Noteworthy Decision Summary

Decision: WCAT-2003-02653-AD **Panel**: H. McDonald **Decision Date:** September 24, 2003

Stay of Workers' Compensation Board decision – Section 244 of the Workers Compensation Act – Item 5.40 of the Manual of Rules, Practices and Procedures

The corporation appealed a January 28, 2003 decision by an assessment officer in the Assessment Department of the Workers' Compensation Board (Board). The assessment officer had decided that the appellant was correctly classified as "Commercial Cleaning or Janitorial Services" and that all payments made by the appellant to persons working as janitors under a franchise agreement should be included in the appellant's assessable payroll. This resulted in an increase in the appellant's assessment for the year 2001 and an under-remitting penalty. The appellant submitted that the assessment officer's decision was wrong in law and in fact and requested a stay of the decision on the ground that it could become insolvent if it had to make the payments. The panel considered the factors described in section 5.40 of the *Manual of Rules, Practices and Procedures* and the fact that the granting of a stay is an extraordinary remedy. The panel concluded that it was not persuaded that the appellant would become insolvent if it had to pay the Board in that it would be unable to find the funds to meet its employee payroll obligations. The request for a stay was denied.

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WCAT Decision Date: September 24, 2003
Panel: Heather McDonald, Vice Chair

Introduction

The appellant is a corporation that is appealing a January 28, 2003 decision by an assessment officer in the Assessment Department of the Workers' Compensation Board (Board). In her January 28, 2003 decision, the assessment officer found that the appellant was correctly classified in classification unit 764014 (Commercial Cleaning or Janitorial Services). She also found that persons working as janitors under a franchise agreement with the appellant were, if not registered as labour contractors with the Board, workers of the appellant. For the year 2001, she included in the appellant's assessable payroll all payments made by the appellant to such persons. This resulted in an increase of $5,804.55 in the appellant's assessment for the year 2001. As well, a consequence of the assessment officer's decision was that the Board assessed the appellant an under-remitting penalty of $464.36, bringing the total owing to $6,268.91. The appellant submits that the assessment officer's decision is wrong in law and in fact.

Within 30 days of the assessment officer's decision, the appellant initiated an appeal with the Appeal Division. On March 3, 2003, the Workers' Compensation Appeal Tribunal (WCAT) replaced the Appeal Division and the Review Board. As an Appeal Division panel had not considered the appellant's appeal before March 3, 2003, it will be decided as a WCAT appeal. See section 39 of the *Workers Compensation Amendment Act (No. 2), 2002* (the Amendment Act).

There was a delay of almost six months before WCAT acknowledged the appellant's appeal, sending the appellant a "Notice of Appeal by Employer from WCB Non-Claims Decision" form to complete. The appellant partially completed the form and returned it to WCAT on August 29, 2003. On the form, the appellant indicated that it was requesting a stay of the Board assessment officer's decision. The appellant provided a written submission in support of its request for a stay.

In this decision, I will deal only with the appellant's request for a stay of the assessment officer's January 28, 2003 decision.

Issue(s)

Should WCAT grant the appellant's request for a stay of the assessment officer's January 28, 2003 decision?

Procedural Matters and Jurisdiction

Legal counsel represented the appellant in these proceedings. The appellant returned a partially completed notice of appeal to WCAT; it did not indicate, on item 5 of the notice, whether it wanted WCAT to consider its appeal by way of an oral hearing or a read and review process. In his letter accompanying the written submission made on behalf of the appellant, legal counsel states that he looks forward to receiving advice about the date of the hearing; therefore I assume that the appellant is requesting an oral hearing on the merits of its appeal.

I have decided that the appellant's request for a stay may be decided on the basis of the material on file, in particular the appellant's written submission and accompanying evidence. An oral hearing is not necessary to decide the stay issue, although the WCAT panel assigned to deal with the appeal on the merits may decide to convene an oral hearing on the merits of the appellant's appeal.

Legal Background

Section 39(2) of the Amendment Act provides that all proceedings pending before the Appeal Division on March 3, 2003 are continued and must be completed as proceedings pending before WCAT.

Section 244 of the Act states:

> ***Unless the chair directs otherwise*****,** the filing of a notice of appeal under section 242 does not operate as a stay or affect the operation of the decision or order under appeal.
>
> [emphasis added]

Under *Decision #1* of the chair of WCAT (March 3, 2003), the chair has delegated her authority under section 244 of the Act to grant a stay of a decision or order under appeal to WCAT members. "Member" is defined in *Decision #1* as all vice chairs, including any senior vice chair, specialized vice chair, and deputy registrar." I am a vice chair of WCAT and accordingly *Decision #1* of the WCAT chair delegates me the authority under section 244 to grant a stay of a decision or order under appeal to WCAT.

Section 5.40 of WCAT's *Manual of Rules, Practices and Procedures* (MRPP) deals with requests for stays of decisions under appeal to WCAT. With respect to the criteria for granting a stay, section 5.40 of the MRPP states as follows:

> The chair will consider the following factors in determining whether to issue a stay:

(a) whether the appeal, on its face, appears to have merit (to ensure the appeal is not frivolous; that is, there is a serious question to be heard);

(b) whether the applicant would suffer serious irreparable harm if the stay were not granted (for example, loss of a business);

(c) which party would suffer greater harm or prejudice from granting or denying a stay; and

(d) in the context of occupational health and safety, whether the granting of a stay would endanger worker safety;

This list is not exhaustive, and other factors may be taken into account.

An application for a stay will generally be dealt with as a preliminary matter on the basis of written submissions. If no particulars or reasons are provided with the request, the request for a stay will be summarily dismissed.

The applicant will normally be required to provide written submissions in support of a stay application together with the notice of appeal or within a further 7 days. WCAT will send the submissions to the other parties who will be given seven days to respond. The requesting party will then have five days to provide rebuttal. The chair will issue a written decision on the stay request as soon as practicable once submissions are complete.

The factors described in section 5.40 of the MRPP to consider in deciding whether it would be appropriate to grant a stay are similar to the common law criteria for issuing a stay outlined by the Supreme Court of Canada in *Manitoba (Attorney-General) v. Metropolitan Stores Ltd*., [1987] 1 S.C.R. 110 and *RJR Macdonald Inc. v. Canada (Attorney-General)* [1994] 1 S.C.R. 311. The Court in those cases noted that a stay of proceedings and an interlocutory injunction are remedies of the same nature and, in the absence of statutory language to the contrary, should be governed by the same tests. The Court also affirmed the principle that a stay is an extraordinary remedy.

The language in section 244 of the Act ("unless the chair directs otherwise") is essentially the same as the language afforded the former Appeal Division to grant a stay by section 210 of the Act, before the legislation was amended on March 3, 2003 to replace the Appeal Division by establishing WCAT. The factors described in section 5.40 of the MRPP are also very similar to the factors that were considered by the Appeal Division under *Decision No. 33* [17 W.C.R. D-7] in deciding whether to grant a stay of a decision under appeal.

Section 244 of the Act states unless WCAT directs otherwise, a notice of appeal does not operate as a stay of the decision under appeal. Section 5.40 of the MRPP requires that a party requesting a stay provide a written submission in support of its request and if there are no reasons or particulars to support the request, WCAT will summarily dismiss the request for a stay. I have considered the wording of section 244, the onus that the MRPP places on the party requesting the stay to provide reasons or risk summary dismissal of its request, and the Supreme Court of Canada's comments in the case law earlier cited. Those considerations indicate that, like the granting of an interlocutory injunction, a stay of proceedings is an extraordinary remedy. WCAT will not grant a stay unless the applicant requesting the stay provides sufficient reasons justifying a special exercise of the tribunal's discretion to temporarily halt, pending the outcome of the merits of an appeal, the lawful effect of a Board decision or order.

Background to the Appellant's Request for a Stay

In its written submission in these appeal proceedings, the appellant relates that it is a franchisor that sells franchises to various purchasers. The appellant provides the purchasers with a training program and initially provides them with client accounts. The client accounts are offices and business premises requiring cleaning (janitorial) services. The appellant disagrees with the decision of the Board assessment officer, as it says that the purchasers are not its employees. The appellant does not supervise the cleaning work of the purchasers, nor does it supply equipment for them to use. It does not remit any monies to Revenue Canada, nor does it control any other aspect of the purchasers' businesses other than to ensure quality control. The appellant does collect monies from the client accounts and remits those monies to the purchasers, minus a moderate management fee. The appellant says that, in essence, the purchasers pay the appellant to administer their accounts.

On the stay issue, the appellant submits that the assessment officer's decision has caused it to suffer severe financial difficulty. The appellant submits that the combined impact of the increased amount of its assessment remittances, the retroactive assessment, and the under-remitting penalty, is more than it can financially deal with at this time. It submits that it is losing money and there is a real chance it will have difficulty in maintaining its payroll for its seven employees working in its office, and in continuing to conduct its business as a franchisor.

The appellant enclosed copies of filed income tax returns for the years 2001 and 2002. The year 2001 income tax return indicates that the appellant had an operating loss of $76,011.00, and its liabilities exceeded its assets by $270,424.00. For the year 2002, its income exceeded its operating expenses by $130,264.00; its net income for tax purposes was $129,773.00. The appellant's liabilities exceeded its assets by $161,176.00.

In its written submission on behalf of the appellant, legal counsel submitted as follows:

> It would be a travesty if [the appellant] was to become insolvent as a result of having to make these WCB payments and then it turns out that the appeal is successful. If [the appellant] becomes bankrupt it would not be possible to resurrect it based on the loss of goodwill it would clearly suffer. It is submitted that the spirit of the Act and the spirit of the Appeal process is such that a business should not be put in a position to go bankrupt when it turns out, after appeal, that the initial decision was incorrect.
>
> It is submitted that this particular situation is exactly the type of situation that is contemplated by Section 3 of the Notice of Appeal by Employer from WCB Non-Claims Decision form. The idea being that this business should be able to keep afloat until final determination is made.
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> [reproduced as written]

Reasons and Findings

In reaching my decision on the appellant's application for a stay, I have been guided by the considerations referred to in section 5.40 of the MRPP as well as the Supreme Court of Canada jurisprudence mentioned earlier in this decision.

My assessment of the appellant's appeal on the merits of the case is that the appeal is not of a frivolous or vexatious nature. While I am not commenting on the likelihood of the appeal's success, there is a serious issue to be decided on appeal, namely the application of the Act and the Board's assessment policy to the relationship between the appellant and the franchise purchasers.

The next consideration is whether the appellant would suffer "serious irreparable harm" if the stay were not granted. In this regard, the MRPP gives the example of a loss of a business. This is precisely the scenario referred to by the appellant's legal counsel as the situation potentially facing the appellant. After reviewing the income tax returns submitted as evidence in this case, I am not persuaded that it would immediately and necessarily throw the appellant into bankruptcy if it were required to pay the several amounts owing to the Board. However, the evidence does persuade me that the appellant's financial circumstances are insecure. It might be difficult for the appellant to pay the amounts owing to the Board, which could impact on its ability to meet its employee payroll, for example. This is an unusual case as I am considering the residual impact of the cumulative amounts owed to the Board on individuals not directly involved with the assessment remittance and penalty issues. However, this is a factor I need to take into consideration on the stay issue in this case.

The next consideration is "which party" would suffer greater harm or prejudice from granting or denying a stay. The factors involving harm or prejudice do not involve only the appellant's financial considerations. One must also consider the impact on the public interest and the Board's need to maintain an adequate accident fund. Employers are expected to do business within the province of British Columbia in accordance with the requirements of the law, including the need to pay assessments as charged by the Board. I would not want a signal to be sent to employers that challenging a classification decision or assessment through appeal proceedings might be a way to avoid prompt payment of the assessments charged to them by the Board.

Section 259(1) of the Act provides that the Board must pay an employer interest (in accordance with the policies of the Board's board of directors) on any amount ordered by WCAT in appeal proceedings to be refunded to an employer. Thus, if no stay were granted in this case and the appellant ultimately succeeded on the merits of its appeal, the Board would be required to refund, with interest, the additional assessments and under-remitting penalty. This would not, however, redress the immediate impact, for example, on employee payroll, that might result from the employer having to pay the assessed amounts to the Board before WCAT dealt with the merits of the appeal.

The final factor to consider involves worker safety, in the context of an occupational health and safety issue in the appeal proceedings. The merits of the appellant's appeal involve classification and assessment issues, not occupational health and safety. Accordingly, the final factor is not a relevant consideration in this case.

After considering all the relevant criteria, I have decided not to grant the appellant's request for a stay. Although I recognize that the appellant's business is struggling, I am not persuaded that it would be unable to make the decisions necessary to find the funds to both pay the Board and its employee payroll. It might be able to obtain adequate operating credit or sell an asset in order to fulfill its legal obligations to the Board, for example. It is important for appellants to appreciate that the granting of a stay is an extraordinary remedy that requires proof of irreparable harm to an appellant if a stay is denied. In this case, the evidence falls short of establishing that situation. With that in mind, and acknowledging that the employer has a legitimate case to be heard on appeal, I find that the most appropriate way to proceed is for WCAT to proceed as expeditiously as possible to deal with the merits of the employer's appeal. There has already been a significant delay in the processing of the appellant's appeal, and this should be taken into account in expediting the proceedings from this point forward.

Conclusion

For the foregoing reasons, I deny the appellant's request for a stay of the assessment officer's January 28, 2003 decision. I remit this matter to the WCAT Registry to assign a panel, as quickly as possible, to deal with the merits of the appellant's appeal.

Heather McDonald
Vice Chair

HM/gk

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