Noteworthy Decision Summary

Decision: WCAT 2004-03070 **Panel:** Heather McDonald **Decision Date:** June 10, 2004

WCAT found an error of law and breach of policy in a Workers' Compensation Board (Board) assessment decision that justified the cancellation of that decision under section 253 of the Workers Compensation Act - The Board office assessor did not turn his mind to applying policy in section 20:30:20 of the Assessment Operating Policy Manual, despite the employer's request to do so, when reaching his decision to include payments to all commissioned agents as part of the employer's assessable payroll, and this failure to consider relevant policy constituted an error of law and a breach of policy

The Workers' Compensation Board's (Board) officer assessor issued an audit decision increasing the employer's assessment by $31,300. Although the employer requested a determination under section 20:30:20 of the Assessment Operating Policy Manual (Assessment Manual) that its commissioned insurance agents were independent firms rather than workers under the Workers Compensation Act (Act) and policy, the office assessor did not deal with the issue in his decision. The employer appealed.

The panel convened a telephone conference with the employer and a representative from the Board's Assessment Department, and listed 3 options for dealing with the matter before it: (1) request the Board to further investigate the status of the commissioned agents and report back under section 246(2) of the Act; (2) refer the issue back to the Board for a determination under section 246(3); or (3) find an error of law and policy because the assessor did not turn his mind to applying policy in section 20:30:20 of the Assessment Manual, despite the employer's request to do so, then cancel the assessor's decision under section 253(1) and remit the issue of the employer's 2000 audit back to the Board for a new decision. The policy manager of the Board's Assessment Department submitted that an essential underpinning of the officer assessor's decision, namely the applicability of the relevant Manual policy to the status of the commissioned agents, was lacking in the decision. He submitted that the appropriate way to proceed would be for WCAT to cancel the office assessor's decision and to remit the matter of the employer's 2000 audit back to the Board. The director of the Assessment Department and employer agreed that the preferred option would be option (3). After considering the evidence and the submissions made by the participants in the telephone conference call, the panel allowed the employer's appeal and cancelled the Board's decision under section 253. It found an error of law and policy in the office assessor's decision, in that he failed to consider relevant policy criteria in reaching his decision to include payments to all commissioned agents as part of the employer's year 2000 assessable payroll. His failure to turn his mind to relevant policy considerations constitutes an error of law and a breach of policy, justifying the cancellation of his decision under section 253.

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Panel: Heather McDonald, Vice Chair

Introduction

The employer is a life insurance company. It has appealed a February 3, 2003 decision by a Workers' Compensation Board (Board) office assessor. In that decision, the office assessor increased the employer's assessment for the calendar year 2000 by $31,302.74. Although the employer had requested a determination under section 20:30:20 of the *Assessment Operating Policy Manual* (Manual) that its commissioned insurance agents were independent firms rather than workers under the *Workers Compensation Act* (Act) and Board policy, the office assessor did not deal with that issue in his February 3, 2003 decision. Instead, he advised the employer that it would have to write to the Assessment Department in that regard, providing all necessary information to support its request.

On appeal to the Workers' Compensation Appeal Tribunal (WCAT), the employer's position is that the office assessor erred in including commissioned insurance agents in calculating the employer's assessable payroll for the calendar year 2000.

Issue(s)

Did the Board err in its decision of February 3, 2003 in deciding to include commissioned insurance agents in calculating the employer's assessable payroll for the calendar year 2000?

Jurisdiction

On March 3, 2003, WCAT replaced both the Appeal Division and the Workers' Compensation Review Board (Review Board). The employer's right of appeal to WCAT arose under section 41(1) of the transition provisions set out in Part 2 of the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63), which allows persons who had unexercised rights of appeal to the Appeal Division immediately before March 3, 2003, to appeal to WCAT.

The employer filed its appeal with WCAT two weeks beyond the statutory deadline for appeal. The chair of WCAT granted it an extension of time (see *WCAT Decision #2003-02709*) to do so. In her decision, the chair noted that the employer had requested advice, in a timely way, from the Board regarding its avenues of appeal, as the transition provisions in Part 2 of Bill 63 were not clear. Further, the office assessor's decision letter of February 3, 2003 misled the employer to some extent regarding the

appropriate avenues of appeal. Accordingly, the chair found special circumstances to grant the employer's request for an extension of time to appeal, as the delay in filing its appeal was short; before the expiry of the appeal period, the employer had evinced an intention in a timely way to appeal the office assessor's decision; and there was a significant issue at stake in the appeal.

Under section 253 of the Act, WCAT may confirm, vary or cancel an appealed decision or order. Under section 254 of the Act, WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact and law arising or required to be determined in an appeal before it.

Sections 241 and 242 of the Act (as amended in 2003) now do not require employers to establish grounds for appeal from a decision of the Review Division. As the employer's unexercised right of appeal to the Appeal Division was grounded under the former sections 96(6) and 96(6.1) of the Act, the employer is required to satisfy a threshold test of error of law, error of fact, or contravention of published policy for its appeal to proceed.

However, pursuant to section 42 of Bill 63, the new WCAT provisions in the amended Act also apply. For example, WCAT must make a 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.

Legal counsel represented the employer in these appeal proceedings. The employer requested an oral hearing. The employer also provided a comprehensive written submission. On June 9, 2004, I convened a telephone conference call to discuss the issues in this case and hear oral submissions from the employer's legal counsel, and two Board representatives. The Board representatives were the director and policy manager of the Assessment Department. After hearing from those three persons, I decided that it was unnecessary to convene an oral hearing to decide the issue in this appeal.

Background and Evidence

On March 14, 2002, an office assessor from the Board's Revenue Services Department wrote to the employer to advise it that the Board had scheduled an audit for the calendar year 2000. The Board requested a list of all the employer's employees who worked in British Columbia, a list of all contractors who performed work for the employer in British Columbia, and a list showing the gross wages paid to workers and contractors in each of the employer's industry classifications, with a separate list showing the gross wages paid to all administration and management staff.

The employer responded by inquiring about the request for a list of all contractors, and the office assessor advised the employer to look at the Manual for guidance. In a letter

dated May 3, 2002 to the office assessor, the employer's associate counsel advised that it was proceeding on the basis that the request for information about "contractors" referred to labour contractors as outlined in section 20:30:20 of the policy Manual.

With a cover letter dated June 4, 2002, the employer's manager of health and safety provided the office assessor with the documentation he had requested for purposes of his audit. In that letter she advised as follows:

> [The employer's] legal department requests a determination from the WCB that the agents are not employees of [the employer] but are in fact independent firms. Your consideration to the following request would be appreciated.
>
> We hereby request a determination under Policy No. 20:30:20 of the Assessment Operating Policy to determine the status of these insurance agents and distributors under the Act. We view [the employer's] insurance distributors to be separate business enterprises.
>
> While the particular circumstances of each distributor varies, the following is a general description of [the employer's] relationship with insurance agents who contract to sell [the employer's] products in British Columbia.
>
> [The employer's] distribution contracts do not tie agents to [the employer]. In fact, many of our agents are also contracted to and sell products underwritten by other insurers. There is no commitment to sell exclusively for [the employer] and no requirement to sell a certain level of products or to remain contracted for any period of time.
>
> Other than as required by the Insurance Act and other statutes, [the employer] does not oversee or have the ability to control the manner in which the distributor conducts business. Agents control their advertising and their offices. Agents hire and pay any staff they may have and pay the cost of overhead and upkeep of their offices. Agents and distributors do not share in any employee or group benefit program. Many of the insurance agents on the attached list are incorporated entities.
>
> [reproduced as written]

The employer's manager of health and safety concluded her letter by advising the officer assessor that should he require additional information in order to make a determination under section 20:30:20 of the Manual, he should contact the employer's associate counsel. She provided him with the mailing address and telephone number of the associate counsel.

Almost eight months later, the office assessor responded with the decision letter at issue in this appeal. He advised that as a result of his assessment review of the employer's payroll for the year 2000, he had increased the employer's assessment by $31,302.74. The office assessor advised that this increase was due to "understated wages/salaries, unreported commission paid to agents, and unreported amounts paid to unregistered subcontractors." The assessor also stated:

> Regarding a determination under Policy No. 20:30:20 for the status of these insurance agents who are paid by commission, you have to write to the assessment department and provide all necessary information to support your request.
>
> I have enclosed a copy of my working papers for your records.

A review of the assessor's working papers reveals that he included payments made to all commissioned insurance agents in the employer's assessable payroll for the 2000 calendar year. There were approximately 2,350 agents that received commissions from the employer in 2000.

In its written submission dated April 28, 2004 to WCAT, the employer advised that many of its commissioned agents are registered with the Board as employers or have personal optional protection (POP) coverage. Further, the employer alleged that the office assessor included payments on residual commissions paid to agents who did not have any work activity for the employer in the year 2000; in some cases, these residual commissions were paid to retired agents and the estates of agents who were deceased in 2000. The employer's position is that contrary to policy in sections 20:30:20 and 50:50:00 of the Manual, the Board assessed the employer for premiums paid to entities that:

- were independent firms;
- were registered with the Board as employers;
- who had obtained POP coverage;
- who had no work activity in the year 2000 related to the employer.

As earlier stated in this decision, I convened a telephone conference call on June 9, 2004 with the employer's legal counsel and Board representatives from the Assessment Department. I also arranged for an appeal coordinator to advise these participants, several days in advance of the telephone conference, to review *Appeal Division Decision 2002-0711* (March 20, 2002) and *WCAT Decision #2004-00411-AD* (January 28, 2004) in preparation for our discussion.

In the telephone conference, I had originally intended to ask for submissions on how to deal with procedural matters in the appeal, such as the way to provide notice of the appeal to over 2300 commissioned agents. After reviewing the employer's firm file and

the employer's written submission dated April 28, 2004, however, it appeared that the Board and the employer were not ready to deal with procedural issues in the appeal. Board representatives and the employer's legal counsel had commenced discussions regarding appropriate process for the Board to audit the employer for the 2001 and 2002 years. They were considering such matters as designing a questionnaire for the commissioned agents to assist in determining their status under the Act and Board policy, inviting a representative from an insurance industry association to provide evidence in statutory declaration or affidavit form, and reaching an agreement on representative groupings of agents with different circumstances affecting status under the Act. The outcome of those discussions would likely affect the procedure, and even, perhaps, the merits of the appeal proceedings in the case before me.

The Board representatives and the employer's legal counsel agreed that pending their discussions on the appropriate way to proceed with the 2001 and 2002 audits, they were not ready to discuss procedural or other issues in this appeal dealing with the 2000 audit. I indicated that I saw several ways in which I could deal with the matter before me:

(1) under section 246(2)(d) of the Act, I could request the Board to investigate further into the issues of procedure, as well as the substantive issue regarding status of the commissioned agents, and report back to me in writing the results of investigation;

(2) under section 246(3) of the Act, I could refer the issue of the applicability of the policy in section 20:30:20 of the Manual to the commissioned agents, back to the Board for a determination, and suspend the appeal proceedings until the Board provided me with that determination;

(3) under section 253(1) of the Act, given that in his February 3, 2003 decision, the office assessor did not turn his mind to applying the policy in section 20:30:30 of the Manual, despite the previous request by the employer that he do so, I could find an error of law and policy and cancel his decision. I would then remit the issue of the employer's year 2000 audit and the status of its commissioned agents, back to the Board to fully and properly investigate, and to reach a new decision.

I advised the telephone conference participants that I was open to listening to their submissions on the appropriate way to proceed in this appeal, and was willing to consider other options they might wish to suggest. I also advised that with respect to option (3) above, I understood that in the spring of 2003, there had been considerable confusion regarding the transition provisions of Bill 61 and the impact of the newly amended Act on the Board's right to review and/or reconsider the office assessor's

decision of February 3, 2003. The result, however, was that in these appeal proceedings, WCAT was in the position of either supervising the Board's year 2000 audit of the employer, or in effect doing the audit itself. I was not satisfied that this was an appropriate role for WCAT to undertake, nor was this a role that the legislature had envisioned for WCAT to undertake as an appellate tribunal. My concern was that due to the office assessor's refusal to consider relevant Manual policy criteria raised by the employer, there had been no initial determinations by the Board on issues critical for a reasoned audit decision, with considerations of relevant policy criteria. Arguably, this constituted an error of law and policy, and WCAT should remit the matter back to the Board to undertake a full investigation and render a new decision.

The advantage of option (3) above, was that the Board would have the opportunity of undertaking a thorough investigation, taking into account all relevant considerations, in reaching a decision regarding the year 2000 audit. As the Board is already in the process of dealing with audits for the 2001 and 2002 years, the 2000 audit could be part of that process. This process could be undertaken without the presence of WCAT appeal proceedings, and its legal requirements, to complicate the process. Further, the end result might be that the employer would be satisfied with the Board's audit decisions for 2000, 2001 and 2002, and there would be no need for a WCAT appeal.

The advantage for the employer in option (3) would be that even if it were still dissatisfied with the Board's ultimate decisions on the 2000, 2001 and 2002 audits, as there would be new Board decisions for those years, the employer would have a right of appeal to the Review Division (and thereafter to WCAT) in the new appeal scheme under the Act.

The policy manager of the Board's Assessment Department submitted that an essential underpinning of the office assessor's audit decision of February 3, 2003, namely the applicability of relevant Manual policy to the status of the commissioned agents, was lacking in the decision. He submitted that the appropriate way to proceed would be for WCAT to cancel the officer assessor's decision of February 3, 2003, and to remit the matter of the employer's 2000 audit back to the Board. The director of the Assessment Department agreed. The employer's legal counsel agreed that the preferred option would be option (3).

Reasons and Findings

After considering the evidence in this case, and the submissions made by the participants in the telephone conference call, I have decided to allow the employer's appeal, cancel the office assessor's February 3, 2003 decision, and remit the issue of the employer's 2000 audit back to the Board for a new decision.

In *Appeal Division Decision #94-0219* (February 22, 1994; reported at 10 W.C.R. 339), a former chief appeal commissioner noted at page 352 that there is "ample judicial

support for the proposition that the concept of an error of law includes failing to take relevant considerations into account." In that regard, the panel referred to the Supreme Court of Canada decision in *Oakwood Development Ltd. v. Rural Municipality of St. Francois Xavier*, [1985] 2 S.C.R. 164 that held the failure of an administrative decision-maker to take into account a highly relevant consideration is just as erroneous as the improper importation of an extraneous consideration.

In this case, I find an error of law and policy in the Board's February 3, 2003 decision, as the office assessor, in deciding to include payments to commissioned agents in the employer's assessable payroll for the year 2000, failed to consider the employer's argument regarding their status as independent entities and the applicability of Manual policy (in particular, section 20:30:20 of the Manual) to those agents. His failure to turn his mind to relevant policy considerations constitutes an error of law and a breach of policy, justifying the cancellation of his decision under section 253 of the Act.

In *WCAT Decision #2004-00411-AD* (January 28, 2004), the panel requested that the Assessment Department take specific steps in conducting a further investigation into the status of certain newspaper carriers and drop site supervisors. In this case, I leave it to the Board and the employer's legal counsel to discuss the means for an efficient and thorough investigation into the status of the employer's commissioned insurance agents. I do, however, paraphrase as a recommendation, the final item (#5) of the specific steps recommended by the panel in *WCAT Decision #2004-00411-AD*, namely, that the Board consider and refer to all of the numerous tests outlined in the published policy and relevant jurisprudence, in rendering its determination and providing written reasons regarding the status of the commissioned agents and whether or not they should be included as part of the employer's assessable payroll.

Conclusion

For the foregoing reasons, I allow the employer's appeal and cancel the Board's decision dated February 3, 2003. I have found an error of law and policy in the office assessor's decision of February 3, 2003, in that he failed to consider relevant policy criteria in reaching his decision to include payments to all commissioned agents as part of the employer's year 2000 assessable payroll. I remit the issue back to the Board for a thorough investigation and new decision.

I am not awarding costs in this case.

Heather McDonald
Vice Chair

HM/hba