis and Response

As noted in the stakeholder feedback above, a move toward universal coverage requires legislative and/or regulatory change. The WCB Board of Directors is responsible for making recommendations to Government for any changes and recognizes the importance of engaging stakeholders in any legislative/regulatory change considerations. The Board of Directors will be consulting with Government on the approach to the development of a legislative agenda as well as the timing of any legislative review process.

Feedback received

> *#**8** 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 foregone 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.*
>
> ***#9.** The presumption propagated in this draft appears to be that universal coverage is the desired end result. While this may be an option, we need a full discussion on our current and alternative models that have emerged in many jurisdictions across North America and around the world. Ostensibly implementing a universal coverage model indirectly through policy changes is unacceptable and contrary to the collaborative solution building approach that is desired by employers in our industry.*

Analysis and Response

For the purposes of this response, the WCB assumes the stakeholder feedback is focused primarily on the requirements in *Policy 9.1.3 Coverage for contractors and subcontractors which employ less than three workers.*

The phrase "universal coverage" generally refers to ensuring that every worker and workplace in a jurisdiction is covered under workers' compensation legislation; the phrase "scope of coverage" refers to the types of industries, size of employers, and classes of workers that are subject to mandatory coverage under the *Act*. The WCB agrees that universal coverage is not in

place in Nova Scotia and this is reflected in the *Act* and *Regulations*. The *Regulations* set out the scope of coverage requirements:

- Certain industries are explicitly included in the scope of coverage. Coverage is mandatory for these industries.
- Certain industries are explicitly excluded from the *Act*. Employers in these industries are not required to have coverage.
- Within mandatory (or "covered") industries, all firms and workers are included in the scope of mandatory coverage unless they are explicitly excluded.
- The key coverage exclusion with regard to the concerns identified by some stakeholders in this consultation is the "three worker rule". Generally, Section 15-18 of the Regulations excludes employers with less than 3 workers from the coverage requirements.

The WCB Board of Directors continues to support the basic intent of Policy *9.1.3* – to ensure as much work activity as possible is covered by the *Act* so that workers have coverage if they are injured and employers cannot be sued for the costs of a workplace injury. As was the case in 1999, the Board believes *Policy 9.1.3* is consistent with the *Act* and does not implement universal coverage. This is because:

- There are provisions in the *Act* and *Regulations* that give the WCB the discretion to cover persons or workers who might otherwise not have compensation coverage. These sections are described below:
    - Section 9 of the *Act* states the WCB may, where a person who is not a worker within the scope of the *Act* performs work for the benefit of another person, deem the first person to be a worker and the second person to be the employer of the first person and determine an amount that shall be deemed to be the earnings of the worker.
    - Section 142 of the *Act* states where a contractor or subcontractor has not been assessed for any work carried on by the contractor or subcontractor the WCB may deem any worker of the contractor or a subcontractor to be a worker of the principal, or any worker of the subcontractor to be a worker of the contractor.
- Policy *9.1.3* is about deeming workers for assessment premium purposes. It does not impose coverage on employers who are not required by the *Act* or *Regulations* to have compensation coverage for their workers. Simply put, if a principal is required to have coverage (mandatory industry and at least 3 of their own workers) and they hire a contractor with less than three workers (who is also in a mandatory industry) they are required to pay assessment premiums for the labour portion of the work performed by the contractor's workers. If the contractor hired by the principal in question is not in a mandatory industry, the principal would not be required to pay assessment premiums on behalf of the contractor's workers.

The WCB acknowledges that the consultation process for policy development and approval at the time the contractor policies were originally approved (1999 – 2002) is not the same as the process used by the WCB today. However, the policies were reviewed and approved by an employer and labour/worker representative Board of Directors. As noted earlier, these policies have been in place for over a decade and do not impose new requirements or implement universal coverage. The WCB understands that some stakeholders have strong views about coverage requirements and universal coverage. As noted in the WCB response to issues #6

and #7, the WCB Board of Directors recognizes the importance of engaging stakeholders in any legislative/regulatory change considerations.

◄Definition of contractor/subcontractor

Feedback received

> ***#10.*** *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: According to WCAT, a subcontractor provides a service which is necessary or integral to fulfilling the main contract. 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 and an example of, in WCAT words, an "absurd result". 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 service providers who are integral to fulfilling the main contract.*

Analysis and Response

In WCAT 2010-656-AD; 2012-196-AD and 2012-665-AD (February 2013), the Appeal Commissioner states that the WCB Hearing Officer noted that the terms "principal", "contractor", and "subcontractor", were not defined in the *Act*, *Regulations*, or WCB policy. In the absence of definitions, the Hearing Officer applied the principles of statutory interpretation. These principles state that generally, subject to the legislative context, the ordinary definition of terms is used for non-technical words. The Hearing Officer came to the conclusion that a contractor/subcontractor provides a service integral to the service being provided by the employer to the client. The Appeal Commissioner agreed with and adopted the Hearing Officer's reasoning. As noted in the policy background paper, this interpretation results in fewer persons or firms being considered contractors/subcontractors. A key outcome is that fewer workers would have compensation coverage and fewer employers would be protected by the *Act* from being sued for the costs of a workplace injury.

The WCB believes defining the terms contractor and subcontractor using the WCB's long-standing inclusive interpretation is legal and appropriate for following reasons:

- The WCB Board of Directors has the authority to approve policy that defines terms in the *Act*, as long as the definitions are consistent with the *Act*. For example, Policy *3.5.1 – Definition of Suitable Employment* defines the term "suitable" in the context of suitable and reasonably available employment in S. 38 of the *Act*.
- An inclusive definition is consistent with overall purpose of the *Act*, which is to provide compensation to injured workers and protect employers from suit, as well as the specific coverage requirements in the legislations and regulations.
- The definitions reflect the WCB's long-standing interpretation of the terms, the original intent of the contractor policies, and do not impose new requirements.

The WCB agrees that some employers require contractors to have their own compensation coverage as a condition of hiring. Employers may ask this of any contractors who are not

required by law to have coverage. This is a business decision on the part of the hiring employer and not a WCB requirement.

Feedback received

> ***#11*** *We believe these changes better clarify the intent. The only feedback we would offer is for there to be a definition of "incidental" and "integral" in the documents.*

Analysis and Response

The terms "integral" and "incidental" were included in the definition of contractor to specifically address the points raised in the Appeal System decisions and ensure the term is not interpreted narrowly. As per the definition, "contractor" means a person hired by a principal to perform work or services that….."*are for the purposes of the principal's trade or business, including those that are integral or incidental to the operation of the principal's business".* In all but very rare circumstances, the persons or firms hired by the employer (principal) will be "*for the purposes of the principal's trade or business".* If an employer is hiring a person other than an employee to perform a service for them (that includes a labour component) at the jobsite, they are a principal and the person they have hired is a contractor. The following example illustrates the use the terms integral and incidental:

> An oven repair service hired by an industrial bakery performs a service that is integral to the operation of the industrial bakery (making bread). This is because it directly supports the reason the business is operating – to make and sell bread. Bread cannot be baked if the oven is broken. If the bakery hires a cleaning service to clean the facilities, they have hired a contractor to perform a service that is incidental to the operation of the bakery. This is because it generally supports making bread by ensuring a clean facility that meets, for example, food safety requirements. Both the oven repair service and the clearing service are for the purpose of the principal's trade or business.

The WCB agrees it is important that policies are clear. However, the definition is currently detailed and the WCB is concerned that further defining terms within the definition could limit discretion and make it difficult for the WCB to consider unique circumstances. Rather than define the terms within the policy itself, the WCB will consider other ways to communicate the policy requirements to ensure stakeholders understand the meaning of the term contractor and the policy requirements.

Feedback received

> ***#12****. Our association is in agreement with the Board's decision to codify the definition of contractor and subcontractor in policy. It is beneficial for workers and employers to be covered by the Workers' Compensation Act rather than face financial hardship in the case of a worker and potential civil liability in the case of an employer.*
>
> ***#13.*** *We think the Act should be amended to include this broader definition of contractor and subcontractor. We support a broad interpretation of the meaning of these terms to include the persons who provide work or services integral to as well as incidental to the principal's (or contractor's) business. As a result, we would also support the proposed revisions to the relevant policies.*

Analysis and Response

As noted previously, the Board of Directors will be consulting with Government in on the approach to the development of a legislative agenda as well as the timing of any legislative review process.

◄Use of term "employer" and "principal"

Feedback received

> *#**14.** WCB's interpretation of the words "principal" and "employer" expands the scope of authority beyond what the legislation allows. Section 140(1) of the Act provides WCB with specific authority respecting liability for assessments. 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. 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. 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. Essentially, principals are employers for the purpose of sections 140 and 141 but not all employers are principals. The OEA submits that WCB is incorrectly replacing the word "principal" with the word "employer" which expands the scope of WCB's assessment authority.*
>
> *#**15.** 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".*

Analysis and Response

The WCB agrees that not all employers are principals and the WCB does not believe the contractor policies make all employers principals. This is because:

- The *Act* recognizes that an employer can become a principal (while remaining an employer). The definition of employer states "employer" means an employer within the scope of Part I and includes …… (ii) the principal, contractor and subcontractor referred to in Sections 140 and 141.
- An employer becomes a principal based upon a contractual relationship with a person who is not their employee. When they enter into a principal-contractor relationship, the *Act*, *Regulations*, and WCB policy impose certain requirements. These requirements are intended to ensure workers have coverage, assessment premiums are paid, and employers are protected from suit. If an employer does not hire contactors, they are not a principal and the *Act*, *Regulations*, and WCB policy provisions related to principals would not apply.

- There are Sections of the *Act* that are intended to apply to employers, but not when the employer is acting as a principal. For example, the *Act* imposes reemployment obligations on some employers. An employer, in their capacity as a principal, would generally not be subject to these requirements for the contractors they hire because the criteria in Sections 89-191 would not be met.

The WCB believes the terms have been, and continue to be, used appropriately and do not make all employers principals.

◄ Contractor/Subcontractor annual reporting

Feedback received

> ***#16.*** *WCB should abandon the practice of requiring Employers to file any annual contractor / subcontractor report. This may have made sense for general contractors a long time ago but since our cross checking process with CRA I don't see the point. Why is WCB still doing this? What value does this specific process add? It creates a lot of work for business and will likely create a lot more if WCB wants full compliance.*

Analysis and Response

The focus of the consultation paper was primarily designed to ensure workers of contractors continue to have coverage and employers are protected by the *Act* from being sued for the costs of a workplace injury. The WCB appreciates the effort made by stakeholders to provide feedback in response to this consultation. However, feedback on the "how" to submit the annual contractor / subcontractor report was outside the scope of the consultation.

The WCB acknowledges that changes to the annual reporting requirements for contractor / subcontractor reporting could be reviewed. On a go-forward basis the WCB plans to review its processes, through the lens of small/medium business, and explore ways to improve compliance with requirements like contractor/subcontractor reporting while at the same time making it less burdensome for employers.

Appendix A

Contractors:
Consultation Summary

Introduction

In September 2012 the WCB Board of Directors (the "Board") added the topic of the clarification of the terms contractor and subcontractor to the Revolving Program Policy Agenda as a minor policy revision. On June 6th, 2013 the document entitled "*Program Policy Background Paper: Minor revisions to program policies related to contractors and subcontractors* and draft program policies were mailed to individuals on the key stakeholder mailing list and initially posted to the WCB website for a period of 30 days. At the request of employer stakeholders, the deadline for submissions was extended to October 31, 2013.

In total, the WCB received 6 submissions from stakeholders. Injured worker and labour stakeholders made 2 submissions and 4 were received from employer stakeholders. One of the employer submissions, from the Office of the Employer Advisor (OEA), was endorsed by 54 employers or employer organizations.

Injured workers' associations and labour stakeholders who provided comment were supportive of the proposed revisions. Both believed it was important to maintain a broad interpretation of the terms contractor and subcontractor to ensure continued coverage of workers.

Employer stakeholders expressed varied views on the proposed amendments. Two employer stakeholders were supportive of the changes. Both believed clarification of the policies' intent was helpful. The remaining two employer submissions (including the OEA) expressed concern about the policy consultation process. In addition to concerns about the consultation process, the OEA identified the overall approach taken in one contractor policy in particular (*Policy 9.1.3 Coverage for Contractors and Subcontractors which Employ less than Three Workers)* as problematic. The OEA believes the deeming of contactors with less than 3 workers to be workers of a principal, combined with a broad definition of contractor and subcontractor, undermines the coverage requirements in the *Workers' Compensation Act* and are not within the legal authority of the WCB.

Overview of Stakeholder Submissions

Outlined below is a summary of general comments submitted by stakeholders.

Injured Worker and Labour

- Injured Workers' Associations and Labour organizations:
  - We are in agreement with the Board's decision to codify the definition of contactor and subcontractor as a result of the WCAT decisions.
  - It is beneficial for workers and employers to be covered by the Act rather than face financial hardship in the case of a worker and potential civil liability in the case of an employer.

- The time has come for the WCB Board of Directors to present a legislative package to the Government to reform the workers' compensation system. The concept of universal coverage is one of the Meredith Principles upon which our system is founded. All system stakeholders are in agreement universal coverage is necessary. Universal coverage would eliminate the need for this policy as all workers and all employers would be covered, regardless of whether they are a principal, contractor or subcontractor.
- We understand the need to review and revise the relevant program policies of the Board related to contractors and subcontractors in light of the Appeal System's more restrictive interpretation of what a contractor and subcontractor means for the purposes of the *Workers Compensation Act*.
- We support a broad interpretation of the meaning of these terms to include the persons who provide work or services integral to as well as incidental to the principal's (or contractor's) business.
- We think the Act should be amended to include this broader definition of contractor and subcontractor. In the longer-term, we also believe the Act should be also amended to ensure universal coverage of Workers Compensation for all working people, as outlined in the Stanhope Manifesto and is the case in most other jurisdictions. If this was the case, this question about how broadly or narrowly to interpret the terms of contractor and subcontractor would be unnecessary.
- We believe the starting-point for any WCB policy should be a statement of basic principles. In our earlier submissions, we have referred in some detail to the statement entitled "The Stanhope Manifesto on Workers Compensation".

Employer

- Employer and employer organizations:
  - I find it reasonable in that it clarifies what is now exists. It is important we all share the financial burden of the WCB.
  - We believe these changes better clarify the intent. The only feedback we would offer is for there to be a definition of incidental and integral in the documents.
  - Our recommendation, in addition to those contained within the OEA submission, would be to work with the larger industries to understand the unique circumstances within each industry that may require further special policy considerations. This would enable the development of policy that better anticipates and guides practices to proactively consider industry specific circumstances.
  - The process, with regard to this policy, was seriously flawed and led to a great deal of trepidation that could have been avoided had business and industry been part of the discussion since its first consideration by the Board. We therefore recommend that large industries, like construction, be part of the process from the earliest possible point and engaged as a partner.
  - While it is noted that these policy changes are "minor" in nature, this is not aligned with the WCB definition of minor as there are potential financial, administrative and productivity impacts. As there is insufficient detail to determine the specific impacts that these policy changes may have on our industry, we recommend that this policy be discussed in greater detail with leaders in the construction industry before being implemented.
  - Our recommendation is that WCB bring stakeholders together for a meaningful discussion on potential alternative models and/or policies that protect workers and mitigate against the potentially negative impacts on employers that this

policy in its current iteration will have. The presumption propagated in this draft appears to be that universal coverage is the desired end result. While this may be an option, we need a full discussion on our current and alternative models that have emerged in many jurisdictions across North America and around the world. Ostensibly implementing a universal coverage model indirectly through policy changes is unacceptable and contrary to the collaborative solution building approach that is desired by employers in our industry.

- Our recommendation is to abandon the practice of requiring employers to file an annual contractor/subcontractor report.

- Office of the Employer Advisor:
  - According to WCB's criteria, the definition of sub/contractor is not a "minor issue". 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 initiate and sustain constructive relationships with stakeholders by engaging in a two way process of dialogue that creates opportunities for understanding stakeholder concerns.
  - 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?* Recommendation: Assumptions respecting universal coverage should be tested through stakeholder consultation.
  - According to WCAT, a subcontractor provides a service which is necessary or integral to fulfilling the main contract. WCAT 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 and an example of, in WCAT words, an "absurd result". 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 fulfilling the main contract.
  - 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". 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: WCB's use the word principal should be consistent with section 140 of the Act.

- 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. 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: Revise the policy documents under consideration in this consultation to reflect the correct use of the term

Appendix B

WCB Board of Directors' Criteria for Minor and Major Policy Issue (taken from WCB Policy Consultation Strategy)

Minor Issue:
A policy issue may be considered minor if it satisfies one or more of the following:

- 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

Major Issue:
A policy issue may be considered major if it satisfies one or more of the following:

- Potential financial impact on the System
- Potential impact on benefit or rate levels
- Potential impact on entitlement
- Change in policy intent/direction
- Issue appears contentious – opposing views on the issue have been expressed

Appendix C

Final Board of Directors Approved Contractor Program Policies

POLICY

NUMBER: 9.1.3R

Effective Date:	January 1, 2014	**Topic:**	**Coverage for contractors and subcontractors which employ less than three workers**
Date Issued:	January 23, 2014	Section:	Assessments and Collections
Date Approved by Board of Directors: December 18th, 2013		Subsection:	Scope of Coverage

PREAMBLE

1.The *Workers' Compensation Act* requires employers which employ three or more workers, and which operate in industries designated by Regulation as subject to mandatory registration, to register for coverage. Employers within the scope of mandatory coverage under the *Act* are referred to as covered employers.

2. A covered employer which hires contractors is considered a principal. A covered employer who is a contractor may hire subcontractors. *Contractor and subcontractor have the same meaning as in Policy 9.5.4R1-Late Reporting of Year – End.*

POLICY STATEMENT

Deemed Workers

3. Where a contractor with less than 3 workers is hired by a principal, the workers of the contractor are deemed to be the workers of the principal if the following criteria are met:

a) Both the principal and the contractor operate in an industry designated under the *Workers' Compensation General Regulations* as subject to mandatory coverage;

b) The contractor has not purchased voluntary compensation coverage;

c) The principal has three or more workers.

4. Workers of subcontractors with less than three workers hired by a covered contractor are deemed to be the workers of the contractor where both operate in an industry designated under the *Workers' Compensation General Regulations* as subject to mandatory coverage, and the remaining criteria in Section 3 of this policy are met.

Determination of contractor's assessable earnings

5. To determine the contractor's (or subcontractor's) assessable earnings the principal (or contractor) must calculate the labour portion of the work or services performed. The labour component is determined by subtracting the value of materials and equipment from the gross amount of work or services performed. The amount remaining is the labour portion of the work or services.

6. Where the exact value of materials and equipment is not known, a proxy amount specified in the table below must be used.

Type of work/service	Proxy
Labour and Materials	50%
Logging (chain saw):	75%
Courier Service	50%
Trucking and Leased Equipment	25%
Labour only	100%

Example:

Type	Total value of work or services performed	Proxy	Value of labour
Logging (chain saw)	$500	75%	$375

APPLICATION

This Policy applies to all decisions made on or after January 1, 2014.

REFERENCES

Workers' Compensation Act (Chapter 10, Acts of 1994-95), (as amended) Sections 9, 125.

Workers' Compensation General Regulations, Section 15.

POLICY

NUMBER: 9.5.4R1

Effective Date:	January 1, 2014	**Topic:**	**Late Reporting of Year-end Contractor and Subcontractor Report**
Date Issued:	January 23, 2014	Section:	Assessments and Collections
Date Approved by Board of Directors: December 18th, 2013		Subsection:	Penalties

POLICY STATEMENT

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.

DEFINITIONS

"contractor" means a person hired by a principal to perform work or services that

i) include a labour component;

ii) are carried out at the principal's premises or worksite, or at a location determined by the principal; and

iii) are for the purposes of the principal's trade or business, including those that are integral or incidental to the operation of the principal's business.;

but does not include those

iv) whose sole function is to deliver goods or equipment to, or pick them up from, the principal's premises or worksite; or

v) who perform all of the work or services at their own worksite.

"subcontractor" has the same meaning as contractor where the person or firm is hired by a covered employer who is a contractor.

APPLICATION

This Policy applies to contractor or subcontractor reporting for the year January 1, 2014 onward.

REFERENCES

Workers' Compensation Act (Chapter 10, Acts of 1994-95), (as amended), Section 129, 208, ***Policy 9.1.3****R*.

POLICY

NUMBER: 9.8.4R

Effective Date: January 1, 2014

Topic: Holdback of Assessment Premium From Contractors and Subcontractors

Date Issued: January 23, 2014

Section: Assessments and Collections

Date Approved by Board of Directors: December 18th, 2013

Subsection: General

PREAMBLE

1. The *Workers' Compensation Act* required employers which employ three or more workers, and which operates in industries designated by Regulation as subject to mandatory registration, to register for coverage. Employers within the scope of mandatory coverage under the *Act* are referred to as covered employers.

2. A covered employer which hires contractors is considered a principal. A covered employer who is a contractor may hire subcontractors. Contractor and subcontractor have the same meaning as in *Policy 9.5.4R1-Late Reporting of Year – End.*

3. Section 143 of the *Workers' Compensation Act* allows principals to retain the applicable assessment premium as a 'holdback' from some of their contractors to safeguard against liability which may arise if the contractor has failed to maintain an account in good standing with the WCB (similarly, contractors can hold back from subcontractors). This protects the party from potential liability if assessments have not been paid to the Workers' Compensation Board (WCB).

POLICY STATEMENT

4. A hold-back is allowed under section 143 if

   a) The contractor or subcontractor is within the mandatory scope of the *Workers' Compensation Act* (has three or more workers and is in a mandatory industry); or

   b) The contractor is admitted under the *Act* through voluntary coverage pursuant to section 4.

5. Principals are not authorized to hold back from contractors who are 'deemed to be workers' of the principal as per ***Policy 9.1.3****R*.

APPLICATION

This Policy applies to all decisions made on or after January 1, 2014.

REFERENCES

Workers' Compensation Act (Chapter 10, Acts of 1994-95), (as amended), Sections 4, 143.