

**Construction Employers Coalition  
(for WSIB and Health & Safety and Prevention)**

December 18, 2015

Mr. David Marshall, President & CEO  
Workplace Safety & Insurance Board  
200 Front Street West  
Toronto ON M5V 3J1



Dear Mr. Marshall,

**Re: Classification of Construction Executive Officers – Rate Group 755**

The Construction Employers Coalition for WSIB and Health & Safety and Prevention (CEC) represents more than 2,000 firms employing approximately 80,000 workers in the province. The CEC was formed in 2011 for the purpose of studying and responding to “big-picture” issues related to Occupational Health and Safety (OH&S), Prevention, and WSIB that affect the construction industry. The Rate Framework Reform (RFR) process and its associated impact on the industry is one of many such issues.

As the CEC has noted in its submissions to the WSIB, we have a number of concerns with the RFR proposal. Chief among these is the proposed elimination of Rate Group (RG) 755 – *Non-Exempt Partners and Executive Officers*. As you know, the construction sector is governed by a unique set of rules under the WSIB system, including a requirement set out in Bill 119 (2012) that executive officers *must* have WSIB coverage. Where executives in other industries are as a matter of law expressly excluded from coverage (WSIA, s. 11(2)) unless they voluntarily “opt-in” (WSIA, s. 12(3)), executive officers in construction have no such choice and must pay into the system.

The most recent RFR update provided to stakeholders in December 2015 notes that WSIB is considering reforming its stance on eliminating the multi-rating of companies; specifically, it notes that “the WSIB is interested in further exploring some exceptions to this general rule for separate classification and multiple rates for a single employer...” We would propose that RG 755 be included as an exception. Maintaining RG 755, or a separate grouping and rate for executives in construction, would ensure that they are being charged a premium that is based on the level of risk that they are bringing to the system.

We appreciate your attention to this request.

Regards,

Patrick McManus, CEC Chair

**Feedback Submission to the Workplace Safety & Insurance Board  
pertaining to the released  
Preliminary Draft Operational Policies as part of  
*Bill 119, An Act to Amend the Workplace Safety & Insurance Act, 1997*  
by  
The Construction Industry WSIB Taskforce**

## Overview

The Construction Industry Taskforce (CITF) is pleased to offer the Workplace Safety and Insurance Board (WSIB) its feedback as part of the written public consultation phase of the development of operational policies for new mandatory coverage statutes represented by Bill 119, *An Act to Amend the Workplace Safety & Insurance Act, 1997*.

The preliminary draft operational policies presented for public consultation are the product of detailed conversations with the CITF and represent the beginning of a new level of commitment to more meaningful engagement between primary stakeholders and the WSIB. In the spirit of this new commitment the CITF is looking forward to establishing a process of ongoing development and refinement of these and future WSIB policies. Recognizing that the policy development process is not an exact science, the CITF is seeking from the WSIB an ongoing commitment to revisit these policies in a consistent and timely fashion so as to ensure their effectiveness and ward off unforeseen unintended consequences. The CITF is seeking from the WSIB the commitment to review these policies at regular intervals during and after the implementation phase of the policies. It is recommended that such a review take place 6 months, 1 year and 2 years post implementation.

**Section: Employer Coverage**

**Subject: Expanded Compulsory Coverage in Construction**

### ***Definitions***

The CITF recommends that in the definition of an Independent Operator that the time period currently listed as 12 months be changed to 18 months

*“is retained as a contractor or subcontractor by more than one person during an **18 month** period”*

The duration of a typical construction project can vary substantially from project to project. This variance occurs across all sectors of the construction industry. Given that the duration of a construction project has wide degree of variance, it is imperative that the definition of an independent operator be reflective and responsive to the current business practices of the construction industry. More importantly, the first two aspects of the definition are more meaningful in determining status, and by themselves are sufficient to ensure independent operators are appropriately classified. An independent operator may choose, for a variety of business reasons (terms, conditions payment, profit etc), to work for one principle for a period beyond one year. In choosing to do so, the nature of the employment relationship with that principle has not changed. To limit the duration to 12 months will unnecessarily prevent many legitimate independent operators from qualifying as independent operators. As such, the CITF feel that an “18 month” period is sufficient and is reflective of the needs of the construction industry.

### **Status Declaration Requirement**

The CITF is concerned with the language of the first paragraph:

*“Deemed workers who operate on their own, without other workers, and who are subject to compulsory coverage, must submit a signed status declaration confirming their independent operator status when they register with the WSIB. The deemed worker may be required to provide copies of invoices or other financial records, as well as copies of bids and contracts, as supporting evidence for the status declaration.”*

As the policy is presently written there is no stipulated time period within which the WSIB is required to acknowledge to the individual submitting the signed status declaration for independent operator status that their declaration has been received and processed by the Board. Without confirmation of independent operator status by the WSIB these individuals are not able to be issued a clearance certificate which would thereby hamper their ability to conduct their livelihood.

It is the position of the CITF that the policy be amended to include language stipulating that the WSIB is required to acknowledge/respond within 14 days to individuals who have submitted a signed status declaration confirming their independent operator status. The policy ought to also include language stipulating that barring such acknowledgement within the 14 day time period that such declarants are to be granted *deemed independent operator status* until otherwise notified by the WSIB. The CITF would like to work further with the WSIB on this issue to ensure that the process of administering these status declarations is responsive to both the construction industry and the WSIB.

### **Exemption of Home Renovation Work**

The CITF has significant concerns about the how the exemption of Home Renovation Work will impact the policy objectives entrenched in Bill 119 and more importantly, ensure that a level playing field exists between all sectors of the construction industry, particularly the residential sector.

In its current form, exempt home renovation work means construction work that is performed

- By an independent operator, sole proprietor, a partner in a partnership, or an executive officer in a corporation and,
- On an existing private residence that is or will be occupied by either the person or by a member of the person’s family who directly retains the independent operator, sole proprietorship, partnership, or corporation

It is not unimaginable to foresee a world (post implementation) in which a home renovation contractor requests that the homeowner directly and individually retain his/her services and directly and individually retain the services of his/her employees. By retaining the services of his/her employees directly, the home renovation contractor has mitigated all of his/her WSIB responsibilities and shifted that burden to his/her employees.

### ***Exemption of Home Renovation Work (continued)***

However those previous employees are no longer employees but individuals performing home renovation work directly retained by a homeowner and as such are exempt from compulsory coverage. Combined with the introduction and implementation of the HST, the compulsion to enter into such arrangements will be real and unrestrained. The net policy effect of this exemption will be that most if not all residential renovation work will be performed legally outside the gambit of the WSIB.

It is the opinion of the CITF, that this potential and significant loophole needs more work and attention in the Operational Policies for Bill 119 than is currently contemplated within the policies. It is the recommendation of CITF that a subcommittee comprised of all relevant stakeholders be struck to address this particular policy loophole.

### **B. Exemption of a partner or executive officer**

At a meeting held late last year between senior WSIB officials, Ministry of Labour and CITF members, the WSIB agreed with the CITF recommendation that non-exempt executive officers who do not perform construction work should pay WSIB premiums commensurate with their respective risk profiles. It was further suggested, the premium rate be modeled similar to Rate Group 958 Technical and Business Services which accurately reflects the nature of the work and risk tolerances that an executive officer who does not perform construction work would be exposed to.

Although the commitment with respect to this issue was included in the draft operational policies, a noted omission was the key linkage that the premium rate would be similar to Rate Group 958 Technical and Business Services. Although the draft operational policies state that

“ the WSIB will allow the insurable earnings of non-exempt partners and executive officers who do not perform construction work to be considered as a distinct business activity and reported under a separate classification unit (CU) in class G” (page 8 of 9)

It is the opinion of the CITF that the separate classification unit in class G be modeled and based upon Rate Group 958 Technical and Business Services. This treatment is both fair and equitable and a necessary requirement to be included in the draft operational policies.

In addition, currently this policy position is buried in the section “**Reporting by Partnerships and Corporations (with more than one executive officer)**” and should be included in Section B. Exemption of a partner or Executive Officer.

### **Declaration of exemption requirement**

The CITF believes that the policy for executive officers submitting signed status of declaration documents ought to be the same as that for those individual submitting signed status declaration forms for classification as independent operators. The WSIB should have 14 days to respond to or acknowledge such submissions and should it fail to do so then the declarant shall be granted *deemed exempt executive officer status* until otherwise notified by the WSIB.

**Section: Employer Accounts**  
**Subject: Insurable Earnings - Construction**

#### **B – Labour Portion of the Contract Method**

This policy is unclear and requires clarity. The policy must recognize that sub-contractors meeting the definition of “independent operator” (deemed worker) and sub-contractors not meeting the definition of “independent operator” (worker) face identical cost exposures. Therefore, to ensure equitable treatment, each must have the labour portion of the contract set in an identical manner. The CITF submits that the “*Labour Portion of the Contract Table*” (“the “Table”) must apply in each case *even if* there are adequate business records available. The CITF further requests that the Board initiate a comprehensive review of the Table before the policies become operational.

#### **C – Estimated Annual Amount Method**

To ensure consistent application and to provide clarity, the CITF recommends that the policy expressly declare that an Independent Operator who is also an Executive Officer of a corporation is excluded from the “Wages and Salaries Method”.

**Section: Employer Accounts**  
**Subject: Certificate of Clearance (for 2012)**

#### **Validity Period**

It is the preference of the CITF that the validity period of certificates of clearance be up to **120 days** from the date of issuance rather than the currently stipulated 90 days. Given the creation of the eClearance system and its ability to effectively manage the clearance certificate process for the principal, an extension of the validity period would be completely acceptable further reducing an administrative burden of the adopting such a system might create. It is the recommendation of the CITF that for the validity period Certificate of Clearance (for 2010) be tested based on a 90 day validity period, but for 2012 and beyond that period be extended to 120 days from date of issuance.

Given the enhanced role that a certificate of clearance will play ensuring in compliance with Bill 119, it is imperative that the eClearance system as designed be responsive to the needs of the construction industry. The eClearance system is a critical component of the operational policies in support of Bill 119. Without such a feature, the policy objectives of Bill 119 would be virtually impossible to be in compliance with and place undue administrative hardships for employers in the construction industry. As such, it is imperative that the eClearance system be seamless in both its integration and adoption within the other administrative systems of the WSIB.

*Subject: Offences and Penalties – For Compulsory Coverage in Construction (effective January 1, 2012 to December 31, 2012)*

A focus on changing construction employer behaviour through education and not prosecution must form the cornerstone of this policy. The CITF asks that this commitment be introduced in a clear unequivocal declaration at the outset. The CITF asserts that “innocent non-compliance” should never attract prosecution, during or post-2012. However, clarity is required before the CITF can endorse this policy. “Innocent non-compliance” must be more clearly defined and enunciated in a series of guideline examples. CITF is of the firm view that the heavy hand of prosecution should be engaged only in the face of solid evidence demonstrating an intent to deceive the WSIB. While Bill 119 creates a myriad of potential new offences, administrative remedies should be exclusively deployed absent such intent. The CITF received such a commitment in a senior dialogue in late-2009, and seeks codification of that commitment in these policies.

## Construction Industry WSIB Task Force



April 1, 2010

Ms. Dana Leshchyshyn  
Executive Director, Operations, WSIB  
Workplace Safety & Insurance Board  
200 Front Street West  
Toronto ON M5V 3J1

Dear Ms. Leshchyshyn:

### Consultation on draft operational policies relating to Bill 119

On behalf of the **Construction Industry Task Force (CITF)**, I am enclosing the CITF response to the Board's "*Consultation on draft operational policies relating to Bill 119, mandatory coverage in the construction industry*" (reference your letter of January 18, 2010).

Our engagement on the development of *workable* policies is not coming to an end with these submissions, it is effectively beginning. As you are aware, the CITF has been a fervent supporter of *Bill 119*. However, more work is required to ensure the Board's policies receive the support of the CITF. As there is no real urgency at this point, and there is sufficient time to perfect the Board's policies, we are seeking to commence the more formal phase of policy development with a meeting with you and your colleagues to review our concerns and set out the next steps.

All that said, we are greatly concerned with what has been omitted from the policies.

*First*, notwithstanding an agreement from the WSIB at its most senior levels that a new rate group within the construction cluster for executive officers will be struck, no specific policy has yet been developed. As you know, we expect a new rate group with a premium commensurate with the true insurance risk of executive officers. CITF support for moving forward is contingent on such a policy being developed and presented to the CITF for ratification.

*Second*, the Board remains silent on a cornerstone commitment – to commence a process to explore the development of a verification system as contemplated by s. 183(1.1) and (1.2) of the *Workplace Safety & Insurance Act*. As you were present at the meeting held at the Minister's office last December, I will not repeat our position. The CITF expects that the Board will commence that dialogue before these policies proceed for approval. While the Board is approaching the policy development phase as being distinct from the verification protocol, the CITF links the two as being integral features of *Bill 119*.

We will be in touch to schedule our next discussion.

Yours truly,

Clive Thurston  
Chair, CITF

cc: The Hon. Steve Mahoney, WSIB Chair  
David Marshall, WSIB CEO  
Tom Teahen, Chief, Corporate Services Cluster