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September 14, 2012

VIA EMAIL

OHS Policy Consultation
Policy and Regulation Division
WorkSafe BC
PO Box 5350, Station Terminal
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Dear Sir/Madam

**Re: New Policy - Employer's Obligations Towards Other Workers
Section 115(1)(a)(ii) of the *Workers Compensation Act***

The BC Building Trades supports the adoption of a new policy respecting an employer's obligations towards workers who are not on their payroll but are present at the workplace where the employer's work is carried out.

As an organization with a long history of speaking up for unionized and non-unionized construction workers throughout British Columbia and the Yukon, we agree with the Board that the current brief mention in section 115(1)(a)(ii) of the *Workers' Compensation Act* of an employer's responsibility to ensure the health and safety of other workers is unsatisfactory. Moreover, the fact that there is no policy expressly setting out the parameters of an employer's obligations and responsibilities towards other workers is equally troubling. The result has been considerable uncertainty about the scope of section 115(1)(a)(ii). Too many employers and workers are simply unaware of their respective obligations and many workers have been unnecessarily injured as a result. Generally speaking, the Board's proposed policy provides useful interpretative guidance for applying section 115(1)(a)(ii) and will increase awareness of the law and policy.

While in the past the interpretation of section 115(1)(a)(ii) focused primarily on whether the duty applied in a specific situation, the proposed policy simplifies this process by, first, adopting a broad interpretation as to when the duty applies, and then, secondly, setting out practical criteria that can be used to determine what the scope of the duty is (e.g., what the duty means on the construction site).

With respect to *when the duty applies*, the policy states that “the duty applies whenever other workers are present at a workplace at which that employer’s work is being carried out.” Furthermore, it states:

The employer’s work can be carried out in one of two ways:

- (a) Other workers are present at a workplace where the employer’s workers are working, or
- (b) Other workers are doing work for the employer’s benefit.

Once the duty applies, the second step set out in the policy is to ascertain *the scope of the duty or what the duty requires*. As noted, section 115(1)(a)(ii) of the Act already requires an employer to ensure the health and safety of “other workers”. As it is impossible to provide instruction for every conceivable workplace situation, the proposed policy provides three principles or factors to guide decision makers when assessing the “reasonableness” of an employer’s actions or inactions in particular circumstances, namely:

- (1) the employer’s degree of control;
- (2) the employer’s level of expertise in the work being performed; and
- (3) the extent to which the employer is aware or ought to be aware of what is occurring in the workplace.

Finally, the Board’s policy then identifies a number of the reasonable steps that an employer would be expected to take in particular circumstances with reference to the three principles.

While the policy does indeed provide useful guidance to evaluate whether an employer’s action or inaction were reasonable, the manner in which the policy is currently structured is problematic. Specifically, although the background segment which sets out, among other things, the relevant sections of the Act and OHS Regulations is useful, it is not appropriately integrated into the following policy segment. In addition, the policy segment lacks clarity because it combines the principles (which are set out in the first paragraph of the scope of the duty section) with the circumstances set out in the latter part of that section. Because the principles are already set out independently to provide a “lens” through which to evaluate the circumstances, repeating them within the text of the circumstances only confuses the matter.

To remedy these minor shortcomings, the BC Building Trades suggests the policy segment be redrafted as follows:

POLICY

Under section 115(1)(a) of the Workers’ Compensation Act:

Every employer must

- (a) ensure the health and safety of
 - (i) all workers working for that employer, and

- (ii) any other workers present at a workplace at which that employer's work is being carried out, and
- (b) comply with this Part, the regulations and any applicable orders.

Definition

The term "*other workers*" in section 115(1)(a)(ii) refers to workers other than those of the employer. This includes workers of other employers as well as persons deemed to be workers through signing up for Personal Optional Protection (POP).

When Does the Duty Apply?

The duty applies whenever *other workers* are present at a workplace at which that employer's work is being carried out.

The employer's work can be carried out in one of two ways:

- (a) *other workers* are present at a workplace where the employer's workers are working, or
- (b) *other workers* are doing work for the employer's benefit.

What Does the Duty Require? (Scope of the Duty)

Once the duty applies, section 115(1)(a)(ii) requires an employer to take all reasonable steps in the circumstances to ensure the health and safety of the *other workers*.

When evaluating whether the employer took reasonable steps to ensure other workers health and safety at the workplace, the decision-maker must consider three factors:

- (a) the employer's degree of control;
- (b) the employer's level of expertise in the work being performed; and
- (c) the extent to which the employer is aware or should be aware of what is taking place in the workplace.

These three factors are the "lens" through which the decision-maker must determine the reasonableness or lack thereof of an employer's actions or inactions. Generally, the higher the employer's degree of control and level of expertise, the greater the responsibility to take remedial action to ensure the other workers health and safety. Similarly, the greater the employer's awareness of what is taking place in the workplace, or the expectation of that awareness, the greater his or her responsibility to safeguard the health and safety of other workers.

Some reasonable steps employers are expected to take include:

1. Making reasonable inquiries prior to a firm doing work on the employer's behalf to determine whether the firm is appropriately qualified to perform the work and about the firm's plans to safely conduct the work.

2. Preventing unsafe conditions or work that may affect the other workers and addressing those that arise.
3. Analyzing the processes implemented to address safety compliance and the employer's response to unsafe conditions or work.
4. Ensuring that the employer's workers do not put the other workers at risk. The employer must address any aspects of the employer's work that could create a hazard for other workers. This would include workers coming on to the site after the work day. For example, security guards patrolling in the evening risk injury if hazards are left at the end of the work day.

PRACTICE

In the scenarios set out in the Board's proposed practice, for further clarity we suggest two minor changes be made.

In scenario #1, we suggest the first bullet read as follows:

The employer must make reasonable inquiries to determine that the subcontractor is qualified to perform the work and able to safely perform the work.

And the statement following the above bullet should read:

This would involve questions for the subcontractor as well as checking references.

We appreciate the opportunity to provide feedback to the Workers' Compensation Board and look forward to the implementation of your policy respecting the obligations of employers to *other workers*.

Sincerely



Merrill O'Donnell
Workers' Advocate

MOD/wg

