Noteworthy Decision Summary

Decision: WCAT-2003-03419 -AD **Panel**: H. McDonald **Decision Date**: November 5, 2003

Assessment - Reclassification – Board Error – 30:20:40 of the Assessment Operating Policy Manual

Under the former Section 96(6.1) of the *Workers Compensation Act*, the employer appealed a January 31, 2003 decision of the director of the Assessment Department, Workers' Compensation Board (Board). The director found that although the employer had registered with the Board in 1988, it had misrepresented its operations in that until 1998 it had failed to accurately report or describe its operations to the Board such that the Board would be able to properly classify the employer. The employer was classified as "mixed farm" when it should have been "adult daycare/ learning centre". The employer took the position that the reason for the reclassification was board error not inadvertent misrepresentation because accurate information about its operations had been provided to the board in its 1991 and 1992 payroll reports.

The panel found that the board erred in finding that there was misrepresentation within the meaning of item #30:20:40 of the *Assessment Operating Policy Manual*. The Board had received the correct information in the payroll reports and failed to respond by, for example, making further inquiries of the employer. The onus was not on the employer to pursue the matter further in these circumstances, and thus there was not misrepresentation. The employer's appeal was allowed and the director's decision varied.

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WCAT Decision Date: **November 05, 2003**
Panel: Heather McDonald, Vice Chair

Introduction

Under the former Section 96(6.1) of the *Workers Compensation Act* (Act), the employer is appealing a January 31, 2003 decision of the director of the Assessment Department, Workers' Compensation Board (the Board). In that decision, the director confirmed an earlier decision by the manager of the Assessment Department. The manager had decided that effective January 1, 1998, the employer's classification should change from "Mixed Farm" (CU 064300) to "Adult Daycare/Learning Centre" (CU 140605). The manager decided that although the employer had registered with the Board in 1988, it had misrepresented its operations in that (until 1998) it had failed to accurately report or describe its operations to the Board such that the Board would be able to properly classify the employer.

The employer's position is that the effective date for the classification change should be January 1, 1991, because in its 1991 payroll reports, the employer had provided accurate information to the Board about its operations. The employer's position is that the Board made an error in failing to reclassify the employer in 1991 when it provided the accurate information to the Board about its operations in its payroll report.

Issue(s)

Did the director err in fact, law or policy in his January 31, 2003 decision in confirming January 1, 1998 as the effective date for the employer's classification change? Was the reason for the reclassification one of Board error or a matter of inadvertent misrepresentation?

Procedural Matters and Jurisdiction

The employer filed its appeal with the Appeal Division on February 27, 2003. On March 3, 2003, the Workers' Compensation Appeal Tribunal (WCAT) replaced both the Appeal Division and the Workers' Compensation Review Board (Review Board). As an Appeal Division panel had not considered the employer's appeal before the transition date of March 3, 2003, it is being completed as a WCAT appeal. (See the *Workers Compensation Amendment Act (No. 2), 2002*) [Amendment Act].

Section 39(1)(a) of the transitional provisions contained in part 2 of the Amendment Act provides that all appeal proceedings, pending before the Appeal Division on March 3, 2003, are continued and must be completed as proceedings pending before

WCAT (except that no time frame applies to the making of the WCAT decision). This means that WCAT will consider the application under the former section 96(6) or (6.1), including application of the grounds of error of law or fact or contravention of a Board published policy. However, the new WCAT provisions also apply. For example, WCAT must makes its decision on the merits and justice of the case, but in so doing, it must apply published Board policy that is applicable in the case. See sections 250(2) and 251 of the Act.

In these appeal proceedings, an employers' adviser represented the employer. On the notice of appeal, the employer submitted that the director's January 31, 2003 decision contravened Board published policy. The employer indicated that an oral hearing was not necessary in the appeal, and I agree that the issues on appeal can be decided on the basis of the file documentation and the employer's written submissions.

Relevant Law and Policy

The applicable Board policy is the version of section 30:20:40 of the Assessment Operating Policy Manual (Manual) in effect at the time of the employer's request to the manager. That policy provided that a change in an employer's classification could result from such things as a change in an employer's operations, a review of an incorrect classification, an investigation by an assessment officer or Assessment Department staff, or a change in Board policy towards an industry or type of employment. The policy also provided that an employer might request a review of classification from the Assessment Department by providing a full description of the operations and reasons for disputing the classification in writing. The policy also noted that in the course of a payroll examination, the Board might find that an employer's account was incorrectly classified. The effective date of a change in a firm's classification depended on the reason why the classification was changing. As earlier stated, the Board's position is that the reason for the classification change in this case was misrepresentation, and the employer argued that it was Board error in failing to recognize the character of the employer's operations. In section 30:20:40, "Board error" and "Misrepresentation" are described as follows:

> 1. Board error
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> A "Board error" is where the information is available and complete to allow the proper classification to be applied but a wrong classification is applied.
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> It would also include an improper classification continuing after an Assessment Officer has audited the firm.
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> A "Board Error" means a clear cut case of misclassifying a firm.

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It does not include borderline classification questions which are subjectively decided and changed at a higher level.

Also, it does not include situations where the information supplied by the firm or its representative is incomplete, inaccurate or simply wrong regardless of whether such is deliberate or inadvertent.

5. Misrepresentation

A firm may misrepresent their operations deliberately or inadvertently. Misrepresentation can be by omission of information, false information, or by words which, through a reasonable interpretation, do not accurately reflect the firm's operations. A section 38 registration qualifies under this heading.

[underline emphasis in original]

Background and evidence

On November 21, 1988, one of the employer's principals telephoned a registration officer in the Assessment Department to register the employer with the Board. There are no detailed notes of the conversation in the Board file. There is no evidence in the notes that do exist to indicate that the principal described the employer's operations in that telephone call other than saying the business involved a mixed farm with vegetables, pigs and chickens. Although in the employer's written submissions to the manager of the Assessment Department, the employer indicated that it "would have" fully described the nature of its operations in November 1988 to the registration officer as involving a training centre for disabled persons, the written record of the telephone conversation does not support that version of events. I also note that in its written submissions in these appeal proceedings, the employer is not requesting an effective date for reclassification retroactive to 1988.

In any event, the Board registered the employer and classified it in "Mixed Farm" (CU 063400). In 1989 and 1990, on the form "Employer's Payroll and Contract Labour Report", the employer described its business in Part A of the Form as "Mixed Farm". Part A provided one line of space in which to give a business description. In 1991, however, the employer described its business in Part A as "Farm and Vocational Development Center". In 1992, the employer completed Part A of the form as "Mixed Farm and Vocational Program". In 1993, the Employer's Payroll and Contract Labour Report form changed, and Part A did not request a description of the business. Rather, it requested the street address where accounting records were kept. Instead, there was a new, more complicated Part E, in which shareholders earnings could be reported, as well as a request that if the industry description was inaccurate, the employer should describe its operations. The industry description for the employer still indicated "Mixed

Farm", and the employer did not write anything in Part E to refute or expand upon that description.

Things remained the same until November of 1998, when the Board sent employers an 'Employer Classification Profile Checklist Form". The Board sent this form in anticipation of the new year 2000 classification system, so that it could review employer classifications to establish their classification in the new system. The employer completed this form which the Board received on November 19, 1998. The employer described its business as a "certified organic farm used as a teaching setting for persons with cognitive difficulties funded by Ministry of Children and Families". The employer noted that 98% of the revenue was derived from that activity. Other financial records submitted by the employer reveal that virtually all of its income is from Ministry funding, with only a small proportion derived from actual farm sales. While the employer operates a farm, the true nature of its business is to serve an educational and training function for persons with disabilities.

The Board did respond when it received the employer's completed Employer Classification Profile Checklist Form. An assessment officer telephoned the employer in April of 2000 and after a brief conversation, determined that the employer's appropriate classification should be Adult Daycare/Learning Centre (CU 140605). This resulted in a rate down for assessment premiums. The assessment officer established the effective date for this change as January 1, 2000.

Subsequently, in late November 2000, an employers' adviser wrote to the manager of the Assessment Department, requesting that the effective date of the classification and rate change be retroactive to the date of the employer's registration in 1988. By letter dated April 16, 2002, the manager of the Assessment Department denied the employer's request, but did change the effective date of the classification/rate change to January 1, 1998. The manager reasoned that the employer had made the Board aware of the true nature of its operations in 1998 when it submitted the Employer Classification Profile Checklist Form. The manager decided that until that point in time, the employer had inadvertently misrepresented the nature of its business to the Board. The manager decided that although the employer had advised the Board in 1991 and 1992 that it was a "farm and vocational development centre", that simple phrase was insufficient to effect a change in classification. Under section 30:20:40 of the Manual policy, a change in classification, needed because of earlier misrepresentation, that has a rate down effect, is made effective January 1st of the year the Board "became aware". In these circumstances, as the Board "became aware" in 1998 of the nature of the employer's operation, the manager made the effective date for the classification change January 1, 1998.

The employer requested the director of the Assessment Department to review the manager's decision. The director's January 31, 2003 decision confirmed the manager's conclusions. The director stated in part as follows:

> Based on the information received from [the employer] at the time of registration, their operation was properly classified as "Mixed Farm". The fact that they wrote "Farm and Vocational Development Centre" and "Mixed Farm and Vocational Program" on their respective payroll submission reports for the years 1992 and 1993 would in itself not be enough to necessarily effect a change of classification. Both statements indicate that the employer's operations are in or about mixed farming. If a firm believed that it was misclassified, a letter or a phone call questioning their classification would be more appropriate than to indicate this information solely on a line on their payroll reports. This method of communication would initiate a review of the firm's classification by the Board, rather than leaving to chance that information indicated on the payroll report would ensure a response on our part. Alternately, if for some reason the firm did not receive a response to their request, then there should be some obligation on the part of the employer to contact the Board to follow-up within a reasonable time, which in this case, did not happen.
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> [reproduced as written]

In these appeal proceedings, the employer is not requesting that the effective date of its reclassification be retroactive to the date of its registration. It does submit, however, that the evidence and policy support a finding that the effective date of reclassification should be the date the Board made an error in failing to recognize that a vocational centre did not fall within the industry of mixed farming.

Analysis and Findings

In this case I have decided to allow the employer's appeal and vary the director's January 31, 2003 decision. I have found that the director contravened Board policy by finding that the circumstances in this case amounted to misrepresentation by the employer until 1998. My conclusion is that the employer provided the Board with a concise and accurate summary of its business operations both in 1991 and 1992 when it submitted the Employer's Payroll and Contract Labour Reports. I also conclude that when the Board received those Reports, it made an error when it failed to note that the employer was operating a vocational development centre/program and failing to respond by, for example, making further inquiries of the employer.

The evidence does not support a finding that at the time of the employer's registration in 1988, it provided the Board with accurate information regarding the nature of its business. Thus I do not find that the effective date of the employer's reclassification should be retroactive to the date of the employer's registration with the Board.

I am concerned with the comments made by the director in his January 31, 2003 letter, as they suggest that under Board policy, it is an employer's primary responsibility to effect a change in its own classification if one is necessary. In his comments, the director assumed that this employer knew that a reclassification was necessary and that somehow it failed itself and the Board by failing to provide a comprehensive written description (or telephone call to the same effect) about its operations in 1991 and 1992. Thus both the manager and the director reasoned in their decisions that the employer had inadvertently "misrepresented" its business operations to the Board.

First, it is precisely and obviously evident from the facts in this case that this employer did not know that it was a candidate for reclassification, even after it provided the Board with a more comprehensive description of its operations in the Employer Classification Profile Checklist Form. In fact, the evidence indicates that the employer never realized on its own that it was a candidate for reclassification. The reclassification was triggered in early 2000 when an assessment officer read the description of the employer's operation in the Employer Classification Profile Checklist Form. That assessment officer was efficient and so contacted the employer to discuss the employer's operations. It was a simple matter to recognize that a classification change was necessary. But it was a simple matter for a Board officer specialized in assessment issues, not at all a simple matter for an employer unsophisticated in Board assessment policy.

The employer, in good faith, completed the Payroll and Contract Labour Reports in 1991 and 1992, and in the small one line of space provided to describe its operations, it managed to do so accurately and succinctly. In his January 31, 2003 decision, the director disparaged the employer's one-line description in the 1991 and 1992 Reports by saying that "if a firm believed that it was misclassified, a letter or a phone call questioning their classification would be more appropriate than to indicate this information solely on a line on their payroll reports". He also indicated that the employer was somehow at fault in "leaving to chance" that information it provided on the Reports "would ensure a response" by the Board.

As I have earlier stated, in this case the employer did not know that it was improperly classified. In the 1991 and 1992 Reports, the employer responded to the Board's request to describe its operations in the small space provided to do so, and it did so accurately. It is reasonable for an employer to expect that when it provides information on a form that the Board requires it to complete, in the space provided on the form, Board experts will respond to the information appropriately and in a timely way. When an employer completes a Board assessment form accurately, a Board assessment officer should take the time to actually read the information provided by the employer, and to respond to it appropriately, within Board policy.

In this case, the employer indicated that it was operating a vocational development centre or program as well as a mixed farm. This was clear and accurate information

that should have immediately prompted the Assessment Department to make further inquiries of the employer. The obvious inquiry would have related to classification issues, for example, was the employer's classification accurate? Had the employer's business changed since registration? Was the employer a candidate for multiple classification? Instead, the Assessment Department did nothing.

The director's next comments in his January 31, 2003 decision relate to his conclusion that even if the Assessment Department fails to respond to an employer's direct request for reclassification, "there should be some obligation" on an employer's part to contact the Board "to follow-up within a reasonable time, which in this case, did not happen." The implication, then, is that even if the Board makes a mistake, it really becomes transformed into an employer's mistake if an employer does not know enough to pursue the Board after initiating a matter.

In this case, the employer provided an accurate summary of its business operations in the 1991 and 1992 Reports. When the style of the Reports changed in 1993, it did not indicate that its industry classification was wrong on the new style of Report, simply because the employer did not know that its industry classification was wrong. This was not the fault of the employer. On the 1991 and 1992 Reports, the employer had provided the Board with an accurate description of its business operations and as the Board did not react to change its industry classification, it trusted the Board's expertise in assessment matters, and assumed that it was in the correct industry classification.

The original copy of the employer's 1991 Payroll and Contract Labour Report, found in the hard copy of the employer's firm file, indicates that the Board received the employer's completed Report on January 17, 1992. The evidence satisfies me that there was no inadvertent misrepresentation by the employer on or after that date about its business operations. It accurately advised the Board that it was running a mixed farm and vocational development centre. That information was sufficiently accurate and complete for the Board to have immediately contacted the employer to clarify the nature of its business operations for classification purposes. When that contact finally occurred in the year 2000, it took only a brief telephone call to quickly establish the employer's accurate industry classification. On that basis, I find that under Manual policy 30:20:40, a "Board error" occurred when the Board failed to respond to the employer's description of its business operations, as the description was "available and complete to allow the proper classification to be applied" but a wrong classification was maintained.

Under Manual policy 30:20:40, where a rate down situation results by "Board error" reasons for classification change, the effective date for reclassification "may be made effective the date the error was made". In this case, it would have been reasonable for the Assessment Department to have reclassified the employer appropriately within a few weeks of receiving the employer's 1991 Payroll and Contract Labour Report.

Accordingly, I find that the effective date for the reclassification should be February 1, 1992.

Conclusion

I allow the employer's appeal and vary the director's January 31, 2003 decision. I have found that the director erred in applying Manual policy 30:20:40. I have found that the reason for the classification change was "Board error" and that the effective date for the employer's classification change should be February 1, 1992.

Heather McDonald
Vice Chair

HM/mak

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