WCAT Decision Number: WCAT-2012-02540
WCAT Decision Date: September 28, 2012
Panel: Warren Hoole, Vice Chair

1.0 Summary

[1] The current version of *Assessment Manual* policy item AP1-37-3(2.1) permits the Workers' Compensation Board (Board) to withdraw an employer from a classification unit (CU) and transfer it to a new CU. An employer's assessment costs depend, in large part, on the type of CU to which it is assigned.

[2] The policy item goes on to state that the effective date of a change in classification "…is January 1st of the year following the date on which the Board identified the [employer's] classification for evaluation…."

[3] The practical result of policy item AP1-37-3(2.1) is that an employer will be required to continue paying assessments on the basis of a superseded CU for up to one year after the classification change. Where the new CU is less expensive than the old CU, the resulting unfairness of continuing to pay assessments based on the old, more expensive CU for up to a year is obvious.

[4] The employer submits that the impugned portion of the policy is patently unreasonable because the *Workers Compensation Act* (Act) provides no basis to delay implementing a classification change until January 1st of the following year. On the contrary, the Act requires that classification changes be implemented on the basis of fairness and expediency, both of which favour immediate implementation of a classification change.

[5] I agree with the employer and I therefore refer the validity of the impugned policy to the Chair in accordance with subsection 251(2) of the Act.

2.0 Background

[6] The evidence is not in dispute and I need not set it out at length. The employer accurately advised the Board of its diesel fuel distribution operations when it commenced business in 2005. There is no suggestion that the employer misrepresented the nature of its business. Nor is there any suggestion that the employer's circumstances or business operations changed between 2005 and 2011.

[7] It was not until the middle of September 2011 that the employer fortuitously discovered from speaking with another fuel distributor that it might be wrongly classified. The employer immediately contacted the Board and, in a decision letter dated

September 20, 2011, the Board agreed to change the employer's classification from a general trucking CU to a fuel distribution CU. The assessment costs of the latter CU were almost half those of the former CU.

[8] The Board therefore made an error in its original 2005 classification decision. Although it is not necessarily relevant, I note that the error was not particularly obvious; it was merely the sort of error that inevitably arises from time to time in high-volume decision making.

[9] For its part, the employer failed to query the original classification decision or take any steps to alert the Board to its error for several years, despite receiving annual reminders from the Board about its classification status. Consequently, because the employer did not contact the Board until September 2011, its incorrect classification remained in place. The Board and the employer therefore share responsibility for the employer's incorrect classification and consequential overpayment of assessments since 2005.

[10] The employer agrees with the Board's decision to change its classification; however, it disagrees with the Board's decision that the change in classification would not be effective until January 1, 2012.

3.0 The Impugned Policy

[11] I underline below the impugned portion of the policy:

> **2.1 Classification Changes under Section 37(2)(f)**
>
> The purpose of the classification system is to classify firms into groups that can be used to set fair and equitable rates. The Board undertakes periodic reviews of the classification system to ensure that this purpose is met and that the classification system does not unfairly differentiate between firms competing for the same business.
>
> Section 37(2)(f) outlines the Board's authority to 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.
>
> <u>Where a firm's classification changes as a result of the Board's exercise of this authority, the effective date is January 1st of the year following the</u>

> date on which the Board identified the firm's classification for evaluation and the general rule is that a firm's experience will transfer.

4.0 Analysis

[12] The employer does not argue that it should receive a retroactive refund of the excess assessments it paid prior to raising its classification status with the Board in September 2011. Given the employer's failure to request a review or to alert the Board to the possibility of a misclassification in a timely manner, I note in passing that the employer might well have difficulty arguing the retroactive effective date issue.

[13] Instead, the employer merely argues that it should have received the immediate benefit of its new classification, decided on September 20, 2011, rather than being required to wait until January 1, 2012. As the employer limits its argument to this point, I too will only consider the employer's entitlement to immediate, prospective implementation of its classification change under the impugned portion of the policy.

[14] In this regard, I agree with the employer that the portion of policy item AP1-37-3 resulting in the January 1, 2012 effective date for the employer's classification change is patently unreasonable.

[15] The meaning of "patently unreasonable" for the purposes of section 251 of the Act has been discussed in several decisions of the former WCAT Chair and I need not repeat that analysis here. I merely point out that, where a policy is clearly contrary to the Act the policy will be patently unreasonable.[1]

[16] Here, the Act is silent as to the effective date of classification changes made pursuant to the Board's authority in paragraph 37(2)(f) of the Act. However, subsection 37(3) of the Act provides general guidance regarding how the Board should implement classification changes as follows:

> (3) If the Board exercises authority under subsection (2), it may make the adjustment and disposition of the funds, reserves and accounts of the classes and subclasses affected that the Board considers just and expedient.
>
> [my emphasis]

[17] The Act therefore imports the requirements of justness and expediency into the Board's implementation of a classification change. I consider it so obvious as to not require further analysis that it is unjust to force an employer to continue to pay higher assessments than warranted once a classification error has been identified that would otherwise result in lower assessment costs.

[1] See, for example, *Glover v. British Columbia (Workers' Compensation Board)*, 2007 BCSC 1878 at paragraph 56.

[18] Such an outcome is manifestly unfair and therefore contrary to the express requirement of subsection 37(3) that the Board must implement classification changes in a fair manner. As already noted, a policy that contradicts its enabling statute will be patently unreasonable.

[19] Moreover, I do not consider that the phrase "expedient" in subsection 37(2) permits such an outcome. It is true that expediency relates to practicality and convenience, without particular regard for fairness.

[20] However, a classification change must still result in a recalculation of an employer's assessment obligations at some point in time and nothing about delaying that decision until January 1st of the following year ameliorates that minor administrative burden. I therefore doubt it is more practical or convenient to carry out the necessary recalculation on January 1st of the following year rather than simply carrying out recalculation at the same time the Board actually decides to change the classification.

[21] The only potential explanation I can see for delay might be that the Board sets its base rate for each CU annually on January 1st. If the change in classification for an employer is delayed until January 1st, it might be that the Board will be able to calculate the annual base rate for each CU with slightly more precision.

[22] However, CUs are large groupings that are intended to incorporate sufficient employers to reflect a viable statistical base in accordance with the general insurance principles that underlie the assessment system. I doubt that the addition or deletion of a single employer at times other than January 1st will interfere to any noticeable extent with the annually calculated base rates. I therefore see little or no expediency in permitting the Board to delay implementing a classification change until January 1st of the following year.

[23] Further, I note that other aspects of policy item AP1-37-3 in fact permit a classification change to be effective immediately without awaiting January 1st. It is only the impugned portion of policy item AP1-37-3 that takes such an inflexible approach by permitting only a single possible effective date – that is, January 1st of the following year.

[24] For example, item 2.2 of policy item AP1-37-3 provides that, where a change in classification is required because an employer changes its business operations, the new classification will normally be effective as of the date of the changed business operations. It is therefore apparent even within policy item AP1-37-3 that there is no pressing practical need to make classification changes effective on January 1st only.

[25] Finally, regardless of classification many new employers join the assessment scheme and many old employers leave the scheme over the course of a year. This movement of employers in and out of CUs is in itself a practical reality that the Board must deal

with in setting annual base rates. In this context, maintaining a handful of employers in a CU until January 1st of the following year following a classification change under item 2.1 of policy item AP1-37-3 therefore appears all the less expedient.

[26] Consequently, I do not consider that the impugned aspect of the policy is supported by the notion of expediency, as referenced in subsection 37(2) of the Act. Simply put, the Board will in any event be required to undertake the administrative task of implementing a classification change. I see no persuasive practical or convenient reason for this minor administrative step to be delayed until January 1st of the following year rather than simply implementing the change on the same day as the change in classification decision is made.

[27] It follows that I find the impugned portion of policy item AP1-37-3 is contrary to the direction in subsection 37(3) of the Act that the Board implement classification changes in a just and expedient manner. Because the impugned portion of the policy is clearly contrary to the Act, it is patently unreasonable and I would refuse to apply it.

[28] Were it necessary to do so, I would conclude that the impugned portion of the policy is also patently unreasonable because it both eliminates and fetters the discretion mandated in the Act. As already noted, subsection 37(2) of the Act confers on the Board a broad discretion in how to implement classification changes. The impugned portion of the policy discards this statutory requirement for discretion because it mandates only a single outcome. The impugned aspect of the policy therefore incorporates no discretion and accordingly contradicts the Act such that it is patently unreasonable on this basis alone.

[29] Because I consider the impugned portion of the policy to be patently unreasonable, pursuant to subsection 251(2) of the Act, I must refer this issue to the WCAT Chair to complete the remainder of the process set out in section 251 of the Act.

[30] In an effort to assist the Board to understand my views in relation to the impugned aspect of the policy, I expect that it need undergo only a minor amendment to be consistent with the Act.

[31] It is my opinion that item 2.1 of policy item AP1-37-3 need only recognize an immediate effective date for a classification change as at least a potential option, particularly in a "rate down" situation. It is not necessarily problematic that January 1st of the following year remains one option for setting the effective date of a classification change, as long as January 1st of the following year is not the single and inflexible outcome currently mandated under the impugned portion of the policy.

5.0 Conclusion

[32] In conclusion, I find that item 2.1 of policy item AP1-37-3 is patently unreasonable to the extent that it requires that the Board delay implementation of an employer's "rate down" classification change until January 1st of the following year.

[33] I therefore consider that the impugned policy should not be applied to the current appeal and I refer it to the Chair of the WCAT pursuant to subsection 251(2) of the Act.

[34] For convenience, I underline once again the impugned aspect of the policy below:

> **2.1 Classification Changes under Section 37(2)(f)**
>
> The purpose of the classification system is to classify firms into groups that can be used to set fair and equitable rates. The Board undertakes periodic reviews of the classification system to ensure that this purpose is met and that the classification system does not unfairly differentiate between firms competing for the same business.
> Section 37(2)(f) outlines the Board's authority to 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.
>
> Where a firm's classification changes as a result of the Board's exercise of this authority, the effective date is January 1st of the year following the date on which the Board identified the firm's classification for evaluation and the general rule is that a firm's experience will transfer.

Warren Hoole
Vice Chair

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