

Noteworthy Decision Summary

Decision: WCAT-2011-02362 **Panel:** Jill Callan **Decision Date:** September 22, 2011

Assessments – Classification (section 37 of the Workers Compensation Act) – Reconsiderations (sections 96(4) and (5) of the Act) – Assessment Manual – Policy Items AP1-37-1 “The Classification System” and AP1-37-3 “Classifications – Changes” – Lawfulness of Board Policy Determinations (section 251)

Division 4 of Part 1 of the *Workers Compensation Act* (Act) establishes the legislative scheme pursuant to which assessments are levied against employers, and collected by the Workers' Compensation Board, operating as WorkSafeBC (Board). The accident fund is funded by such assessments. Section 37 of Part 1 of the Act establishes classes of industries for assessment purposes. It grants the Board various powers in relation to classes and subclasses, including the authority to assign employers (and independent operators and industries) to classes and subclasses, to withdraw employers from classes and subclasses, and to transfer employees to other classes and subclasses.

Sections 96(4) and 96(5)(a) of the Act provide that, while the Board may reconsider a decision made under Part 1 of the Act, it may not reconsider a decision if more than 75 days have elapsed since that decision was made. Section 1 of the Act states that “reconsider” means to “make a new decision in a matter previously decided where the new decision confirms, varies or cancels the previous decision or order.”

Pursuant to Board policy, the Board classifies each employer in one or more “classification units”, for assessment purposes. Each classification unit is assigned a rate. Employers classified in the particular classification unit are required to pay assessments to the Board at that rate. Policy indicates that the term “classification units” used in policy is equivalent to the statutory term “further subclasses” found in section 37 of the Act.

In a 2008 WCAT decision (*WCAT-2008-02064*), the WCAT panel concluded, in *obiter dictum*, an opinion not essential to the decision, that certain provisions of the Act, namely, sections 38, 39, 47 and 49, rationally support the concept of an annual classification cycle. Pursuant to this cycle, classification decisions would only have legal effect for a particular year. Interpreting section 96(5)(a) as prohibiting this cycle would lead to the inequitable result of an error in an employer's classification continuing in perpetuity. Rather, the Board could annually classify employers. Those annual classification decisions would then be subject to the section 96(5)(a) 75-day reconsideration limitation.

Portions of policy items AP1-37-1 and AP1-37-3 in their current form, effective October 1, 2009, establish the “Annual Classification Cycle”, pursuant to which the Board assigns employers (and firms and independent operators) to classification units on an annual basis. The policies contemplate an employer's classification potentially changing on an annual basis. It appeared that, in amending policies AP1-37-1 and AP1-37-3 to their current form, the Board had relied on the panel's analysis in *WCAT-2008-02064*.

In *WCAT-2011-00996*, a WCAT vice chair concluded that, to the extent that portions of policy items AP1-37-1 and AP1-37-3 permit the Board to reclassify an employer (that is, change an employer's classification), more than 75 days after it had classified that employer, on the basis that it had previously misclassified the employer due to error on the part of the Board, those policies were patently unreasonable. The vice chair concluded that, in the absence of changed factual, statutory, or policy circumstances of an employer, or in the absence of fraud or misrepresentation, the Board was not authorized to redetermine an employer's classification each year (and thus correct earlier classification errors), because such a redetermination offends the reconsideration limitation established by section 96(5)(a) of the Act. Thus, the vice chair referred the impugned portions of these policy items to the chair of WCAT, pursuant to section 251(2) of the Act.

The chair's determination

Policy item AP1-37-3 permits classification changes in the presence of fraud or misrepresentation, or where the factual, statutory, or policy circumstances of an employer have changed. The vice chair expressly excluded these situations from his referral to the chair. The chair noted that the Board's annual review of employers' classifications to determine the existence of any of these circumstances was a responsible and fair administrative practice.

The referral to the chair was limited to the narrow question of whether, after the passage of 75 days from the date of its classification decision, the Board could make new classification decisions for the purpose of correcting its previous classification errors.

Section 37(2) of the Act confers upon the Board the power to "assign" an employer to a subclass, "withdraw" an employer from a subclass, and "transfer" an employer to another subclass. It is apparent from the use of these three different terms that the legislature intended to confer three different powers, although it seems that the authority to withdraw and the authority to transfer would often be exercised together.

The impugned policies speak only of "assignment". Policy AP1-37-1 states that employers are "assigned to classification units annually", while policy AP1-37-3 states that an employer is "assigned one or more classifications every year."

A decision to "assign" an employer to another classification unit due to the operation of the annual classification cycle involves varying a previous decision to assign, and accordingly falls squarely under the definition of "reconsideration" in section 1 of the Act.

Sections 24 and 96(7) clearly set out circumstances in which section 96(5)(a) is not applicable. Section 113(2) establishes the Board's extensive authority to reconsider previous occupational health and safety decisions or orders.

In contrast to sections 24, 96(7), and 113(2), there is no explicit language in section 37(2) indicating that section 96(5)(a) is not applicable. Had the legislature intended that section 96(5)(a) would not be applicable to classification decisions under section 37(2), it could have created a further exception to section 96 (as it did with the fraud and misrepresentation

exception in section 96(7)), granted the Board broad authority to change its classification decisions (as it did in relation to occupational health and safety decisions and orders), or provided for reconsideration of classification decisions if certain criteria are met (as it did under section 24). The absence of any of these exclusion mechanisms in section 37(2) supports the proposition that the legislature did not intend to exclude classification decisions from the operation of section 96(5)(a).

Through amending the Act to limit reconsiderations of decisions, the legislature implemented the recommendation of the March 11, 2002 *Core Services Review of the Workers' Compensation Board* that the finality of compensation and assessment decisions made under Part 1 of the Act be enhanced. The annual classification cycle established by the impugned policies takes the Board in the opposite policy direction.

There is no language in section 37(2) or elsewhere in the Act to rationally support the notion that employers' classifications expire at the end of each year. The chair agreed with the vice chair, for the reasons given in his referral in *WCAT-2011-00996*, that, given that sections 38, 39, 47 and 49 establish annual obligations of employers and the Board in relation to matters other than the specific classification power, they do not establish an annual classification cycle.

Accordingly, the chair concluded that policies AP1-37-1 and AP1-37-3 are so patently unreasonable that they cannot be supported by the Act, to the extent that they declare that classification decisions are essentially cancelled at the end of each year, and purport to authorize the Board to correct its classification errors by annually assigning employers to classification units. The policies of the board of directors cannot grant the Board the authority to vary or cancel assignments that are based on Board error, more than 75 days after those erroneous assignments are made.

The chair considered section 37(2)(f) and decided that the authority to withdraw and transfer, was separate and distinct from the authority to assign an employer to a classification unit. Decisions to withdraw and decisions to transfer are new decisions rather than decisions that vary or cancel the decision to assign.

The chair concluded that, notwithstanding section 96(5)(a), it was rational to interpret the Act as providing that, even in the absence of a change in an employer's operations or policy, or fraud or misrepresentation, the Board may make a new decision to withdraw an employer from a classification unit and a new decision to transfer it to another classification unit after 75 days.

The question of how the Board's authority to withdraw and transfer might apply to the appeals of the three employers was beyond the narrow question before the chair and was for the vice chair to determine in deciding the three employers' appeals following the section 251 process.

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1. Introduction

- [1] This is a determination under section 251(3) of the *Workers Compensation Act* (Act). Section 250(2) of the Act requires the Workers' Compensation Appeal Tribunal (WCAT) to apply the applicable policies of the board of directors of the Workers' Compensation Board (Board or WCB), which operates as WorkSafeBC, in making its decisions. However, section 251(1) of the Act provides an exception when the applicable policy is "so patently unreasonable that it is not capable of being supported by the Act and its regulations."
- [2] In *WCAT-2011-00996* dated April 20, 2011 (the referral), a WCAT vice chair determined that provisions in certain policies regarding the Board's employer classifications system are so patently unreasonable that they are not capable of being supported by the Act (there are no applicable regulations). Although the policies apply to "employers", "independent operators", and "firms", for the sake of simplicity I will discuss the classification of "employers" throughout this determination. However, my analysis will also be applicable to the classification of "independent operators" and "firms".
- [3] Sections 36 to 52 of the Act comprise "Division 4 – Accident Fund and Assessments" of Part 1 of the Act. Division 4 establishes the Board's obligation to maintain the accident fund of the workers' compensation system and the legislative scheme pursuant to which assessments are levied against employers and collected by the Board. Section 37 establishes classes of industries for assessment purposes and grants the Board various powers in relation to classes and subclasses, including the authority to assign employers to classes and subclasses, withdraw employers from classes and subclasses, and transfer employers to other classes and subclasses.
- [4] As part of its assessments system, and under the applicable policies, the Board classifies each employer in one or more "classification units". When the board of directors of the Board approves the annual *Classification and Rate List*, each classification unit is assigned a rate at which the employers classified in that classification unit are required to pay assessments to the Board to fund the accident fund.
- [5] In the referral, the vice chair considered the appeals of three related employers. In each case, effective January 1, 2010, the Board had reclassified the employer in accordance with policies AP1-37-1 (The Classification System) and AP1-37-3 (Classifications - Changes) of its *Assessment Manual*. Specifically, in order to rectify a Board error, it deleted a classification unit from each of the three employers' classifications, more than 75 days after it had assigned those employers to the classification unit. Section 96(5)(a) of the Act is central to the referral. It provides that

the Board may not reconsider a decision if more than 75 days have elapsed since that decision was made.

- [6] The referral considered that the impugned policies are patently unreasonable because they “depend on the notion that each employer’s classification decision expires at the end of the year in which it is made” and they authorize the Board to “classify and reclassify an employer annually, on a prospective basis.” The referral arises out of circumstances in which the Board reclassified the three employers because it determined that it had previously misclassified them due to errors on the part of the Board. There were no changes in the operations of the three employers that would have otherwise affected their classifications.
- [7] In this determination, I will refer to the collective policy provisions in AP1-37-1 and AP1-37-3 that purport to establish the Board’s annual classification and reclassification authority as the “impugned policies”, consistent with the vice chair’s use of this term in the referral. The impugned policies are founded on the “annual classification cycle” established through *Assessment Manual* policies.
- [8] The current versions of policies AP1-37-1 and AP1-37-3 came into effect on October 1, 2009. Policy AP1-37-1 states that the Board annually publishes the *Classification and Rate List*, which is a policy of the board of directors, and also provides the following summary of the foundational principles of the classification system:

1. GENERAL

The classification system is based on the principle that the cost of producing a product or providing a service includes the cost of injuries or diseases incurred by the workers doing the work. The system is based on industrial undertaking rather than on occupation or hazard. If a specific product is being manufactured, the classification is the same, regardless of whether the manufacturing is done by the employer’s workers or subcontracted out to another firm. A classification includes all occupations within the industry, including office or clerical staff.

The terms classes, subclasses and further subclasses are used in section 37 of the Act. For the purposes of describing the Board’s industrial classification system, a sector is equivalent to a class, subsectors are equivalent to subclasses, and classification units are equivalent to further subclasses.

[emphasis added]

- [9] In this determination, I will mainly use the statutory terms “class” and “subclass”. However, for ease of reference, I will use the policy term “classification units” rather than the statutory term “further subclasses”. When I use “classification” it will apply to either the classification unit or subclass depending on the context.
- [10] The provisions in AP1-37-1 regarding classification units (CUs) include the following:

2. CLASSIFICATION UNITS

Employers and independent operators are assigned to classification units annually and at other times as the Board requires, on the basis of the industry in which the firm is operating. In assigning the classification, some of the factors considered are the type of product or service being provided, the processes and equipment that are used, and the type of industry with which the firm is in competition. Occupations of individual workers may be reviewed when assigning the classification, but only as an indicator of the type of industry being carried on. The fact that an employer contracts out parts of an industry to other employers does not mean that the employer cannot be classified in that industry. The classification system should not unfairly discriminate between firms competing for the same business.

[emphasis added]

- [11] The referral concluded policy AP1-37-1 is patently unreasonable in establishing that employers are assigned to CUs “annually” because, in that regard, the policy contravenes section 96(5)(a) of the Act by authorizing reconsideration of a classification decision when more than 75 days have passed from the date of that decision.
- [12] Similarly, the referral concluded section 2 of policy AP1-37-3 is patently unreasonable because it establishes the annual classification cycle. Policy AP1-37-3 provides, in part:

2. CHANGE IN CLASSIFICATION

The Board may change a firm’s classification.

The effective date of a change in a firm’s classification and the impact on the firm’s experience rating depends on the reason for the change. Set out below are four reasons why the Board may make a new decision concerning a firm’s classification, and the effective date and impact on experience rating associated with each reason for change. Decisions in

these cases do not constitute reconsiderations of existing classification decisions.

2.1 The Annual Classification Cycle

A firm is assigned one or more classifications every year as a consequence of the yearly establishment of the *Classification and Rate List*. This assignment may result in a firm's classification changing. The effective date of a change to a firm's classification resulting from the annual classification cycle is January 1st of the year for which the *Classification and Rate List* is established.

Where a firm's classification changes as a result of the annual classification cycle, the general rule is that a firm's experience will transfer.

[emphasis added]

- [13] The referral acknowledges that the Board is authorized to reclassify an employer "where the factual, statutory, or policy circumstances of an employer change or in the presence of fraud or misrepresentation", which are the other three reasons for new classification decisions set out in policy AP1-37-3. The referral concludes that section 96(5)(a) otherwise precludes the Board from reclassifying an employer after the 75-day period has elapsed.
- [14] The three employers are represented by counsel. The Employers' Forum to the WCB, the Business Council of British Columbia, and the Employers' Advisers Office are participating in this matter and have provided submissions. The three employers, the Employers' Forum to the WCB, and the Business Council of British Columbia all take the position that, although the amount of each employer's assessment is determined annually, the Act does not authorize the Board to classify each employer annually. The Employers' Advisers Office has provided a submission to assist in the consideration of this matter but has not taken a position.

2. Issue(s)

- [15] The broad issue in this determination is whether the provisions of policies AP1-37-1 and AP1-37-3 authorizing the Board to annually determine the classification of each employer are so patently unreasonable that they cannot be supported by the Act. The referral recognizes that the Act authorizes reclassification of an employer "where the factual, statutory or policy circumstances of an employer change or in the presence of fraud or misrepresentation" even if the reclassification is triggered by an annual review of the employer's classification. The specific issue arising out of the referral is whether

it is patently unreasonable under the Act for the policies of the board of directors to, in effect, authorize the Board to correct its classification errors on a prospective basis, through the operation of the annual classification cycle.

3. The Board's statutory authority to classify employers

[16] Section 37(1) of the Act establishes a classification system for employers, for the purpose of assessment, and section 37(2) vests in the Board the authority to:

- (a) create new classes in addition to those referred to in subsection (1);
- (b) divide classes into subclasses and divide subclasses into further subclasses;
- (c) consolidate or rearrange any existing classes and subclasses;
- (d) **assign** an employer, independent operator or industry to one or more classes or subclasses;
- (e) **withdraw** from a class
 - (i) an employer, independent operator or industry,
 - (ii) a part of the class, or
 - (iii) a subclass or part of a subclass,

and transfer it to another class or subclass or form it into a separate class or subclass;

- (f) **withdraw** from a subclass
 - (i) an employer, independent operator or industry,
 - (ii) a part of the subclass, or
 - (iii) another subclass or part of another subclass,

and transfer it to another class or subclass or form it into a separate class or subclass.

[emphasis added]

4. Policy AP1-96-1

[17] Although it is not included in the referral as an impugned policy, I note that policy AP1-96-1 (Reconsiderations of Decisions) of the *Assessment Manual* is also relevant. Among other things, it sets out the board of directors' policies regarding reconsiderations of assessment decisions under section 96 of the Act. It provides, in part:

(a) Definition of reconsideration

A reconsideration occurs when the Board considers the matters addressed in a previous decision anew to determine whether the conclusions reached were valid. Where the reconsideration results in the previous decision being varied or cancelled, it constitutes a redetermination of those matters.

Decisions that are reconsidered under section 96(4), and are therefore subject to the time limitations in section 96(5), are decisions on individual matters. Examples of such decisions include:

- the modification of an employer's assessment rate through experience rating;
- determinations regarding whether an individual is a worker, employer, independent operator or labour contractor;
- the application of a penalty for failure to remit or report as required under the *Act*; and
- the charging of claims costs when an employer is in default and an injury or occupational disease occurs to one of its workers during the period of default.

Matters of general application, on the other hand, are not intended to be covered by section 96(4) and (5). Examples of such matters include:

- the allocation of income, compensation payments, outlays, expenses, assets, liabilities, surpluses or deficits to or from an account of a class or subclass, or to or from a reserve of the accident fund, with the exception of section 10(8) and

section 39(1)(b), (d) and (e) decisions as they relate to a specific employer or independent operator; and

- the determination of an assessment rate for a class or subclass.

Section 37 of the *Act* establishes the Board's authority to make any changes to classes and subclasses that are considered necessary and appropriate as part of the management of the classification system. **The exercise of this authority, including withdrawing an employer or independent operator from a subclass and transferring the employer or independent operator to another class or subclass, due to the application of the Annual Classification Cycle, a change in the firm's operations, policy changes which result in changes to classification units or a firm's fraud or misrepresentation, does not constitute a reconsideration of a Board decision.** Rather, the change constitutes a new decision pursuant to the exercise of the Board's normal classification authority under section 37(2). The restrictions, including the 75-day time limit, placed upon the Board's reconsideration authority under section 96(5) do not apply.

[emphasis added]

5. The history of the classification of the three employers

(a) Classification at the time of registration

[18] The three employers are related companies, each of which is in the business of operating retail outlets that sell building supplies. When they initially registered with the Board, it assigned them to CU 741013 "General Retail – Not Elsewhere Specified" (General Retail) and to CU 741014 "Home Improvement Centre". Throughout the history of this matter, the assessment rate for the Home Improvement Centre CU has been higher than that for General Retail. For instance, in 2010, the assessment rate for the Home Improvement Centre CU was \$2.02 per \$100 of payroll and the assessment rate for General Retail was \$0.48 per \$100 of payroll.

[19] Throughout the relevant period CU 741013 and CU 741014 have both been in "74 – Trade Sector" (which is a "class" under the Act) and they have both been in "7410 – Retail Subsector" (which is a "subclass" under the Act). Under the terms used in the Act, the CU 741013 and CU 741014 are "further subclasses", established under the authority of section 37(2)(b).

(b) The change of the classifications of the three employers effective January 1, 2006

- [20] Prior to November 1, 2007, policy AP1-37-3 provided that the Board had broad authority to change classifications of employers, including authority to do so when the employer was misclassified due to Board error.
- [21] In 2005, the Board decided to delete the General Retail CU for each of the three employers and assess them only at the rate for Home Improvement Centres effective January 1, 2006 because the three employers had been assigned to the General Retail CU due to a Board error. The Review Division confirmed the Board's decisions and the three employers appealed to WCAT.
- [22] By memorandum dated April 2, 2007 (available at www.wcat.bc.ca – follow the links at research, lawfulness of policy decisions (section 251), withdrawn lawfulness of policy referrals), the vice chair to whom the three employers' appeals were assigned (the 2007 WCAT panel) determined that policies AP1-37-3 and AP1-96-1 were patently unreasonable because section 96(5)(a) of the Act precludes the Board from reconsidering a decision, in order to correct a Board error, after 75 days have passed.
- [23] In response to the 2007 WCAT panel's memorandum, in October 2007 the board of directors amended policy AP1-37-3 to address the matter identified by the 2007 WCAT panel. Accordingly, there was no need for a determination by the chair under section 251(3) of the Act.
- [24] The 2007 WCAT panel then issued *WCAT-2008-01030* and *WCAT-2008-01034*, which allowed the three employers' appeals and enabled them to continue to be classified in both the General Retail and Home Improvement Centre CUs.

(c) The decision of the 2008 WCAT panel (regarding another employer)

- [25] In *WCAT-2008-02064* dated July 10, 2008, another vice chair (the 2008 WCAT panel), who was deciding an appeal initiated by a different employer, considered whether policy AP1-37-3 (as amended in October 2007) and policy AP1-96-1 were patently unreasonable under the Act. The effect of the relevant part of policy AP1-37-3 in effect at that time was that the Board could not change an employer's classification to rectify a Board error more than 75 days after its classification decision was made. Specifically, like the 2007 WCAT panel, the 2008 WCAT panel considered whether those policies were rendered unlawful by failing to take into account the section 96(5)(a) restriction on the Board's reconsideration authority. The 2008 WCAT panel concluded in *obiter dictum* (an opinion not essential to the decision) that the Act authorizes the Board to establish each employer's classification on an annual basis.

- [26] The conclusion of the 2008 WCAT panel that the Act rationally supported the concept of an annual classification cycle was largely based on the annual activities and obligations prescribed by sections 38, 39, 47, and 49 of the Act. These include employers' obligations to provide payroll reports, the Board's obligation to levy and adjust assessments, and its authority to levy penalties against employers that fail to honour their annual obligations. In this regard, the 2008 WCAT panel stated:

It appears to me that [sections 38, 39, 47, and 49 of the Act] may be viewed as supporting an analysis that the assessment system functions on a calendar basis. The issuance of a new Classification and Rate List each year provides a fresh opportunity to examine the correctness of the employer's classification within the current classification structure. In the event there is any concern regarding the correctness of the employer's classification, this could be addressed but not retroactively to a prior year in the absence of fraud or misrepresentation.

However, this analysis would appear inconsistent with the conclusion by the board of directors [in their resolution making the October 2007 policy amendments] that the Board cannot reconsider a classification decision after 75 days based on Board error. If the theory set out above were correct, the Board would have similar authority to correct a classification in situations of Board error and employer non-compliance, in a subsequent assessment year. While the policy amendments did not expressly provide that a misclassification due to Board error would continue to be applied in subsequent years, that would appear to have been the meaning of the policy change (in the context of the [April 2007] section 251 referral which resulted in [the October 2007] revision of the policy).

- [27] The 2008 WCAT panel considered the comments regarding finality and the purpose of the assessment system in the March 11, 2002 *Core Services Review of the Workers' Compensation Board* (Core Review) and the debates in the legislature regarding the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). He concluded that the purposes and the intent of the assessment system would be undermined if an error in an employer's classification could continue in perpetuity. He went on to discuss the unfairness that this would create in the assessment system because employers with erroneously high assessment rates would be disadvantaged in competing with other employers, while employers with erroneously low assessment rates would have an unfair competitive advantage. The 2008 WCAT panel concluded:

It seems to me that to apply the 75-day time limit on the Board's reconsideration authority so as to preclude the making of new classification decisions in subsequent calendar years (i.e. based on Board

error or firm non-compliance, without a change in operations) would lead to results which are extremely unreasonable or inequitable or incompatible with the object of the legislative enactment. To my mind, this supports a purposive reading of the Act so as to avoid an absurd result.

The provisions of the Act concerning the Board's assessment system establish a system of annual assessments. By policy, a new Classification and Rate List is promulgated on an annual basis. Within this framework, I consider that a classification decision only has legal effect for a particular assessment year. It is, therefore, within the Board's authority to address as a new issue the question as to the proper classification of an employer within the context of any new Classification and Rate List provided in a subsequent year.

Where, however, an employer objects to a decision concerning its classification for a particular year, the employer may seek reconsideration within 75 days, or request a review by the Review Division within 90 days. The 75-day time limit on the Board's reconsideration authority applies to classification decisions, but only in respect of the particular assessment year in question.

(d) The March 2009 discussion paper and the October 2009 policy amendments

- [28] The decision of the 2008 WCAT panel appears to have formed the basis of the Board's March 27, 2009 discussion paper entitled "Annual Classification Cycle". The paper notes that each year the board of directors establishes a new classification system through a new *Classification and Rate List*. The paper proposed that classification decisions only be effective for a year, such that each year the Board would assign each employer to a CU under the new *Classification and Rate List* for that year.
- [29] The discussion paper was the focus of a consultation process with stakeholders. Following the consultation, the board of directors amended policies AP1-37-1 and AP1-37-3 effective October 1, 2009 in order to authorize the Board to classify and reclassify employers annually on a prospective basis. Those versions of AP1-37-1 and AP1-37-3 are the subjects of the referral.

(e) The 2010 classification of the three employers

- [30] The Board applied the amended policies to the classifications of the three employers and decided that, for the 2010 assessment year, each of the three employers would be classified only in the Home Improvement Centre CU. The Review Division decision

confirming the Board's decision is the subject of the appeal that led to the referral I am now considering regarding the impugned policies.

6. The standard of review under section 251

- [31] In making a determination under section 251 of the Act, the WCAT chair is required to determine whether the impugned policy is “so patently unreasonable that it is not capable of being supported by the Act and its regulations.” The meaning of “patently unreasonable” can be determined by considering various court decisions.
- [32] In *Speckling v. British Columbia (Workers' Compensation Board)*, 2005 BCCA 80, the Court defined patently unreasonable as “openly, clearly, evidently unreasonable.” In *Davidson v. British Columbia (Workers' Compensation Board) et al.*, 2003 BCSC 1147, the Court cited a series of authorities regarding the meaning and application of the standard of patent unreasonableness, including the following:

[47] The patently unreasonable test requires that a decision under review to [sic] be “openly, evidently, clearly” unreasonable. In the ***Canada (Director of Investigation and Research) v. Southam Inc.***, [1997] 1 S.C.R. 748, Iacobucci J. stated at ¶57:

The difference between “unreasonable” and “patently unreasonable” lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable.

...

[50] Another description of this standard is that enunciated by Beetz J. in ***Syndicat des employés de production du Québec et de l'Acadie v. Canada (Labour Relations Board)***, [1984] 2 S.C.R. 412:

A mere error of law is to be distinguished from one resulting from a patently unreasonable interpretation of a provision which an administrative tribunal is required to apply within the limits of its jurisdiction. This kind of error amounts to a fraud on the law or a deliberate refusal to comply with it. As Dickson J. (as he then was) described it, speaking for the

whole Court in *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227 at p. 237, it is

...so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review...

[emphasis in original]

- [33] Under section 82 of the Act, the board of directors has broad discretion to set and revise policies. The board of directors is not required to apply the correct interpretation of the Act in establishing policies. A policy is not patently unreasonable under the Act if it applies a rational interpretation of the Act. Therefore, in considering whether policies of the board of directors are patently unreasonable under the Act, I must accept that statutory provisions are often capable of more than one interpretation and that there may be a variety of rational policy options through which a statutory provision may be implemented.

7. Principles of statutory interpretation

- [34] The question before me is whether the annual classification cycle established in policies AP1-37-1 and AP1-37-3 is rationally supported by the Act. In order to interpret the Act, it is necessary to consider and apply the principles of statutory interpretation.
- [35] Statutory interpretation in Canada is governed by the “modern principle.” This principle was formulated in 1974 by Professor Elmer Driedger in the first edition of *The Construction of Statutes*¹ as follows:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

- [36] In 1998, the Supreme Court of Canada in *Re Rizzo and Rizzo Shoes Ltd.*², declared the modern principle as the preferred approach to statutory interpretation. In 2002, in *R. v. Jarvis*,³ the court restated the modern principle in this way (at paragraph 77):

¹ Elmer A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974) at p. 67.

² [1998] 1 S.C.R. 27, at 41, per Iacobucci J.

³ [2002] 3 S.C.R. 757, 2002 SCC 73, per Iacobucci J. and Major J.

The approach to statutory interpretation can be easily stated: one is to seek the intent of Parliament by reading the words of the provision in context and according to their grammatical and ordinary sense, harmoniously with the scheme and the object of the statute.

[37] The types of external contextual factors to consider vary from case to case, but often include information about the legislative evolution and history of the statute and provision in question, such as previous versions of the provision in question, legislative debates about its enactment, and government commissioned reports related to the proposed amendments.

[38] In British Columbia, the modern principle is buttressed by section 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238 which provides:

Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[39] In applying the modern principle for the purposes of this determination, it is necessary to consider the objects of the Act, its legislative history, the Core Review, and the debates in the legislature. I will also consider the ordinary meaning of the words in sections 37 and 96(5)(a) and consider them in the context of the Act as a whole.

[40] Before setting out my own analysis, I will review the referral's reasons for concluding that the impugned policies are so patently unreasonable that they cannot be supported by the Act.

8. The vice chair's section 251 referral in WCAT-2011-00996

(a) Sections 38, 39, 47, and 49

[41] The referral considered the analysis in *WCAT-2008-02064* regarding the annual classification cycle that the 2008 WCAT panel considered to be established by sections 38, 39, 47, and 49 of the Act.

[42] In the referral, the vice chair concluded that nothing in sections 38, 39, 47 or 49 relates to an authority to annually reclassify employers (see referral, paragraphs 43 to 46). He noted that those sections make no mention of classification issues, and thus are silent with respect to the Board's classification and reclassification authority. The vice chair concluded that the ordinary and grammatical sense of these provisions does not establish that the Board is authorized to annually reclassify employers.

(b) Section 37(2) and section 96(5)(a)

- [43] The referral also considered the classification authority established by section 37(2) and its interplay with section 96(5)(a).
- [44] The referral concluded that, in the absence of changed factual, statutory, or policy circumstances of an employer, or in the absence of fraud or misrepresentation, the Board is not authorized to re-determine an employer's classification each year (and thus correct earlier classification errors) because such a redetermination offends the limitation on reconsiderations established by section 96(5)(a). In this regard, the referral set out the following analysis:
- [80] ... The difficulty with interpreting section 37 of the Act as providing an annual classification and reclassification power turns on subsection 96(5) of the Act. Other than the subsection 96(7) exception for cases of fraud or misrepresentation, subsection 96(5) mandates a 75-day limit on the Board's reconsideration authority.
- [81] The purpose of the 75-day reconsideration rule is to encourage finality within the workers' compensation system. As noted earlier, the importance of finality was discussed at length in the *Core Services Report* and then codified in Bill 63. The benefits of finality are obvious; however, the cost of finality is, occasionally, incorrect decision-making.
- [82] With the importance of finality in mind, section 1 of the Act is also relevant and defines "reconsider" as making "...a new decision in a matter previously decided where the new decision confirms, varies or cancels the previous decision or order."
- [83] It therefore appears to me that, in the absence of a material change in an employer's circumstances, or a material change in the statutory and policy framework, any further effort by the Board to change an employer's classification after 75 days would amount to a reconsideration by the Board.
- [84] Such a reconsideration would be impermissible because subsection 96(5) is said to apply to "Part 1" of the Act. It need hardly be said that section 37 is found within Part 1 of the Act and must consequently be subject to the 75-day reconsideration rule. There is nothing in the wording of section 37 to suggest that it

should somehow not be included in Part 1 and therefore subject to the 75-day reconsideration rule.

[45] The referral also notes that, when section 96(5)(a) was brought into effect through Bill 63, the legislature amended section 24 of the Act to establish that the Board's authority to revisit certain disability awards decisions is not subject to section 96(5)(a). In the vice chair's view, if the legislature had intended the Board's authority under section 37 of the Act to not be subject to the restriction in section 96(5)(a), the legislature would have included specific language in section 37 to that effect.

[46] The vice chair concluded as follows:

[93] In summary, the ordinary and grammatical sense of section 37, in combination with the reconsideration provisions, the context of these provisions, and the purpose of section 37, as well as finality, do not support the notion of an annual classification or reclassification authority and therefore cannot provide a rational basis for the impugned policies.

[47] The referral also considered whether section 37(2)(f) of the Act establishes classification powers independent from and in addition to its "assignment" power under section 37(2)(d). Section 37(2)(f) grants the Board the power to "withdraw" an employer from a subclass and "transfer" it to another class or subclass. The vice chair concluded that, even if section 37(2)(f) establishes such an independent power, it would still be subject to the 75-day period for reconsideration established under section 96(5)(a) of the Act. In that regard, the referral concluded:

[99] In these circumstances, the presumption against tautology might be said to require that the independent powers set out in paragraph 37(2)(f) add something to the statute not already included in the Board's authority to make an initial classification assignment by way of paragraph 37(2)(d). However, even if this view offers a viable interpretation of the Act, which I doubt, the exercise of the independent powers would still be subject to the 75-day reconsideration rule, the same as the remainder of section 37, and indeed all matters under Part 1.

[100] This means that even the most generous reading of paragraph 37(2)(f) would likely only permit the independent powers to be exercised once before they were in turn exhausted by the 75-day reconsideration rule. If the independent powers are only exercisable once, at most, they obviously cannot support the notion

of an ongoing annual classification and reclassification power. It follows that the “independent powers” analysis offers no rational basis for the impugned policies.

(c) The purpose of the assessment provisions of the Act

- [48] In the referral, the vice chair also conducted a purposive analysis of the assessment provisions of the Act, and concluded that, even if the purpose of ensuring accurate classification decisions were the predominant criterion in interpreting the Act, this would not support the notion of an annual classification cycle. He determined the “mischief” caused by the Board wrongly classifying an employer in a CU with a high assessment rate is rectifiable, insofar as the Act provides such an employer a right of review of this classification decision, and a further right of appeal. Consequently, if a wrongly classified employer fails to take advantage of the review and appeal system, it cannot reasonably complain about its classification, any more than a worker can complain if he or she fails to appeal a compensation decision. Thus, this first form of “mischief” was not compelling as a basis for such a purposive interpretation of the Act.
- [49] The referral then addressed the second type of “mischief”, which arises if an employer is wrongly classified in a CU with a low assessment rate. Such a scenario would result in a windfall for the employer and a competitive disadvantage for its correctly classified competitors. The vice chair recognized that such a situation is obviously unfair because the employer will not likely request a review of such a classification decision, and the Board has no standing to do so.
- [50] The referral stated that the correct approach was for the Board to take the steps necessary to ensure that it properly classifies employers based on an adequate investigation at first instance. In balancing the interest of correcting the occasional erroneous decision with the interest of finality, the vice chair concluded that finality is the overriding principle. The referral also noted:
- [69] The Board may cancel a CU by removing it from the *Classification and Rate List* if that CU is no longer an effective tool for achieving the underlying purpose of grouping and reasonably distributing risk to similarly-situated employers. A CU may also be cancelled if it no longer captures changing technology and business models, or for various other reasons.
- [70] Because CU's are part of the *Classification and Rate List*, they constitute binding policy. Thus, if a CU is eliminated, the resulting policy change would require the Board to reassign the members of the cancelled CU to another CU. The reassignment would not

amount to an impermissible reconsideration; rather, it would be a new decision, on a new matter, flowing prospectively from the change in policy.

- [51] Ultimately, the vice chair concluded that, insofar as the impugned policies purport to provide the Board with the authority to classify and reclassify employers on an annual basis, they are patently unreasonable. In other words, he found the policies are not rationally supported by the Act.

9. The three employers' submissions

- [52] The three employers' position is that the impugned policies are patently unreasonable in purporting to authorize the Board to "make a new decision correcting a prior Board error concerning the classification of an employer (without constituting a reconsideration of an existing classification decision)." They submit that such a new decision is a reconsideration under section 96(4), which is subject to the 75-day time period in section 96(5)(a).

10. The submissions of the Employers' Advisers Office

- [53] The Employers' Advisers Office takes no general position on behalf of the employer community but provides their submission to assist in the full consideration of the referral.
- [54] They agree with the referral's conclusion that sections 38, 39, 47, and 49 do not support the notion of an annual classification cycle. They contend that those provisions establish the annual cycle for employer assessments. However, they point out that the impugned policies purport to be supported by section 37(2) rather than those provisions. Accordingly, they highlight the legislative history of section 37 of the Act as an important consideration in this determination and raise the possibility that the Board's authority in section 37(2) is not subject to the limitation in section 96(5)(a).
- [55] The Employers' Advisers Office specifically notes that the Board's authority in section 37(2)(f) to withdraw an employer from a subclass and transfer it to another class or subclass resulted from Bill 63. As I understand their submission, in their view section 96(5)(a) is not applicable when the Board withdraws and transfers an employer because the authority to withdraw and transfer is distinct and independent from the power to assign and must be interpreted in a meaningful manner. It follows that, if the Board were only authorized to withdraw an employer from a CU and transfer it to another CU during the 75 days after it is initially assigned to a CU, the power to withdraw and transfer would be rendered meaningless because the Act contemplates

the Board reconsidering the CU assigned to an employer during the same 75-day period.

11. Submissions from the Employers' Forum to the WCB and the Business Council of British Columbia

[56] The Employers' Forum to the WCB and the Business Council of British Columbia both submit that the annual experience rating and assessment letters merely inform employers of the assessment rates they will be paying per \$100 of assessable payroll and do not constitute decisions that classify and reclassify employers.

12. Are the impugned policies patently unreasonable under the Act?

[57] In my view, the question of whether the impugned policies are patently unreasonable turns on the interpretation of section 37(2) and its interplay with section 96(5)(a). For the reasons set out below, I conclude that the impugned policies are so patently unreasonable that they are not capable of being supported by the Act. I find no basis on which to rationally conclude that the Board is authorized to limit the duration of classification decisions to one year and annually reclassify employers in order to correct Board errors.

[58] For the reasons set out below, I also conclude:

- After assigning an employer to a CU, the Board may reconsider the assignment within 75 days.
- Section 37(2) does not grant the Board the authority to reassign an employer to a different CU after 75 days.
- Section 37(2)(f) authorizes the Board to withdraw an employer from the assigned CU more than 75 days after the CU was assigned and transfer the employer to another CU.

[59] I leave open the question of whether, after withdrawing an employer from a CU and transferring it to a second CU, the Board is authorized to withdraw the employer from the second CU and transfer it to a third CU after 75 days.

(a) Legislative history of section 37

[60] The two most recent sets of amendments to section 37 resulted from the proclamation of the 1999 *Labour Statutes Amendment Act* (Bill 65), and Bill 63.

[61] Prior to the 1999 legislation, section 36 of the Act established the classifications of industries and section 37 provided:

Creation and rearrangement of classes

37 (1) The board may

- (a) create new classes in addition to those mentioned in section 36;
- (b) consolidate or rearrange any existing class; and
- (c) withdraw from a class an industry or a part of a class or subclass included in it and transfer it wholly or in part to another class, or form it into a separate class.

(2) In case of a rearrangement of the classes, or the withdrawal of an industry from a class, the board may make the adjustment and disposition of the funds, reserves and accounts of the classes affected that is considered just and expedient.

[62] As a result of the 1999 legislation, section 37(2) was significantly amended. The amendments relevant to the referral:

- granted the Board the discretion to “assign” employers to one or more classes;
- added the new terms “independent operator” and “employer” (previously, the relevant provisions had referred only to “industry”); and
- authorized the Board to withdraw a subclass “or a part of a subclass” from a class and transfer it to another class or subclass.

[63] The amended section 37(2) provided:

37(2) The board may do one or more of the following:

- (a) create new classes in addition to those referred to in subsection (1);
- (b) consolidate or rearrange any existing class;
- (c) assign an employer, independent operator or industry to one or more classes established by or under this section;

(d) withdraw from a class

- (i) an employer, independent operator or industry,
- (ii) a part of the class, or
- (iii) a subclass or a part of a subclass,

and transfer it to another class, or form it into a separate class.

[64] The relevant *Hansard* passages record that the Minister of Labour generally described Bill 65 as establishing “a new framework for the workers’ compensation employer classification system to make the system fairer for all employers.” The new system was designed to end the grouping of non-comparable businesses together. The Minister stated:

...The present system has seen little change in the past 35 years. It reflects an economic environment that was far less complex than it is today. It speaks of industries that no longer exist. And it does not adequately accommodate many of the new and emerging industries. The result is that non-comparable businesses are often grouped together, and companies with higher safety risks are, in effect, subsidized by those with lower risks....

For over two years the board has been working on a new system that reflects the modern economy -- a system which will group like employers, which will provide more flexibility to accommodate industry change and which will be fairer and more equitable in calculating assessment rates. Further, changes to the act give the Workers Compensation Board broad discretion to deal with existing accounts, as it considers advisable, to ensure a smooth transition to the new system. I would note that the board has been consulting with business and with workers throughout the process. The framework established by this amendment will allow the Workers Compensation Board to work with business and workers to implement the new system early in 2000.

[reproduced as written]

[65] While these comments do not address the legislature’s intention with regard to the addition of the specific “assignment” power, they establish that the general intention behind the 1999 amendments (which included amendments to the prescribed classes in

the Act) was to create a fairer classification system for employers. Specifically, by introducing these amendments, the legislature sought to avoid grouping together non-comparable businesses and subsidization of employers with higher safety risks by those with lower safety risks. It also sought to establish a classification system that was more flexible and more responsive to changes in industries. To that end, the Board implemented a new classification system in 2000. In my view, the Minister's comments reflect the fundamental principles of the assessment and classification system.

[66] The amendments flowing from Bill 63 became effective on March 3, 2003, which was also the effective date of the restriction on reconsideration established in section 96(5)(a). Those amendments added various references to the term "subclass" in section 37(2), in order to extend the Board's existing powers in relation to "classes" to "subclasses". Specifically, those amendments granted the Board the additional discretion to:

- consolidate or rearrange any existing subclasses;
- assign an employer to one or more subclasses; and
- withdraw an employer from a subclass and transfer it to another class or subclass, or form it into a separate class or subclass.

[67] The amendments also provided the Board with new discretionary powers to divide classes into subclasses and divide subclasses into further subclasses.

[68] The addition of section 37(2)(f) was significant because it clearly establishes that the Board may withdraw an employer from a subclass and transfer it to another class or subclass. In my view, its purpose is to enhance the fairness of the assessment system and grant the Board the flexibility required to manage the assessment system. In my analysis, the central question in the appeal that is the subject of the referral is whether section 37(2)(f) authorizes the Board to correct its earlier error by withdrawing the three employers from the General Retail CU and transferring their General Retail operations into the Home Improvement Centre CU.

(b) In the absence of section 96(5)(a), would the annual classification cycle be authorized by section 37(2)?

[69] For the reasons set out in the referral, I view sections 38, 39, 47, and 49 as establishing annual obligations of employers and the Board in relation to matters other than the specific classification power, rather than establishing an annual classification cycle. Although there is no provision in the Act specifically authorizing the Board to review classifications annually, there is no provision that prohibits the Board from doing so. In

my view, but for section 96(5)(a) the broad authority and discretion conferred under section 37(2) would authorize the board of directors to establish the annual classification cycle.

(c) The Board's reconsideration authority

[70] Prior to March 3, 2003, sections 96(2) and 113(2) of the Act conferred a very broad reconsideration authority on the Board. The extent of the reconsideration authority was among the issues considered in the Core Review. In that regard, the Core Review chapter entitled "Reconsiderations / Reopenings", sets out the following terms of reference:

Should there be time limits on the ability to obtain reconsideration of past decisions with respect to compensation, occupational health and safety, **employer assessment or classification matters**? If so, what should these limitations be?

[emphasis added]

[71] The Core Review recommended that the provisions that ultimately became sections 96(4) and (5) be enacted. In light of the terms of reference in that document, it is evident that recommendation extended to "employer assessment or classification matters" in order to significantly enhance finality. It is apparent from policies in the *Assessment Manual*, that the board of directors recognizes that the limitation on reconsideration applies to various types of assessment decisions.

(d) Are the impugned policies patently unreasonable in light of section 96(5)(a)?

[72] In my view, the question before me turns on whether the impugned policies are patently unreasonable in light of section 96(5)(a). I will start my analysis in this regard by considering other subsections of section 96, as well as other relevant provisions in the Act. I will then analyze the interplay between sections 96(5)(a) and 37(2).

(i) Subsections of section 96

[73] Section 96(1) is a privative clause, which establishes the exclusive jurisdiction of the Board. Section 96(1)(h) establishes that "the Board has exclusive jurisdiction to inquire into, hear and determine ... the class to which an industry or a part, branch or department of an industry within the scope of [Part 1 of the Act] should be assigned."

[74] Section 96(4) establishes that "[d]espite subsection (1)" the Board may reconsider a classification decision made under Part 1. Sections 2 to 100, inclusive, comprise Part 1 of the Act. As noted in the referral, section 1 of the Act provides:

“reconsider” means to make a new decision in a matter previously decided where the new decision confirms, varies or cancels the previous decision or order;

[75] Section 96(5)(a) establishes that “[d]espite subsection (4)” the Board may not reconsider a decision after 75 days have passed.

[76] Section 96(2) establishes the Board’s authority to “reopen a matter that has been previously decided” when there is “a significant change in a worker’s [compensable] medical condition” or “a recurrence of a worker’s injury.” Section 96(3) provides:

(3) If the Board determines that the circumstances in subsection (2) justify a change in a previous decision respecting compensation or rehabilitation, the Board may make a new decision that varies the previous decision or order.

[77] Accordingly, the Act clearly establishes that a reopening of a claim is a new decision that varies the previous decision. It is not a reconsideration and, therefore, is not limited by the time limit established in section 96(5)(a). However, when a new decision is made to reopen a claim under section 96(2), sections 96(4) and (5)(a) are applicable to that decision and limit the Board’s authority to reconsider that decision to a 75-day period.

[78] Section 96(7) provides that “[d]espite subsection (1)” the Board may “at any time” set aside any decision or order made by it under Part 1 of the Act, if the decision or order resulted from “fraud or misrepresentation of the facts or circumstances upon which the decision or order was based”. In other words, the Board is not limited to a 75-day reconsideration period in these circumstances.

(ii) Other provisions of the Act

[79] As noted in the referral, Bill 63 amended section 24 of the Act, which applies to certain permanent disability decisions, to specifically authorize the Board to reconsider those decisions in prescribed circumstances (see section 24(2)). Section 24 also starts with the words “[d]espite section 96(1).” It is clear that the legislature intended that, when the requirements of section 24 have been met, a permanent disability decision may be reconsidered under that provision even though more than 75 days have passed since the permanent disability decision was made. However, when a new decision is made under section 24, the Board’s authority to reconsider that decision will be subject to the 75-day time limit established by section 96(5)(a).

[80] Part 3 of the Act sets out provisions regarding occupational health and safety. Since sections 96(4) and (5)(a) are only applicable to Part 1 of the Act, the 75-day time limit for reconsideration is not applicable to occupational health and safety decisions. Nevertheless, section 113(2), which is in Part 3, makes it very clear that it is open to the Board to change its previous occupational health and safety decisions and orders. It provides:

Despite subsection (1), but subject to subsection (2.1) and sections 189 (1) and 190 (4), the Board may at any time, on its own initiative, make a new decision or order varying or cancelling a previous decision or order of the Board or of any officer or employee of the Board respecting any matter that is within the jurisdiction of the Board under this Part.

(iii) The interplay between section 37(2) and section 96(5)(a)

[81] I now turn to reconsiderations of assessment decisions. As noted earlier, policy AP1-96-1 of the *Assessment Manual* sets out examples of assessment decisions that may be reconsidered under section 96(4) subject to the time limit prescribed by section 96(5)(a), such as decisions regarding experience rating, status, and charging of claims costs. The policy goes on to say that, because section 37(2) authorizes the Board to withdraw and transfer employers to different classes and subclasses, the Board is able to make new classification decisions under the “Annual Classification Cycle” and those new decisions do not constitute reconsiderations under section 96(4).

[82] The referral identified various circumstances in which the Board is authorized to make new classification decisions. In my view, the Board’s annual review of employers’ classifications to determine whether those circumstances exist is a responsible and fair administrative practice, which is intended to ensure that the assessment system is operating as intended by the legislature. The referral does not take issue with the Board changing an employer’s classification “where the factual, statutory, or policy circumstances of an employer change or in the presence of fraud or misrepresentation”. Therefore, the referral recognizes that the Board’s regular review of employers’ classifications enables it to identify situations in which classifications should change due to changes in employers’ operations, policy changes, fraud, and misrepresentation. The referral is limited to the question of whether, after 75 days have passed, the Board is authorized to make new classification decisions under the annual classification cycle to correct previous classification errors. In other words, the question is whether new classification decisions in those circumstances constitute reconsiderations that are prohibited by section 96(5)(a).

[83] Section 37(2) of the Act confers upon the Board the power to “assign” an employer to a subclass, “withdraw” an employer from a subclass, and “transfer” an employer to

another subclass. I agree with the conclusion of the Employers' Advisers Office that it is apparent from the use of three different terms that the legislature intended to confer three different powers, although it seems that the authority to withdraw and the authority to transfer will often be exercised together.

[84] It is noteworthy that section 37(4), which relates to the implementation of Bill 65 in 1999, establishes the Board's authority to "assign or reassign employers" to classes to implement that legislation whereas the Board's authority in section 37(2) does not include the power to reassign. On this basis, the rules of statutory interpretation dictate that the legislature would have specifically granted the Board the authority to reassign under section 37(2) if it had intended that the Board would have that authority.

[85] The impugned policies only speak of "assignment". Policy AP1-37-1 states that employers are "assigned to classification units annually" rather than stating that, after the initial assignment of an employer to a classification unit, the Board reviews the classification annually and may withdraw and transfer the employer. Similarly, in establishing the annual classification cycle, policy AP1-37-3 states that an employer "is assigned one or more classifications every year".

[86] I find that a decision to "assign" an employer to another CU due to the operation of the annual classification cycle involves varying a previous decision to assign and, accordingly, falls squarely under the definition of "reconsideration" in section 1 of the Act. Therefore, I must consider whether there is a rational basis to conclude that section 96(5)(a) is inapplicable to the authority to assign CUs.

[87] The proclamation of Bill 63 resulted in:

- the addition of the definition of "reconsider" to section 1 of the Act;
- amendments to section 24;
- amendments to section 37(2);
- the addition of the current sections 96(2) to 96(9); and
- the addition of the current section 113(2).

[88] Sections 24 and 96(7) contain clear language, which sets out circumstances in which section 96(5)(a) is not applicable. Although section 113(2) is not found in Part 1 of the Act, its language is relevant because it so clearly establishes the Board's extensive authority to reconsider previous occupational health and safety decisions or orders. In contrast to sections 24, 96(7), and 113(2), there is no explicit language in section 37(2)

indicating that section 96(5)(a) is not applicable. Had the legislature intended that section 96(5)(a) would not be applicable to classification decisions under section 37(2), it could have created a further exception to section 96 (as it did with the fraud and misrepresentation exception in section 96(7)), granted the Board broad authority to change its classification decisions (as it did in relation to occupational health and safety decisions and orders), or provided for reconsideration of classification decisions if certain criteria are met (as it did under section 24). The absence of any of these exclusion mechanisms in section 37(2) supports the proposition that the legislature did not intend to exclude classification decisions from the operation of section 96(5)(a).

- [89] Through amending the Act to limit reconsiderations of decisions, the legislature implemented the recommendation of the Core Review that the finality of compensation and assessment decisions made under Part 1 of the Act be enhanced. In my view, the annual classification cycle established by the impugned policies takes the Board in the opposite policy direction. By establishing that each classification decision ceases to apply at the end of the year and a new classification decision is made each year through the assignment of the employer to one or more CUs, the impugned policies direct Board officers to reconsider classification decisions annually. However, there is no language in section 37(2) or elsewhere in the Act to rationally support the notion that employers' classifications expire at the end of each year nor is there language indicating the Board may "assign" CUs to employers over and over again as contemplated by the impugned policies.
- [90] Accordingly, I find the impugned policies, that is the statements in policies AP1-37-1 and AP1-37-3 which declare that classification decisions are essentially cancelled at the end of each year and purport to authorize the Board to correct its classification errors by annually assigning employers to CUs, are so patently unreasonable that they cannot be supported by the Act. The policies of the board of directors cannot grant the Board the authority to vary or cancel assignments that are based on Board error, more than 75 days after those erroneous assignments are made.
- [91] In contrast to the impugned policies, which only speak to the Board annually "assigning" employers, policy AP1-96-1 speaks of the Board's authority to "withdraw and transfer" employers due to, among other things, "the application of the Annual Classification Cycle". It states that the Board's withdrawal or transfer decisions constitute new decisions under its section 37(2) classification authority, and are not subject to the 75-day restriction in section 96(5)(a). In light of this potential conflict between policy AP1-96-1 and the impugned policies, in determining whether the impugned policies are patently unreasonable, I have also considered the question of whether the Board's authority in section 37(2)(f) to withdraw employers from CUs and transfer them to other CUs, which is not subject to any preconditions or restrictions, rationally supports the impugned policies.

- [92] It may be rational to conclude that a decision to withdraw and transfer an employer is a reconsideration of the assignment decision because it could be said to vary or cancel the assignment of an employer to a CU. However, it is also rational, and in my analysis more correct, to view the authority to withdraw and transfer as separate and distinct from the authority to assign an employer to a CU, and conclude that decisions to withdraw and decisions to transfer are new decisions rather than decisions that vary or cancel the decision to assign. The latter approach is consistent with the purpose of the changes to the Act that flowed from Bill 65, which granted the Board further power to ensure that like employers are assessed at the same rates, especially as the employers in a particular industry change, and the flexibility to manage the assessment system in an environment in which industries and employers operating in various industries tend to regularly change. Notwithstanding section 96(5)(a), I conclude that it is rational to interpret the Act as providing that, even in the absence of a change in an employer's operations, policy, fraud, or misrepresentation, the Board may make a new decision to withdraw an employer from a CU and a new decision to transfer it to another CU after 75 days.
- [93] I will not analyze or identify how the Board's authority to withdraw and transfer might apply to the appeals of the three employers because that matter is beyond the narrow question before me and is for the vice chair to determine in deciding the three employers' appeals following the section 251 process. In addition, I will not determine the manner in which sections 96(4) and (5)(a) apply to decisions to withdraw and transfer. However, for future consideration, I raise the question of whether a decision to withdraw and transfer is always a new decision. For instance, suppose an employer is assigned to CU #1 and then withdrawn from CU #1 and transferred to CU #2. If the employer is then withdrawn from CU #2 and transferred to CU #3, could the decision to withdraw from CU #2 be characterized as a new decision, and therefore not subject to section 96(5)(a) because it is the first time that the employer has been withdrawn from CU #2?
- [94] The question before me is whether the authority to withdraw and transfer employers constitutes support for the annual classification cycle, which is a system in which each employer's classification expires each year and the employer is then placed in the same or another classification. Many employers stay in the same CU for periods of many years. Suppose an employer was originally assigned to CU #1. I cannot think of any rational interpretation of section 37(2) that would enable the Board to withdraw the employer from CU #1 and then transfer it to CU #1. Clearly the only rational interpretation of the withdraw and transfer powers is that they apply when an employer's CU is changed by the Board. Therefore, I find the impugned policies are not rationally supported by the Board's power to withdraw and transfer.

[95] I acknowledge that my analysis in this determination does not fully accord with the analysis of the 2007 WCAT panel or the 2008 WCAT panel or the analysis in the referral. However, I have found the reasons of the previous panels and those set out in the referral thoughtful and helpful in this determination. Although decision consistency and predictability is an important value, it is generally accepted that members of a tribunal may have differing views in the early stages of applying new statutory provisions and policies. Through articulating those views, which may arise through application of the legislation and policies to different fact patterns, members of tribunals contribute to a line of decisions which often lead to a consistent approach in the long term.

13. Conclusion

[96] I find that the impugned policies are so patently unreasonable that they are not capable of being supported by the Act. I find no basis on which to rationally conclude that the Board is authorized to limit classifications decisions to one year and annually reclassify employers in order to correct Board errors. The impugned policies provide that the Board may assign an employer to a CU on an annual basis in cases where the factual circumstances of the employer relevant for classification purposes have not changed since the previous classification decision. However, in such circumstances, the Board is squarely caught by the reconsideration prohibition in section 96(5)(a) of the Act because it is making a “new decision” in “a matter previously decided”, more than 75 days after its previous decision.

[97] The limitation on the Board’s reconsideration authority does not prevent it from reviewing the circumstances of employers annually (or on any other schedule) to determine whether there are factors or circumstances that authorize a new classification decision. The circumstances that have been identified in the referral are those “where the factual, statutory, or policy circumstances of an employer change or in the presence of fraud or misrepresentation.”

[98] Although the Board has no authority to vary or cancel a decision to assign an employer to a particular CU after 75 days have passed, it has the authority under section 37(2)(f) to withdraw the employer from the CU and transfer it to another CU. I leave the question of whether a further decision to withdraw an employer from the second CU and transfer it to a third CU is a reconsideration or a new decision because there is no need for me to decide that question in resolving the narrow question that is before me.

14. Operation of Section 251

[99] Section 251 prescribes a series of steps that must be taken as a result of my determination that the impugned policies should not be applied. Those steps include the following:

- In accordance with section 251(5), I will send notice of this determination and my reasons to the board of directors.
- In accordance with section 251(5), WCAT will suspend the other appeal proceedings that I consider to be affected by the impugned provision in policies AP1-37-1 and AP1-37-3 until the board of directors makes a determination under section 251(6). WCAT has identified those appeals and they will be suspended following the issuance of this determination.
- WCAT will forward to the board of directors a list of parties to the appeals that WCAT has suspended under section 251(5).
- In accordance with section 251(6), within 90 days of receipt of notice of this determination, the board of directors must review policies AP1-37-1 and AP1-37-3 and determine whether WCAT may refuse to apply the impugned policies, which I have found to be patently unreasonable.
- In accordance with section 251(7), the board of directors must allow the three employers, who are parties to this appeal, and the parties to all appeals suspended by WCAT to make written submissions.
- In accordance with section 251(8), WCAT will be bound by the board of directors' determination.

Jill Callan
Chair

JC/gw/gn