

Noteworthy Decision Summary**Decision:** WCAT-2004-03600 **Panel:** Heather McDonald **Decision Date:** July 7, 2004***Experience rating and lawfulness of Workers' Compensation Board policy – The October 17, 2002 Resolution of the panel of administrators and the application of assessment policy AP-1-42-1, item 7 to experience rate the employer during the transition period set out in the Resolution was not patently unreasonable***

As a result of a decision to amalgamate a number of logging classification units (CUs) into the DR industry and rate group, the employer's CU 732043 (helicopter logging) was placed into the DR industry and rate group. The employer requested the Workers' Compensation Board (Board) to recalculate its 2002 to 2005 experience rate, only against group rates for CU 732043, until such time as the base rate for all logging groups involved in the panel of administrators' Resolution dated October 17, 2002 became the same in 2006. The Board declined, saying that the remedy requested would contravene the Resolution as well as Board Assessment Operating Policy AP1-42-1, item 7. The Review Division upheld the Board's decision, and the employer appealed. The main issue was whether the Resolution and the application of item 7, AP1-42-1 to experience rate the employer during the transition period conflicts with section 42 of the *Workers Compensation Act* (Act).

The employer argued that, under section 42 of the Act, the Board's authority to adjust rates by experience rating was within a class of employers, not a rate group of employers; therefore policy AP1-42-1, item 7's requirement that compares the employer's cost-to-assessable payroll ratio with that of its rate group conflicts with section 42. The panel found that the term "sector" in the policy corresponds with the Act's term "subclass", policy's use of the terms "rate group" corresponds with the Act's term "subclass", and policy's use of the terms "industry group" and "classification unit" are simply further subclasses under the statutory terminology. Thus when section 42 refers to the hazard or cost of compensation differing from the average of the "class" or "subclass", the corresponding terminology in Board policy would be sector, rate group, industry group, or classification unit. The panel found that the Resolution and the application of item 7, AP-1-42-1 to experience rate the employer during the transition period set out in the Resolution was a viable and lawful exercise of the Board's authority under sections 37, 39, 42 and 82 of the Act. Section 42 is sufficiently general and ambiguous to encompass a system of experience rating that compares an employer's claims cost-to-assessable experience with that of other firms in its rate group which may not share the employer's identical circumstances in terms of risk, size, base rate, etc. With that finding, under section 251(1), the panel was unable to refuse to apply the Resolution and the experience rating policy AP-1-42-1 to the employer for the transitional years 2002 through 2005 established by the Resolution, as the Board policy in the Resolution and AP-1-42-1 was not so patently unreasonable that it was not capable of being supported by the Act and its regulations.

WCAT Decision Number : WCAT-2004-03600
WCAT Decision Date: July 07, 2004
Panel: Heather McDonald, Vice Chair

Introduction

The employer is involved in helicopter logging operations. The employer is appealing a September 22, 2003 decision by a review officer, in the Review Division of the Workers' Compensation Board (Board). In that decision, the review officer confirmed an April 8, 2003 decision of the manager, Employer Service Centre, Assessment Department. In the April 8, 2003 decision, the manager had denied the employer's request to recalculate its 2002 (and onward) experience rate, only against group rates for Classification Unit (CU) 732043 (Helicopter Logging), until such time as the base rates for all industry groups involved in a panel of administrators' Resolution dated October 17, 2002, became the same in 2006. In confirming the manager's April 8, 2003 decision, the review officer found that the manager had applied appropriate Board policy with respect to determining the employer's experience rating.

On appeal to the Workers' Compensation Appeal Tribunal (WCAT), the employer submits that the September 22, 2003 decision is wrong because it failed to find that the Board's April 8, 2003 decision, in applying Board policy, conflicted with the *Workers Compensation Act* (Act). The employer's position is that the Board's decision conflicts with section 42 of the Act, as the Board conferred a special experience rate on the employer that does not correspond with the relative cost of compensation in the employer's industry.

Issue(s)

What is the scope of WCAT's jurisdiction in this case? What is the standard of review of a Board Resolution and/or a Board policy? Should WCAT refuse to apply Board policy AP1-42-1 to the employer in the transitional years 2002 through 2005 in the rate scheme created by the Board Resolution dated October 17, 2002, on the grounds that the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations? Does policy AP1-42-1, as applied to the employer in the transitional situation created by the October 17, 2002 Resolution, conflict with section 42 of the Act? Did the review officer err in confirming the Board's decision to deny the employer's request to recalculate its experience rate for the years 2002 through 2005, comparing it only against the experience of other employers in CU 732043?

Procedural Matters and Jurisdiction

A management consultant represented the employer in these appeal proceedings. The employer did not request an oral hearing, and I decided that the appeal could be dealt with by way of written submissions. WCAT arranged for disclosure of the employer's firm file to the management consultant representing the employer.

Pursuant to section 4.32 of WCAT's *Manual of Rules, Practices and Procedures* (MRPP), I invited the director of the Board's Assessment Department to participate in these appeal proceedings by providing a written submission in response to the employer's initial written submission. This type of participation by the Board, referred to in section 4.32 of the MRPP, is grounded in WCAT's statutory authority under sections 246(2)(i) and 247(3) of the Act. The director provided a written submission as requested, a copy of it was disclosed to the employer, and the employer was given an opportunity to reply.

Section 253(1) of the Act states that on appeal, WCAT may confirm, vary or cancel an appealed decision or order. Section 250 of the Act provides that WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. Further, WCAT must make its decision based on the merits and justice of the case, but in so doing, it must apply a policy of the Board's board of directors that is applicable in the case. Section 251 of the Act provides that WCAT may refuse to apply a policy of the board of directors only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations. If a WCAT panel considers that a policy should not be applied, that issue must be referred to the WCAT chair, and the appeal proceedings must be suspended until the procedure described in section 251 (involving the referral to the WCAT chair and/or a referral to the board of directors) is exhausted.

By *Resolution 2003/02/11-04*, the board of directors adopted as its own policies, among other things, "Policy decisions of the former Governors and the former Panel of Administrators still in effect immediately before February 11, 2003."

Background and Evidence

The employer's appeal, although it stems from an appeal of a decision of a Board manager, in effect constitutes a direct challenge to the legality of Board policy, in particular, the panel of administrators' Resolution dated October 17, 2002, and the application of policy AP1-42-1 to experience rate the employer during the transitional rate scheme created by the Resolution. This is because the manager simply applied the Resolution and AP1-42-1 to the employer's situation. Accordingly, it is important to understand the background to the manager's decision and the employer's appeal, including the content of the Resolution and other relevant Board policy. Therefore, I will set out in detail the background to this appeal.

As earlier stated, the employer engaged in helicopter logging. A panel of administrators' Resolution dated November 14, 2001 (*Resolution 2001/10/31-02*) amalgamated 11 logging classification units (CUs) into one industry and rate group designated as DR. The text of that Resolution is reproduced as follows:

**RESOLUTION OF THE PANEL OF ADMINISTRATORS
Re: Forestry Classifications**

WHEREAS:

Pursuant to Section 82 of the **Workers Compensation Act**, RSBC 1996, Chapter 492 and amendments thereto ("*Act*"), the Panel of Administrators ("Panel") must approve and superintend the policies and direction of the Workers' Compensation Board ("Board"), including policies respecting compensation, assessment, rehabilitation and occupational safety and health, and must review and approve the operating policies of the Board;

AND WHEREAS:

Pursuant to Section 37 of the *Act*, all industries within the scope of the *Act* are divided into classes;

AND WHEREAS:

Pursuant to Section 37(2) of the *Act*, the Board may create new classes, consolidate or rearrange any existing class, assign an employer, independent operator or industry to one or more classes, withdraw from a class an employer, independent operator or industry, a part of a class or subclass or a part of a subclass, and transfer it to another class, or form it into a separate class;

AND WHEREAS:

If the Board exercises authority under Section 37(2), it may make the adjustment and disposition of the funds, reserves and accounts of the classes affected that the Board considers just and expedient;

AND WHEREAS:

Pursuant to Section 42 of the *Act*, the Board must establish subclassifications, differentials and proportions in the rates as between the different kinds of employment in the same class as may be considered just; and where the Board thinks a particular industry or plant is shown to be so circumstanced or conducted that the hazard or cost of

compensation differs from the average of the class or subclass to which the industry or plant is assigned, the Board must confer or impose on that industry or plant a special rate, differential or assessment to correspond with the relative hazard or cost of compensation of that industry or plant, and for that purpose may also adopt a system of experience rating;

THE PANEL OF ADMINISTRATORS RESOLVES THAT:

1. Pursuant to Sections 82, 37 and 42 of the *Act*, for the purpose of assessment, the classification units listed below will be removed from their 2001 rate group and will form one industry and rate group designated as DR:

2001 Rate Group		Classification Unit
CP	703008	Integrated Logging
CP	703006	Ground Skidding, Horse Logging, Log Loading
CP	703012	Logging Road Construction or Maintenance
CP	703014	Mechanized Tree Falling
CP	703011	Log Processing
CP	703004	Dry Land Sort
CP	703009	Log Booming
CP	703013	Manual Tree Falling and Bucking
CP	732043	Helicopter Logging
CP	703015	Shake Block Cutting
CP	703003	Cable or Hi-Lead Logging

2. The 2002 assessment rates of the classification and rate group DR, created in paragraph 1 above, will be as follows:

2002 Rate Group	Classification Unit	2002 Assessment Rate
DR	703008 Integrated Logging	6.41

DR	703006	Ground Skidding, Horse Logging, Log Loading	6.41
DR	703012	Logging Road Construction or Maintenance	6.32
DR	703014	Mechanized Tree Falling	6.41
DR	703011	Log Processing	6.41
DR	703004	Dry Land Sort	6.32
DR	703009	Log Booming	6.32
DR	703013	Manual Tree Falling and Bucking	11.06
DR	732043	Helicopter Logging	10.97
DR	703015	Shake Block Cutting	12.14
DR	703003	Cable or Hi-Lead Logging	12.23

3. A review of forestry classification units and rate groups will be conducted in consultation with industry representatives, so that a decision on the classification of the industry can be reached before assessment rates are determined for 2003.
4. This is a policy decision of the Panel of Administrators and is effective January 1, 2002.

DATED at Richmond, British Columbia, November 14, 2001.

By the Workers' Compensation Board

**Maureen Nicholls, Chair
Panel of Administrators**

As a result of this Resolution, the employer's CU 732043 (Helicopter Logging) was placed into the industry and rate group designated as DR. Subsequently, on October 17, 2002, after the Board conducted the review of forestry industry classifications and rate groups referred to in paragraph three of the November 14, 2001 resolution, the panel of administrators passed another Resolution continuing the amalgamation of the 11 logging CUs into the DR industry and rate group. The text of the October 17, 2002 Resolution is reproduced as follows:

**RESOLUTION OF THE PANEL OF ADMINISTRATORS
Re: Forestry Classification Units
2003 Base Assessment Rates**

WHEREAS:

Pursuant to Section 82 of the *Workers Compensation Act*, RSBC 1996, Chapter 492 and amendments hereto (the "Act"), the Panel of

Administrators (the "Panel") must approve and superintend the policies and direction of the Workers' Compensation Board (the "Board"), including policies respecting compensation, assessment, rehabilitation and occupational safety and health;

AND WHEREAS:

Section 39(1) of the Act requires that the Board, for the purposes of creating and maintaining an adequate accident fund, assess and levy on and collect from independent operators and employers in each class...sufficient funds, according to an estimate to be made by the Board;

AND WHEREAS:

Section 42 of the Act provides that the Board shall establish subclassifications, differentials and proportions in assessment rates as between the different kinds of employment in the same class as may be considered just;

AND WHEREAS:

By resolution dated November 14, 2001, the Panel of Administrators for the purpose of assessment,

- (a) removed certain forestry Classification Units ("CUs") from their 2001 rate group to form one Industry and Rate Group designated as DR and assigned assessment rates for each of those CUs, and
- (b) directed that a review of forestry CUs and Rate Groups be conducted in consultation with industry representatives, so that a decision on the classification of the industry could be reached before assessment rates were determined for 2003;

AND WHEREAS:

By resolution dated August 27, 2002, the Panel determined that, effective January 1, 2003,

- (a) the CUs assigned to Rate Group DR in 2002 be assigned to Rate Groups in accordance with normal Board policy and practice for setting assessment rates, as set out in that resolution,
- (b) the Integrated Logging CU (No. 703008) be renamed "Integrated Forest Management" and redefined to cover firms responsible for the entire range of forest harvesting activities, and

- (c) firms presently assigned to the Integrated Logging CU that do not fall within the new description be reassigned to the other appropriate forestry CUs according to the nature of their activities;

AND WHEREAS:

Further consultation with the industry, and analysis by the Finance Division, as well as a survey conducted among employers in the Integrated Logging CU for the purpose of implementing the August 27, 2002, resolution, indicates that that decision should be modified in order to achieve its purpose that assessment rates not be an economic factor in the forest industry;

AND WHEREAS:

The Finance Division of the Board has advised that, for the purpose of levying assessments in 2003, it would be more appropriate to continue the system for classifying the forest industry in effect in 2002, but that the Integrated Logging CU should still be renamed and redefined;

THE PANEL OF ADMINISTRATORS RESOLVES THAT:

1. The Schedule of Employer Classification Units and 2003 Base Assessment Rates – Forestry attached as Appendix A to this Resolution is approved.
2. The Schedule of Employer Classification Units and 2003 Base Assessment Rates – Forestry, as approved by this Resolution, be incorporated into the 2003 Classification and Rate List and form part of the published policy of the Panel.
3. The Integrated Logging CU (No. 703008) will, effective January 1, 2003, be renamed “Integrated Forest Management” and redefined to only cover firms responsible for a substantial range of forest harvesting activities, including
 - Selecting trees for harvest;
 - Falling trees;
 - Bucking felled trees;
 - Preparing felled trees for transport
4. Firms presently assigned to the Integrated Logging CU that do not fall within the new description will be reassigned to the other appropriate forestry CUs according to the nature of their activities.

5. The resolution dated August 27, 2002 is rescinded.
6. This resolution is a policy decision of the Panel and is effective January 1, 2003.

DATED at Richmond, British Columbia, October 17, 2002

By The Workers' Compensation Board

**MAUREEN NICHOLS, Chair
PANEL OF ADMINISTRATORS**

APPENDIX A

SCHEDULE OF EMPLOYER CLASSIFICATION UNITS AND 2003 BASE ASSESSMENT RATES – FORESTRY

Rate Group	CU	CU Description	2002 Rate	2003 Rate
CI	703001	Chem Brushing, Weeding, Tree Thin, Space	5.87	6.51
CI	703002	Brushing, Weeding, Tree Thin, Spaces	5.87	6.51
DR	703003	Cable or Hi-Lead Logging	12.23	11.67
DR	703004	Dry Land Sort	6.32	7.17
CI	703005	Forest Fire Fighting	5.87	6.51
DR	703006	Ground Skidding, Horse Logging, Log Load	6.41	7.30
DR	703008	Integrated Forest Management	6.41	7.30
DR	703009	Log Booming	6.32	7.17
DR	703011	Log Processing	6.41	7.30
DR	703012	Logging Road Construct or Maintenance	6.32	7.17
DR	703013	Manual Tree Falling and Bucking	11.06	10.79
DR	703014	Mechanized Tree Falling	6.41	7.30

DR	703015	Shake Block Cutting	12.14	11.54
BN	703016	Tree Planting or Cone Picking	3.27	3.30
DR	732043	Helicopter Logging	10.97	10.48
DW	732044	Log Hauling	7.51	7.06

On its website, the Board published a short explanation of the foregoing Resolution. The explanation states as follows:

2003 Forestry Classification Units

The Panel of Administrators has approved the rate group structure and associated rates for forestry industry classifications. In order to ensure that assessment rates are not an economic factor in the forest industry, most forestry industry classification units are now assigned to rate group DR. Each classification within rate group DR is being transitioned into a common rate for the whole rate group, which is scheduled to be completed by the 2006 rate year.

In addition, CU 703008 (formerly Integrated Logging) is renamed "Integrated Forest Management", and the parameters that define participation in this classification unit are redefined to cover firms responsible for a substantial range of forest harvesting activities. The Board will reclassify employers who no longer fall within the new description into other appropriate forestry classification units.

The forestry rates and classifications are effective January 1, 2003.

The website also contained an explanation of the rate variance within the DR Rate Group. It stated:

Rate variance within Rate Group DR explained

Following significant consultation and investigation of options, the Panel of Administrators approved placing 11 logging classification units (CUs) into one industry group and rate group (DR).

Since the 2002 CUs have different base rates, the Panel also approved a base rate transition plan. By 2006 the logging classifications will share the same base rate.

The actuarially required rate for rate group DR in 2003 is \$9.72 per \$100 of assessable worker earnings. This represents the actuarially required rate for the 11 logging classifications combined.

Based on the actuarially required rate of \$9.72 for 2003, the following table reflects the final 2002 and 2003 rate each CU and the projected rate for the years 2004 through 2006.

	Classification Unit	2002	2003	Rate 2004	2005	2006
703003	Cable or Hi-Lead Logging	\$12.14	\$11.54	\$10.93	\$10.53	\$9.72
703004	Dry Land Sort	\$6.32	\$7.17	\$8.02	\$8.59	\$9.72
703006	Ground Skidding, Horse Logging, or Log Loading	\$6.32	\$7.17	\$8.02	\$8.59	\$9.72
703008	Integrated Forest Management	\$6.32	\$7.17	\$8.02	\$8.59	\$9.72
703009	Log Booming	\$6.32	\$7.17	\$8.02	\$8.59	\$9.72
703011	Log Processing	\$6.32	\$7.17	\$8.02	\$8.59	\$9.72
703012	Logging Road Construct/Maint	\$6.32	\$7.17	\$8.02	\$8.59	\$9.72
703013	Manual Tree Falling & Bucking	\$10.97	\$10.66	\$10.35	\$10.14	\$9.72
703014	Mechanized Tree Falling	\$6.32	\$7.17	\$8.02	\$8.59	\$9.72
703015	Shake Block Cutting	\$12.14	\$11.54	\$10.93	\$10.53	\$9.72
732043	Helicopter Logging	\$10.97	\$10.66	\$10.35	\$10.14	\$9.72

The above figures do not account for Prevention exemption adjustments or industry funded safety initiatives that are applied at a CU level. Also note that the rates for 2004, 2005 and 2006 are projections. The year-to-year rates will undoubtedly vary from these, due to fluctuations in claim costs and other factors.

On January 6, 2003, the employer's representative wrote to the Assessment Department, advising that on reviewing the employer's 2002 and 2003 experience calculations, there appeared to be an error with respect to the rate group costs-to-payroll ratios used. The ratios were as follows:

	1998	1999	2000	2001
2002	.015756	.013226	.011288	-
2003	-	.015011	.014112	.010048

The representative noted that the 1998 and 1999 group ratios listed on the firm's 2001 calculation were .040865 and .039393 respectively. He stated that as costs arising from 1998/99 claims go up over time while the assessable payroll amounts for the years stay the same, group ratios should increase, not decrease. On further inspection, he discovered that the lower ratios for 1998 through 2001 on the 2002 and 2003 calculations corresponded exactly with the group ratios in CU 703008 (Integrated Logging). The representative noted, however, that the employer was assessed in CU 732043 (Helicopter Logging). In his view, the Board's error was in incorrectly using group ratios for CU 703008 for comparisons with the employer's firm ratio for CU 732043. The representative concluded his letter of January 6, 2003 by stating:

The result from this is that any firm with experience in the heli-logging classification is likely facing an inappropriate assessment surcharge where their cost-to-payroll ratios are calculated against much lower group cost-to-payroll ratios in the integrated logging classification. Your earliest review/correction of this matter would be appreciated given the impact on these relatively small employers.

The employer's firm file indicates that on February 17, 2003, the manager, Classification & Rate Modification, Assessment Department (who was also the manager of the Employer Service Centre that ultimately issued the April 8, 2003 decision), had a telephone discussion with the employer's representative. The manager confirmed that the rate group ratios reflected on the employer's letters for 2002 and 2003 were correct. The firm file contains the manager's handwritten notes of their discussion. The notes state:

- (a) [The rate group ratios] do illustrate that the RG ratio grows over time as is seen in the ratio for 98 is greater than 99 is greater than 2000 is greater than 2001.
- (b) Helicopter Logging & Integrated Logging are in the same rate group for 2002 & 2003. Therefore for Experience Rating both CUs use the same rate group ratio.

[The representative] argued the fairness of (b). I responded that if Helicopter logging was not in rate group DR

- (a) it would oppose the overwhelming support by Forestry Associations to have all CUs in one RG.
- (b) The required rate for Helicopter Logging would be in excess of \$25 per \$100 of assess. Payroll.

Therefore by being in DR helicopter logging firms are paying a much lower rate than they would be otherwise.

I provide [sic] a copy of the October 17, 2002 Panel Resolution & information from worksafebc.com

[reproduced as written]

Also on February 17, 2003, the manager sent the representative, by facsimile transmission, a copy of the October 17, 2002 Resolution, with Appendix, and copies of the website explanations earlier reproduced in this decision. In the fascimile cover sheet, the manager wrote a brief note to the representative as follows:

Thank you for taking the time to discuss the concerns you have about the manner in which 2003 experience rating is being calculated for firms engaged in helicopter logging.

It appears that you do have the final version of the Panel Resolution regarding Forestry Classification Units dated October 17, 2002. On reviewing this resolution, I find that it states at item 5 that the resolution of August 27, 2002 is rescinded (that is, the CUs will not be separated into various rate groups but will rather remain together in rate group DR – as illustrated in Appendix A) Perhaps when your focus was on page 2 which itemized the August 27 2002 resolution?

I have attached a copy of the resolution (and Appendix) to ensure that you have the same version as I do. I have also attached some documents from our website that speak to the rate group DR and the 2003 Forestry Classification Units.

The manager also referred the representative to the Board's website for further information.

The representative wrote to the manager on February 19, 2003. In that letter, the representative confirmed that he now understood there was no arithmetical error in the Board using the group ratios for CU 703008 (Integrated Logging) to compare with the employer's ratios, as the employer was within the same rate group as Integrated Logging due to the effect of the October 17, 2002 Resolution.

The representative went on to state as follows:

We also understand that the Panel of Administrators approved a transition plan whereby, by 2006, the various classification units will share the same base rate. In this regard class 703008 (formerly Integrated Logging) will move from the 2002 rate of \$6.32 to the 2006 rate of \$9.72, while class 732043 (Helicopter Logging) will move from the 2002 rate of \$10.97 to the 2006 rate of \$9.72. Of course, we realize that by 2006 the base rate could be higher or lower depending on the experience of the rate group in the interim.

We believe, however, that the Panel did not foresee what would happen to smaller employers in the higher-rated classification units when their individual experience rates were calculated against the ratios of the large, lower-rated, classification units (i.e. 703008). These calculations are inherently unfair in that they take a group of employers paying a higher base rate because of their higher cost-to-payroll experience and then

compare them to a group of employers paying a lower base rate because of their lower cost-to-payroll experience.

The representative stated that employers in CU 732043 (Helicopter Logging) in effect pay a double experience surcharge. First, their rate is established at a higher base for a four year period due to their group experience versus CU 703008 (Integrated Logging). Second, they are then individually experience-rated against averages predominated by the larger, lower-rated, CU 703008 firms.

The representative submitted:

In the case of [the employer], the 2002 rate was established at \$14.34 due to a 30.7% surcharge derived primarily from ratio comparison with class 703008 but charged against the \$10.97 base rate for class 732043. A firm in class 703008 with the same 30.7% surcharge, but applied against the \$6.32 base for that class, would only pay 2002 assessments at \$8.26. This is very unfair to companies such as [the employer] and appears to be against the intent of the October 2002 Resolution, which sets out that one of the purposes of the classification modification was “...**that assessment rates not be an economic factor in the forest industry.**” Clearly, an assessment rate difference of the magnitude shown by this example of two firms with the same cost-to-payroll experience competing to sell logs in the same market is obviously an economic factor.

While not the object of this submission, we have another client with operations in classification 703015 (shake block cutting). This class is also being drawn together with class 703008 over the same time frame. The 2002 base rate for that class is \$12.14, and the firm’s experience comparison with the overall rate group resulted in a discount of 2.8% for an assessment rate of \$11.80.

This example illustrates further the unfairness of utilizing ratios from the larger, lower-rated, class 703008 in that, despite having better than average experience, they are paying the same rate as a firm in

class 703008 with an 86.7% surcharge. From this, it is not only demerit position firms that suffer from the apples/oranges ratio comparison.

[bold and underline emphasis in original]

The representative argued that the Board had made an error in the employer's experience-rating calculations. He acknowledged that the October 17, 2002 Resolution spoke to the gradual amalgamation of logging classifications toward a single group rate by 2006. However, he said that it did not specify how individual firms would be experience-rated through the transition. He submitted that the panel of administrators would not have intended the rate discrepancies between firms sharing similar experiences, as set out in the surcharge and discount examples to which he had referred.

The representative submitted that until CU 732043 (Helicopter Logging) shared the same base rate as CU 703008 (Integrated Logging), the two CUs should not share ratio comparisons. He argued that such comparisons superimposed upon a higher base rate amounted to a double penalty for poor experience and an unintended penalty for good experience. The representative requested the Board to recalculate the employer's 2002 (and onward) experience only against group ratios for class 732043 (Helicopter Logging). He stated that only in 2006, when all logging classifications would share the same base rate, would it then be appropriate for the Board to use all logging classification ratios for experience comparison.

The manager responded in the April 8, 2003 decision which was the subject of the subsequent review by the Review Division. With respect to the fairness and intention of the transition measures implemented by the Board until full competitive equity was reached among all firms engaged in various types of logging, the manager stated as follows:

When the Board introduced its new classification and rate setting system in 2000, the assessment rate for the helicopter logging industry was \$20.75 per \$100 assessable work earnings. In 2002, following significant consultation and investigation of options, the Panel of Administrators approved placing 11 logging Classification Units (CUs) into one industry group and rate group (DR) in order to ensure that assessment rates are not an economic factor in the forest industry. Since the 2001 CUs had different base rates, to ease the financial burden on those classifications which would experience base rate increases, the Panel also approved a base rate transition plan such that by 2006 the 11 logging classifications will share the same base rate. It should be noted that had rate group DR not been established, the actuarial rate for the helicopter logging industry would have certainly remained in excess of \$20.00 per \$100 assessable worker earnings.

The manager referred to *Assessment Operating Policy AP1-42-1*, item 7, in support of his decision that the Board had made no error in the employer's experience rating calculations. AP1-42-1 stated in part as follows:

Effective January 1, 2000, a new experience rating ("ER") plan took effect. The main features of the plan are:

- (1) The same ER plan applies to all employers and independent operators in rateable classes.
- (2) The ER plan is prospective in application. ER adjustments are calculated in the fall of each year on the basis of past claims costs experience, and are applied to employers' assessments commencing January 1st of the following year.
- (3) ER adjustments are based solely on claims costs. The costs used are those directly associated with compensation claims, including the capitalized value of pensions awarded. The cost used for fatal claims is the five-year moving Board-wide average rather than the actual cost of each claim.
- (4) The Board's administrative costs are not included in the ER calculation.
- (5) The ER plan uses claims costs arising from claims commenced in the three calendar years prior to the year in which the calculation is made (the "ER Window"). This includes all costs of those claims up to and including June 30th of the year of calculation.
- (6) The costs included are subject to maximum limits for each claim as follows:
 - a) 100% of the first \$70,000;
 - b) 50% of the next \$50,000;
 - c) 10% of all costs above \$120,000.
- (7) *An employer's cost to assessable payroll is compared to the cost to assessable payroll of the rate group to which the employer is assigned.*
- (8) The payroll used is the total assessable payroll used to calculate employers' assessments in the ER Window. This amount excludes

earnings above the maximum wage, and includes Personal Optional Protection amounts.

(9) In determining the cost to assessable payroll ratio in the ER Window, the most recent year is weighted at 50%, the prior year at 33.3%, and the most distant year at 16.7%.

(10) The calculation involves combining an employer's cost experience in the ER window with its ER factor for the previous year. The ER factor reflects the fact that employers participate at different levels, based on the size of the employer's assessment before the ER adjustment. The higher an employer's base assessment, the higher its level of participation in the plan. A higher level of participation means an employer's ER adjustment is more responsive to its claims costs experience in the current ER window.

(11) The minimum participation level is set at 10%.

(12) The maximum ER discount is 50%. The maximum ER surcharge is 100%.

....

(17) For simplicity, ER discounts or surcharges are generally expressed as percentage adjustments to employers' base assessment rates.

[italic emphasis added]

The manager stated that the remedy requested by the employer, namely to recalculate its 2002 (and onward) experience only against rate group ratios for CU 732043 would contravene the October 17, 2002 Resolution as well as Board policy in AP1-42-1, item 7. He stated that the Resolution instructs the Board to consider helicopter logging along with ten other forestry CUs as a single rate group. According to the manager, the employer's request would have the Board separate the helicopter logging CU from the other CUs. Further, as Board policy in AP1-42-1, item 7, required the Board to compare the employer's cost to assessable payroll ratio to the cost to assessable payroll ratio of the rate group to which the employer was assigned (DR), it would contravene item 7 to compare it only to the cost to assessable payroll ratio of CU 732043.

The manager disagreed that the Board had treated the employer unfairly:

If the Board had not established the rate group DR, the helicopter logging classification would have remained in a rate group having an actuarial rate

in excess of \$20 per \$100 assessable worker earnings. Had [the employer's] cost to assessable payroll ratio been compared to the cost to assessable payroll ratio of that rate group, it would have had a 2003 experience rating surcharge of approximately 5% and a calculated net rate of around \$21.70 per \$100 assessable worker earnings. When one observes that this firm's current 2003 rate of \$16.88 is nearly 5 dollars lower, I believe one can conclude that [the employer] has been treated fairly.

The employer requested the Board's Review Division to review the manager's April 8, 2003 decision. In its argument to the Review Division, it relied on the submissions it had earlier made to the manager, as well as responding to the points made by the manager in his April 8, 2003 decision.

The employer submitted that the October 17, 2002 Resolution placed 11 previously separate logging classifications into one rate group and then set a schedule whereby the various 2002 base rates would meld together by 2006. However, the Resolution did not set out how experience rating would apply during the transition. The Board's Assessment Department, in applying experience rating during the transition period, compared all the various classifications against experience dominated by the former integrated logging classification, despite the base rate differences between those classifications. The employer argued that experience adjustments from such comparisons are unfair and contrary to section 42 of the Act.

The employer stated that it was very misleading for the manager to suggest that the employer (as a firm in the helicopter logging industry) would have been paying more than \$20.00 per \$100.00 of assessable payroll, as a base rate assessment, had the rate group DR not been established for the helicopter logging industry. The employer stated that the manager was relying on an earlier \$20.75 base rate that the Board had established for heli-logging when the Board introduced its new classification system in the year 2000. The employer stated that the \$20.75 rate was a "guestimate" that did not develop historically, and with the new experience of the group, the Board adjusted the base rate downward in 2001 to \$16.51, and in 2002 to \$10.97.

The employer disagreed with the manager's reliance on Board policy AP1-42-1. The employer submitted that policy AP1-42-1, item 7, although indicating that an employer's cost to assessable payroll ratio is compared to the cost to assessable payroll ratio of the rate group to which an employer is assigned, (that is, ratios will be compared within rate groups) never envisioned there being different base rates within rate groups.

The employer also disagreed that it would contravene the October 17, 2002 Resolution to recalculate the employer's experience only against rate group ratios for CU 732043 (for the year 2002 onward), as the Resolution did not address experience comparisons. The employer submitted that therefore the Board was free to consider a variation from

policy AP1-42-1 in this situation, as to apply the policy in this situation would be to contravene the Act.

The employer noted that the manager's decision of April 8, 2003 did not address the example provided by the employer of another firm in the shake block cutting subclass (CU 703015). That firm is also being drawn toward a single base logging rate by 2006. In comparison with firms in CU 703008 (integrated logging), the shake firm has better-than-average experience and receives a 2.8% discount. But the discount is applied against a base rate of \$12.14 for a net assessment rate of \$11.80. For an integrated firm in CU 703008 to pay the same net rate, it would have to have a terrible experience, receiving an 86.7% surcharge. But if the shake firm were compared only against other shake firms in their classification unit, its discount would be significantly higher and it would pay a much lower net rate. And if the shake firm had the same base rate as the integrated logging firms with which the Board compares the shake firm's experience, the shake firm's rate would be almost half of what the Board charged.

The employer argued that the comparison of experience among differently rated classes within a single rate group is unlawful in that it offends section 42 of the Act. It emphasized that under section 42, the Board's authority is to look at different experiences *in the same class*, and to confer a special rate, differential or assessment where a particular industry or plant's hazard or cost of compensation differs from *the average of the class or subclass to which the industry or plant is assigned*. The employer submitted that the Board's authority is confined by section 42 of the Act to adjust rates within a class of employers, not a rate group of employers. The employer argued that Board policy AP1-42-1 contravenes the Act where employers' cost-to-payroll ratios are compared for net rate purposes, when they are not in the "same class" as required under section 42 of the Act.

The employer submitted that the Board had strayed from the clear wording of section 42 of the Act, and the result created an unfair comparison with illogical ends. By way of remedy, the employer requested that it receive experience adjustment based only on comparisons with costs/payroll in the helicopter logging CU 732043, until such time as it would share the same base rate with all logging firms. At that point, in effect, all the logging firms would then become the same classification.

In its September 22, 2003 decision, the Review Division confirmed the manager's April 8, 2003 decision. In doing so, the review officer referred to Board policy AP1-37-1, which sets out the framework of the Board's classification system. That policy states in part as follows:

(a) **General**

The Board has adopted a modified collective liability system, under which self-sufficient groups of employers are created on the basis of the industries in which they operate. These groups must be large enough to

provide for an adequate spread of the risk and stability in the assessment rate. Some firms are large enough to form groups by themselves.

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 therefore 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 classification system, a sector is equivalent to a class, a rate group is equivalent to a subclass, and an industry group and a classification unit are equivalent to further subclasses.

(b) Classification units

The board classifies all employers and independent operators into classification units. Not all classification units are large enough to have the financial credibility to stand alone for assessment rate making purposes; they must be grouped together to provide an adequate insurance base...

(c) Industry groups

Classification units that are large enough will form their own industry group. Otherwise, the Board will combine classification units into industry groups on the basis of similarity of industrial activity and a reasonable expectation of similar cost rates. Industry groups must be of sufficient size to be fairly regarded as having some predictability for future claims experience. The Board determines the minimum size for industry groups.

(d) Rate groups

Assessment rates are calculated at the rate group level. Industry groups that are large enough will form their own rate group. Otherwise, the Board will combine industry groups into rate groups on the basis of similarity of historical injury cost rates. Rate groups must meet a minimum size requirement as determined by the Board, in order to be viable for statistical and insurance purposes.

Where the injury cost rate of the industry group differ from the average injury cost rate of its rate group by more than 20% for three consecutive years, the industry group will be moved to a rate group that better reflects its actual injury cost rate.

The review officer also referred to Board policy AP1-42-1, which states that an employer's cost to assessable payroll ratio is compared with the cost of assessable payroll of the rate group to which the employer is assigned.

The review officer noted that under section 99(2) of the Act, the Review Division must apply a policy of the board of directors that is applicable in a case. The review officer found that the panel of administrators' Resolutions and policy AP1-42-1 were applicable policy that he was required to apply in this case. He found that he did not have jurisdiction to determine whether applying AP1-42-1 would create an error of law as in conflict with section 42 of the Act. However, he did note that under policy AP1-37-1(a), a rate group is equivalent to a "subclass" under the Act, and an industry group and a classification unit are equivalent to further "subclasses" under the Act. Therefore, in his view, Board policy in AP1-42-1 was consistent with section 42 of the Act.

The review officer also disagreed with the employer's submission that policy AP1-42-1(7) did not envision there being different base rates within rate groups. In this regard, he stated:

...I note that policy item AP1-37-1 items (c) and (d) clearly states that classification units are combined into industry groups on the basis of similarity of activity with the reasonable expectation of similar class rates, and industry groups are combined into rate groups. Clearly the classification scheme envisioned that there would be rate groups which included CUs with differing base rates. Consequently, I find there is no evidence to support the employer's position that policy item AP1-42-1 did not envision there being different base rates within industry groups.

On appeal to WCAT, the employer submitted that the review officer erred in referring to policy AP1-37-1 as evidence that the classification scheme envisioned there would be rate groups which included CUs with differing base rates. The employer stated that according to policy AP1-37-1, assessment rates (base rates) are calculated at the rate group level. Industry groups can form their own rate group if they are of sufficient size, but there is nothing in the policy to suggest that individual industry groups might have differing assessment (base) rates if they share the same rate group. The employer argued that the October 17, 2002 Resolution has led to the unintended experience comparisons of employers with differing base rates, and nothing in Board policy contemplates such a situation. The employer reiterated its position that the result is the contravention of section 42 of the Act in that the Board is thereby conferring a special experience rate on the employer that does not correspond with the "relative cost" of compensation in the employer's industry.

The employer stated that it was part of a small industry group (helicopter logging) that is now combined with a very large industry group (integrated forest management), but the base assessment rates for these groups will not be the same until 2006. The employer stated that helicopter logging is inherently dangerous and the claims cost-to-payroll ratio will always be higher than integrated forest management for that reason. Another reason for a higher claims cost-to-payroll ratio for helicopter logging firms is because integrated forestry companies tend to be very large with a high number of administrative staff that lower the claims costs as compared with the smaller, hands-on, helicopter logging firms. The employer did not argue that experience comparison between these two groups will be inappropriate or illegal when both industry groups share the same base rate. At that time, the employer submitted, the experience comparison will be "relative", (as required by section 42 of the Act) but until then, it is not "relative."

The employer offered the following illustration of the situation. For its 2004 experience calculation, the employer had \$25,813.32 in costs from 2002 claims compared against \$1,602,463.00 payroll, for an experience ratio of .016118. This was then compared against the .007509 average ratio for the rate group, including the integrated forest management industry group. From this, it is determined that the employer is 216.649% worse than average (2.14690 variance) and this is then weighted and combined with the variances for 2000 and 2001. Following further calculations, a 71.2% experience surcharge is levied against the helicopter logging industry group base rate (\$10.54) and the employer's net 2004 assessment rate is established at \$18.04.

The employer then gave the example of an employer from the integrated forest management industry group that had exactly the same costs/payroll for 2000 to 2002. That employer would also end up with a 2.14690 variance. Assuming that the additional calculations for weighting and past experience were also the same, that company would then face the same 71.2% experience surcharge, however, it would be levied against the integrated forest management industry group base rate (\$8.36) and that employer's net 2004 assessment rate would be established at \$14.31.

The employer pointed out that although the relative cost of compensation for those two employers would be the same, one would pay assessments at a \$18.04 rate while the other would pay at a \$14.32 rate. The employer submitted that this example illustrates that the Board has not met the legislative direction in section 42 of the Act that the experience-rated assessment "must...correspond with the relative...cost of compensation."

WCAT disclosed the employer's written submission to the director of the Board's Assessment Department for his comments. In a memorandum dated March 23, 2004, the director stated that the October 17, 2002 Resolution, placing 11 logging CUs into one industry group and rate group, came about after considerable consultation and analysis of the unique needs of the forest industry. Since the CUs had different base

rates to begin with, a base rate transition plan was also adopted whereby all logging classifications would share the same projected base rate of \$10.74 by 2006.

The director disagreed that the experience comparisons of employers with differing base rates was unintended or unlawful. He stated that the new rate group DR scheme was intended to remedy, albeit unconventionally, competitive disadvantages in the forest industry. In his view, the Board had treated the employer fairly and justly.

The director also stated that the creation of rate group DR had produced a cost advantage to helicopter logging firms. The director noted the employer's challenge to the manager's statement in the April 8, 2003 decision that if the Board had not established rate group DR, the helicopter logging classification would have remained in a rate group having an actuarial rate in excess of \$20.00 per \$100.00 of assessable earnings. The director disagreed with the employer's characterization of the \$20.75 year 2000 base rate for CU 732043 as a "guestimate." The director said that it was an actuarially sound rate using the standard rate setting methodology for the calculation of all rates. The director said that the base rate for CU 732043 went down to \$16.51 in the year 2001 for two reasons:

- An actuarial adjustment to the discount rate from 3 to 3.5 which permitted the reduction of rates across the entire system; and
- The application of the prevention administration cost discount to the base rate to (specifically) helicopter logging.

The director stated that the adjustment downward to the base rate for CU 732043 in the year 2002 was due to the transition plan introduced to the new rate group DR scheme. As well, the director pointed out that the employer's illustration does not take into account that the base rate of \$10.54 is due to the transition plan, and should the new rate group DR scheme not have existed, the base rate would have remained much higher for helicopter logging.

The director stated that the remedy requested by the employer, namely, to be experience-rated within the helicopter logging industry only (until the base rate for all members of rate group DR becomes the same), would be contrary to Board policy which requires that firms be experience rated relative to their rate group, not to their classification unit.

In reply to the director's memorandum, the employer noted that the director did not respond to the specific example demonstrating that an integrated logging firm with exactly the same cost-to-payroll ratio pays assessments at a lower rate than the employer. The employer also observed that the director did not address the position that section 42 of the Act was contravened, as comparisons of cost-to-payroll ratios between employers who do not share the same base rate can never be "relative" as

required by section 42. The firm with the higher base rate will pay a greater penalty for the same ratio.

The employer submitted that there was no actuarial data to support the Board's position that had heli-logging firms remained in a separate rate group for 2003, the base rate would be approximately \$20.00 and therefore the 2003 experience-adjusted rate (\$16.88) for the employer is fair. The employer argued that given the downward trend in base rates from 2000 to 2002, the type of jump in base rate for 2003, suggested by the manager in his April 8, 2003 decision, seems unreasonable. Further, the employer submitted that whether a rate derived from improper experience comparison ends up being appropriate or not should not be a consideration. The issue, according to the employer, is whether the net rate (good, bad or indifferent) has been established by the Board in a lawful manner. The employer's position is that the experience comparison is illegal, contravening the requirements of section 42 of the Act.

The employer submitted that the remedy it requested would not contravene the October 17, 2002 Resolution, because the Resolution did not deal with how the Board would experience rate the firms involved during the transition period to the same base rate. Further, the employer submitted that Board policy AP1-37-1 allows for rate-making at the classification unit, industry group or rate group level. The employer submitted that given CU 732043 previously had its own base rate, it was and is of sufficient size to stand alone.

Findings and Reasons

What is the scope of WCAT's jurisdiction in this case?

Under section 239(1) of the Act, a final decision made by a review officer in a review under section 96 may be appealed to WCAT. The review officer concluded that he did not have jurisdiction to respond to the employer's argument that Board policy AP1-42-1, applied to the employer in the transitional rate scheme devised by Board Resolution dated October 17, 2002, was in conflict with section 42 of the Act. In reaching that conclusion, he referred to section 99(2) of the Act, which provides that the Board must apply a policy of the board of directors that is applicable in a case.

I am satisfied that it is within the scope of WCAT's jurisdiction to deal with the employer's argument alleging a conflict with section 42 of the Act. Section 251(1) of the Act provides that WCAT may refuse to apply a policy of the board of directors "only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations." The employer's argument in this case triggers WCAT's jurisdiction under section 251(1), as the evidence satisfies me that both the Resolution dated October 17, 2002 and AP1-42-1 constitute policies of the board of directors.

In Canadian administrative law, a "policy" is a type of delegated legislation function carried out in a context that benefits the public interest. It is to be contrasted with

decisions or functions of an administrative or quasi-judicial nature that affect individual concerns or rights unique to only certain parties. The October 17, 2002 Resolution stated on its face, in paragraph six, that it was a policy decision of the panel of administrators. (By *Resolution 2003/02/11-04*, the board of directors adopted the panel of administrators' Resolution (among other things) as its own policy.) Apart from the evidence on the face of the October 17, 2002 Resolution indicating that it was a policy decision of the Board's governing body, my review of the contents of the Resolution support a finding that it constituted Board policy.

Under section 36(2) of the Act, the Board is solely responsible for the management of the accident fund and must manage it with a view to the best interests of the workers' compensation system. The statutory authority in section 37 of the Act to classify industries, to create and divide classes and subclasses of industries, and to assign employers to industries or one or more classes or subclasses, are powers provided to the Board for the purpose of raising adequate assessments in order to maintain the accident fund. Similarly, the statutory authority in section 39 of the Act to assess and levy on and collect sufficient funds, from independent operators and employers in each class, by assessment rated on the payroll "or in a manner the Board considers proper," is a power provided to the Board to meet all amounts payable from the accident fund, and to provide and maintain necessary reserves as specified in section 39.

The October 17, 2002 Resolution exemplified the exercise of delegated authority from the legislature to the Board to make any necessary changes to the Board's classification system that would best maintain a public policy purpose. The public policy purpose is the appropriate management of the accident fund, which involves the design of an employer classification system that will provide for adequate assessments to ensure that the fund will be continued and maintained for payment of the necessary expenses under Parts 1 and 3 of the Act.

The annual Classification and Rate List, published by the board of directors (successor to the panel of administrators), states that the Rate List is published policy of the Board under section 82 of the Act. While that statement alone does not decide the issue, there is further evidence in the Board's *Assessment Manual*, in policy AP1-37-1, that:

Every year the Board publishes the *Classification and Rate List*, which forms part of Board policy. This publication lists every classification unit and the assessment rate assigned to it for the year.

The Classification and Rate List represents a type of legislative function carried out by the board of directors under its statutory mandate to create and maintain the classification system and to collect assessments sufficient to manage the accident fund. The List does not represent a type of administrative or quasi-judicial decision involving the adjudication of disputes between entities or affecting only the private concerns of certain individuals or entities. As the List represents published Board policy, then any revisions to that List fall into the category of Board policy. In this case, the October 17, 2002 Resolution revised the Classification and Rate List by creating a

schedule of employer classification units and 2003 base assessment rates for the forest industry, and assigning the classification units to specific rate groups, including the DR rate group in which helicopter logging firms were assigned. This revision to published policy required the exercise of policy-making authority by the board of directors, and the October 17, 2002 Resolution was the means to achieve that end.

I do not need to belabour the point that the Board's *Assessment Manual*, including policies AP1-37-1 and AP1-42-1, constitute published policies of the board of directors.

Therefore, WCAT has jurisdiction to deal with the employer's argument that it was illegal for the Board to apply the experience rating policy AP1-42-1, item 7, to the employer in the context of the transitional rate scheme established by the October 17, 2002 Resolution.

What is the standard of review of a Board Resolution and/or Board policy?

Section 251 of the Act is a privative clause which specifies a statutory standard of review for WCAT of policies of the board of directors. The standard, the "patent unreasonability" test, establishes a very high degree of deference for the board of directors in its policy-making role under the Act. In Appeal Division *Decision #2001-2111/2112* (October 26, 2001), 18 W.C.R. 33, the panel referred with approval to the minority reasoning in Appeal Division *Decision #1999-0734* (unpublished, May 3, 1999), (applied in *Decision #2000-0668* (16 W.C.R. 287)) which provided an extensive rationale for applying a standard of review of patent unreasonableness when assessing policies of the Board's governing body. I think it worthwhile to quote from the rationale provided in those reasons, as it explains the degree of deference that section 251 of the Act says WCAT should give to Board policies:

- 1) Under section 82, "the Governors must approve and superintend the policies and direction of the board, including policies respecting compensation, assessment, rehabilitation and occupational safety and health. . . ."
- 2) Under section 83.1 of the Act, the powers, duties and functions of the Governors are currently exercised by a panel of administrators (I will refer to the Governors for simplicity).
- 3) The legislature has vested responsibility and authority for policy-making in the Governors. The authority of the Governors is paramount in the policy-making arena.
- 4) Many provisions in the Act are broad or ambiguous in their wording, or confer a broad measure of discretion on the board, thus leaving room for a broad range of options for consideration by the

Governors in adopting a policy. Most, if not all, policies necessarily involve some issue or issues of statutory interpretation, as the policies are developed under the Act to further the consistent interpretation and application of the Act to individual cases. Policy-making involves consideration of a broad range of factors, of which legal interpretation of the Act is only one.

- 5) Policy-making will generally involve making choices among various permissible options. It requires an evaluation of the significance and effect of the choice for the workers' compensation system. It involves an application of values by the policy-makers in selecting the preferred policy. Policy-making requires consideration of numerous interests simultaneously, and the promulgation of solutions which balance benefits and costs for many different parties.
- 6) The Governors may properly adopt a policy which, as a matter of bare legal interpretation alone, would not appear to most closely match the terms of the Act.
- 7) The background considerations and material addressed by the Governors in making policy may not be before the Appeal Division at the time the lawfulness of a policy is being impugned. The actual reasons of the Governors for their ultimate choice will often not be in evidence before the Appeal Division.
- 8) To the extent the Governors are making choices guided by values, and economic and systemic considerations, which involve a balancing of competing interests, a second-guessing of their choices by the Appeal Division would involve an improper encroachment on the Governors' policy-making authority under section 82.
- 9) The role of the Appeal Division is to make decisions in individual cases, and in so doing to provide interpretive guidance to the workers' compensation system.
- 10) The Appeal Division must apply and interpret the Act, Regulations, and existing published policy of the Governors. The Appeal Division has no authority to make policy.
- 11) The Appeal Division is required by section 99 of the Act to give its decision according to the merits and justice of the case. The Appeal Division is also subject to the requirements of natural

justice, and cannot fetter its exercise of discretion or apply policy blindly.

- 12) The circumstances of an individual case may warrant a reasoned departure from a policy, without offending the policy.
- 13) Where the issue arises in a matter properly before the Appeal Division, the Appeal Division has authority to declare a policy unlawful. The Appeal Division has an obligation to declare policy unlawful where the policy is contrary to the Act.
- 14) To the extent a policy decision of the Governors involves a selection from a range of viable policy options, the authority of the Governors to make that policy choice resides with them alone under section 82 of the Act. It is not for the Appeal Division to call a policy unlawful on the basis that some other interpretation might "better" fulfill the objectives of the Act. The Appeal Division has no authority to apply a "best-fit" approach (i.e. to require the policy-makers to select the policy which the Appeal Division considers most closely fit the terms of the Act).
- 15) A policy which appears to involve a strained interpretation of the Act may nevertheless be lawful.
- 16) Where a policy involves an interpretation of the Act which is so patently unreasonable that its construction could not be rationally supported by the Act, that policy must be found unlawful. Such concerns should be addressed within the workers' compensation system, to avoid the necessity for intervention by the courts.
- 17) The Appeal Division should apply the same standard of review, in determining the lawfulness of policy, whether the matter comes before it on appeal or on a referral by the President under section 96(4) of the Act. The Appeal Division's consideration as to the lawfulness of policy must reflect the panel's conviction that the reasons for finding the policy contrary to the Act are so compelling under the Act they must override any systemic justifications for the policy choice of the Governors. The evaluation of competing systemic considerations is a function best performed by the Governors.
- 18) If the policy is based on a viable interpretation of the Act, that is, one that is supportable according to accepted principles of statutory interpretation, then the policy would not be based on an error of law.

In the current version of the Act, under section 82 the board of directors is the governing body of the Board that must set and revise Board policies, including policies respecting compensation, assessment, rehabilitation and occupational health and safety. The Act now expressly states in section 251 that WCAT must defer to the policy-making authority of the Board's governing body, unless the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations. Having explored the rationale for such a standard of review, the next matter is applying the "patently unreasonable" test. The concept was described in Appeal Division *Decision ##2001-2111/2112* as follows:

A policy provision will be patently unreasonable if it is not viable in light of the relevant legislation (constitutional legislation may pose different considerations). If it requires some significant searching or testing to find the defect then it may be merely unreasonable and valid. But if the defect is apparent on the face of the policy then it is patently unreasonable and invalid.

This echoed the test described by the Supreme Court of Canada in *Canada (Director of Investigation and Research) v. Southam Inc.* (1977) D.L.R. (4th) 1 (SCC) as follows:

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. As Cory J. observed in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at 963, "[i]n the Shorter Oxford English Dictionary "patently", an adverb, is defined as "openly, evidently, clearly"". This is not to say, of course, that judges reviewing a decision on the standard of patent unreasonableness may not examine the record. If the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem...But once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident.

Applying the foregoing jurisprudence, section 251(1) requires me to assess whether, in this case, to apply Board policy AP1-42-1, item 7 to experience rate the employer in the transitional period of the rate scheme established by the October 17, 2002 Resolution, obviously, clearly, conflicts with section 42 of the Act.

Should WCAT refuse to apply Board policy AP1-42-1 to the employer in the transitional years 2002 through 2005 in the rate scheme established by the Board Resolution dated October 17, 2002, on the grounds that the policy is so patently unreasonable that it is

not capable of being supported by the Act and its regulations? Does policy AP1-42-1, as applied to the employer in the transitional situation created by the October 17, 2002 Resolution, conflict with section 42 of the Act?

My first observation is that section 42 is broad and general in its wording, providing the board of directors with a generous authority and discretion to establish rate classifications and special assessments, including the choice to devise an experience-rating system as a means of conferring or imposing a special rate on an industry or an employer. Section 42 speaks of “where the Board thinks” that a particular industry or plant is “shown to be so circumstanced or conducted that the hazard or cost of compensation differs from the average”. In that situation, section 42 does require the Board to confer or impose a special rate, differential or assessment “to correspond with the relative hazard or cost of compensation” of the industry or plant, but it leaves open to the Board the policy-making decisions to effect the special rate, differential or assessment that is conferred or imposed. To paraphrase the minority panel in Appeal Division *Decision #1999-0734*, supra, the wide discretion afforded the board of directors by section 42 of the Act leaves room for a broad range of options for consideration by the board of directors in developing and adopting policies to effect an experience-rating system.

Section 42’s broad discretion for the Board to design an experience rating system reflects section 39(2) of the Act, which provides the Board with a wide scope of authority to assess employers as it deems necessary. Section 39(2) provides:

Assessments may be made in the manner and form and by the procedure the Board considers adequate and expedient, and may be general as applicable to a class or subclass, or special as applicable to an industry or part of it.

Before the Review Division, the employer had argued that under section 42 of the Act, the Board’s authority to adjust rates by experience rating was within a class of employers, not a rate group of employers. Therefore, argued the employer, policy AP1-42-1, item 7’s requirement that compares the employer’s cost-to-assessable payroll ratio with that of its rate group, conflicts with section 42 of the Act. I agree with the Review Division’s finding that rejected the employer’s submission on that point. Policy AP1-37-1(a) makes it clear that the term “sector” in policy corresponds with the Act’s term “class,” the policy term “rate group” corresponds with the Act’s term “subclass,” and policy’s use of the terms “industry group” and “classification unit” are simply further subclasses under the statutory terminology. Thus when section 42 refers to the hazard or cost of compensation differing from the average of the “class” or “subclass” to which an employer belongs, the corresponding terminology in Board policy would be either the sector, rate group, industry group or classification unit. Board policy in AP1-42-1, in comparing an employer’s experience with that of the rate group, is entirely consistent with section 42 of the Act.

I agree with the employer's submission that the October 17, 2002 Resolution does not expressly deal with experience-rating of the employers in the new DR rate group. I disagree, however, with the employer's argument that the Resolution led to the unintended experience comparisons of employers with differing base rates, and that nothing in Board policy contemplates such a situation. The review officer was correct in stating that the Board's classification system envisioned there would be rate groups which included CUs with differing base rates. This is apparent from the wording of items (c) and (d) in AP1-37-1. Item (c) in particular refers to there being a "reasonable expectation of similar cost rates" – it does not refer to an expectation of identical cost rates.

This expectation is borne out by an examination of the annual Classification and Rate List. By way of example, in the 2004 Classification and Rate List, there are numerous examples of rate groups (subclasses) containing further subclasses or classification units (CUs) that have different base rates. An intended consequence, therefore, where there are these different base rates in the Classification and Rate List's rate groups, is that under item (7) of policy AP-1-42-1, an employer's cost to payroll ratio may be compared with the ratio of the rate group to which it is assigned, even if the ratio of the rate group has been affected by divergent base rates of other employers in different CUs in the rate group.

The October 17, 2002 Resolution continued the amalgamation of 11 logging CUs into the DR industry and rate group. This policy decision was made after a comprehensive review of the forest industry that included consultation with industry representatives. While the October 17, 2002 Resolution did not expressly refer to the experience rating of employers in the DR rate group, the logical expectation was that existing Board policy in that regard would apply. To grant the employer's remedy in this case would be, in effect, to alter the Resolution by treating CU 732043 (helicopter logging) as separate from the rate group to which the employer is assigned, treating it as a stand-alone rate group.

The employer's other challenge to the legality of Board policy was its argument that the section 42 phrase "the Board must confer or impose on that industry or plant a special rate, differential or assessment *to correspond with the relative hazard or cost of compensation of that industry or plant*" prevents the Board from comparing an employer's experience (claims cost to assessable payroll ratio) with the average of the ratio of the rate group to which the employer belongs, where the rate group contains firms with different base rates. The employer's argument is that comparisons of claims cost-to-payroll ratios between employers who do not share the same base rate can never be "relative" as required by section 42 of the Act.

It is unfortunate that in his memorandum of March 23, 2004, the director of the Assessment Department did not respond in any substantive way to the employer's argument that the Board had contravened section 42 of the Act. Neither did the director

respond to the specific example offered by the employer, where an integrated logging firm with exactly the same cost-to-payroll ratio would pay assessments at a lower rate than the employer. Nowhere in that memorandum did the director deal with the employer's argument alleging a statutory violation of section 42 of the Act. The director did not defend the Board's position by explaining its position with reference to statutory principles. In that aspect, the director's memorandum was disappointing, as often the reason for inviting the Board's Assessment Department to participate in WCAT appeal proceedings is, in large part, so that WCAT will be able to understand and appreciate the Board's logic and expertise in applying the Act in specific situations. That important explanation linking the legality of the Board's policy to the Board's statutory authority under the Act, specifically section 42 of the Act, was lacking in this case.

After considering the employer's arguments and the examples it provided in its submissions to the Board's manager, the Review Division, and in these appeal proceedings, I have concluded that the application of policy AP-1-42-1, item 7 to the employer's transitional situation established by the October 17, 2002 Resolution, is not so patently unreasonable that it is not capable of being supported by the Act and its regulations. Specifically, I am unable to find that the experience rating of the employer, comparing its claims cost-to-assessable payroll ratio with the average of the DR rate group, conflicts with section 42 of the Act.

It is not apparent or clear that the Board's experience rating of the employer during the years 2002 to 2005 inclusive, as mandated by item 7, AP-1-42-1, is contrary to section 42 of the Act. I understand the employer's point that during the transition period (particularly during the early years before the base rates become close) claims cost-to-payroll ratios for helicopter firms will tend to be higher compared with other firms in the DR rate group (such as integrated logging firms) which have a large payroll and lower risk due to a large component of office occupations. I also understand the employer's point that a firm with the higher base rate will pay a greater penalty for the same claims cost-to-payroll ratio.

However, section 42's reference to "*where the Board thinks a particular industry or plant is shown to be so circumstanced or conducted that the hazard or cost of compensation differs from the average of the class or subclass...*", combined with the reference to a rate to "*correspond with the relative hazard or cost of compensation of that industry or plant*" is sufficiently general and ambiguous to encompass a system of experience rating that compares an employer's claims cost-to-assessable experience with that of other firms in its rate group which may not share the employer's identical circumstances in terms of risk, size, and base rate, for example.

I agree with the employer that in terms of perfection in comparing relative hazard in a class or subclass, it is arguable that the "best fit" would be to compare the ratios of employers in the same classification unit that share the same base rate. But there were a variety of options open to the Board in devising its experience rating system under section 42 of the Act. Policy-making generally involves considering a wide range of

factors and choices, evaluating the significance and effect of each choice for the workers' compensation system as a whole. A policy choice that departs from the "best fit" in terms of comparing relative hazard is not necessarily an unlawful policy as being inconsistent with section 42 of the Act.

I am very much aware that the October 17, 2002 Resolution, in assigning 11 forestry CUs to one rate group, and in creating a base rate transition plan so that by 2006, all the CUs would share the same base rate, is an example of a delicate and complex exercise in rate making policy. I also accept the evidence of the manager and the director that the base rate for 2002 for the helicopter logging CU 732043 was significantly lower than it would have been in the absence of the October 17, 2002 Resolution. I did not find persuasive the employer's argument that there was an unreasonable and inexplicable "jump" in the manager's estimate of a 2003 base rate of approximately \$20.00 for CU 732043, in the absence of the Resolution.

The evidence satisfies me that the object of the Resolution was to establish base rates on a fair and reasonable basis during the transition period, in part to ease the financial burden on firms in those CUs that would gradually experience base rate increases throughout the transition period. There was also an immediate and significant base rate benefit to firms in the helicopter logging CU 732043. I find it impossible to divorce those facts from my assessment of the impact of experience rating on the DR rate group by application of Board policy AP-1-42-1, item 7. The entire scheme of base rate transition and experience rating through the transition period must be assessed as a whole, as there is an interplay between the Resolution's establishment of base rates during the transition period, and the effect of comparing an employer's cost to assessable payroll ratio with the average of the DR rate group.

The employer gave the example that if it were assessed a 71.2% experience surcharge on its helicopter CU base rate in 2004 (\$10.54), it would pay an assessment rate of \$18.04, whereas an integrated forest firm with exactly the same costs/payroll ratio, facing the same 71.2% surcharge, would end up paying only \$14.31 because its base rate was lower, only \$8.36 per \$100.00 of assessable payroll. In the employer's view, the "relative cost of compensation" for the two firms being the same, under section 42 of the Act, they should ultimately be paying the same assessment rate. That is undoubtedly one way that an experience rating system could be devised under section 42 of the Act. One might even characterize that approach as arguably a "best-fit" approach to experience rating.

Another equally viable way to interpret section 42 of the Act and to assess the validity of the Board's experience rating system, however, is to note that the special assessment that corresponds with the relative hazard or cost of compensation shared by the two firms, is the same percentage surcharge each receive. The ultimate assessment (in monies paid) by each firm will be different, of course, because their base rates are different. But those differing base rates reflect the Board's consideration, under sections 39(2) and 42 of the Act, of the special situation of each employer in which it is

“circumstanced or conducted” in the rate group. Further, in the special transitional situation of the new DR rate group, in the October 17, 2002 Resolution, the Board needed to take into account, and did take into account, the differing hazard or cost of compensation of each firm in the rate group by establishing base rates significantly different (in particular for firms in the helicopter logging CU) than they would otherwise have received, in the absence of the amalgamation of the 11 logging CUs into one rate group. Thus, under section 42 of the Act, the ultimate assessment rate paid by each employer in the DR rate group will reflect the Board’s consideration of relative hazard or cost of compensation at two levels: the base rate level and the experience rating level.

My assessment of the employer’s situation is that it received a significant and immediate financial benefit in base rate reduction by the October 17, 2002 Resolution, and that on appeal to WCAT, it seeks to obtain an even greater financial benefit by requesting a remedy from WCAT that would apply a different experience rating system to provide it with a better financial advantage.

Again, I emphasize that while the employer’s position (evidenced in its shake firm illustration as well) may reflect what arguably it might characterize as a “best fit” approach to experience rating under the Act, WCAT does not have the statutory authority to choose among a variety of policy-making choices to direct that the Board establish the experience rating option preferred by the employer in this case. It is the mandate of the Board’s governing body to make policy, and the evidence is clear in this case that it was only after significant consultation and investigation of options that the Board developed the transition plan in the October 17, 2002 Resolution, with its predictable consequences when experience rating under Board policy in AP-1-42-1 was applied to firms in the new DR rate group.

I find that the October 17, 2002 Resolution and the application of item 7, AP-1-42-1 to experience rate the employer during the transition period set out in the Resolution, was a viable and lawful exercise of the Board’s authority under sections 37, 39, 42 and 82 of the Act. The employer’s arguments have failed to persuade me that the application of Board policy in this case conflicts with section 42 or other provisions of the Act. With that finding, under section 251(1) of the Act, I am unable to refuse to apply the Resolution and the experience rating policy AP-1-42-1 to the employer for the transitional years 2002 through 2005 established by the Resolution, as the Board policy in the Resolution and AP-1-42-1 is not so patently unreasonable that it is not capable of being supported by the Act and its regulations.

Did the review officer in the Review Division err in confirming the Board’s decision to deny the employer’s request to recalculate its experience rate for the years 2002 through 2005, comparing it only against the experience of other employers in CU 732043?

I have found Board policy in the October 17, 2002 Resolution, and Board policy in the *Assessment Manual*, specifically AP-1-42-1 and AP-1-37-1, to be lawful exercises of Board authority under the Act. I am satisfied that the Board manager correctly applied

Board policy with respect to determining the employer's experience rating, and that he correctly denied the employer's request for a recalculation of its experience rate during the transition period established by the Resolution. I confirm the review officer's decision dated September 22, 2003 that upheld the Board manager's decision of April 8, 2003, as I have found no error in his conclusion. Therefore I dismiss the employer's appeal of the review officer's September 22, 2003 decision.

Heather McDonald
Vice Chair

HM/hb