Noteworthy Decision Summary

Decision: WCAT-2004-04784 **Panel**: Heather McDonald **Decision Date:** Sep 14, 2004

Credibility of Evidence – Statutory Declaration – Business Operations Classification – Reclassification

The test for determining the credibility of a witness' evidence is "its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions". A stricter standard should not be applied.

The employer sold log home kits. The employer requested that its business operations during seven calendar years be retroactively reclassified from subclass 0706 (log home construction) to subclass 0604 (prefabricated log home kit manufacturing). During the Workers' Compensation Board's (Board) audit of the employer, it found that records for three of these years were incomplete. The employer then provided a statutory declaration from its general manager stating the percentage of revenue from the sale of log homes in each of the three years. The Board refused to accept the statutory declaration and reclassified the employer's business operations for four years but denied reclassification for the three incomplete years. The employer appealed this decision to the Workers' Compensation Appeal Tribunal (WCAT).

In its written submission to WCAT, the Board submitted that the evidence of the employer was "insufficient, flawed, mere speculation, or invitation to infer." The Board also asserted that the general manager had lied in the statutory declaration and that other representatives of the employer had lied to the Board on the issue of the percentage of revenue from the sale of log homes.

The panel accepted the credibility of the evidence that was provided by the employer and corroborated by its general manager in the statutory declaration. The test used in assessing credibility was that set out in the British Columbia Court of Appeal decision of *Faryna v. Chorney* (the harmony of the evidence with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions). The panel distinguished the case from *Appeal Division Decision #2004-02270* as in that decision there was no evidence whatsoever to corroborate the bare assertions made by the party in question.

The employer's appeal was allowed and the Board's decision was varied. The panel found that the employer should be reclassified to "prefabricated log home kit manufacturing" in the three years in question.

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Panel: Heather McDonald, Vice Chair

Introduction

The employer sells log home kits. The employer is appealing a February 21, 2003 decision of the director of the Assessment Department of the Workers' Compensation Board (Board). In that decision, the director responded to the employer's request to reclassify its business operations for the calendar years 1993 through 1999 from subclass 0706 (building construction) to subclass 0604 (manufacturing – specifically 060412, manufacturing of prefabricated or precut wood frame buildings).

The director's decision was to reclassify the employer as requested for the years 1996 to 1998 inclusive. He also determined that for the year 1999, the employer qualified for multiple classifications, being classified in both 0604 and 0706 that year. But the director denied reclassification for 1993, 1994 and 1995. In the decision, the director also reassessed the employer, increasing the assessable earnings in 1993, 1996, 1997 and 1998. In these appeal proceedings, the employer's only challenge is to that portion of the decision which denied reclassification to subclass 0604 for the years 1993, 1994 and 1995.

Issue(s)

Should the employer, for the years 1993, 1994 and 1995, be reclassified from subclass 0706 (construction) to subclass 0604 (manufacturing)?

Jurisdiction

A management consultant represented the employer in these appeal proceedings.

On March 20, 2003, the employer filed its appeal to the Workers' Compensation Appeal Tribunal (WCAT) from a February 21, 2003 decision of the director of the Assessment Department. On March 3, 2003, WCAT replaced both the Appeal Division and the Review Board. When the director's decision was issued on February 21, 2003, the employer had a right of appeal to the Appeal Division under section 96(6) of the *Workers Compensation* Act (Act). Section 41(1) of the *Workers Compensation Amendment Act (No. 2), 2002* authorizes WCAT to hear this appeal as the employer's right of appeal to the Appeal Division from the director's decision was not yet exercised on March 3, 2003. I am satisfied that the employer filed its appeal in a timely fashion with WCAT, and that WCAT has jurisdiction to deal with the appeal.

The employer did not request an oral hearing, but instead provided an extensive written submission in support of its position.

WCAT invited the Assessment Department to participate in the appeal by providing a written submission and other information in response to the employer's submission. The Assessment Department chose to participate, providing a memorandum dated May 10, 2004 from the manager of Assessment Policy. The employer objected to the invitation extended to the Assessment Department to participate in the appeal, submitting that WCAT was treating the Board as a party to the appeal, contrary to WCAT's *Manual of Rules, Practices and Procedures* (MRPP). In objecting to the participation by the Board's Assessment Department, the employer requested that WCAT disregard the memorandum from the Assessment Department.

I am overruling the employer's objection and have considered the Assessment Department's memorandum in these appeal proceedings. The Assessment Department's participation in this case falls within the role referred to in item #4.32 of the MRPP, and is grounded in WCAT's statutory authority under sections 246(2)(i) and 247(3) of the Act. A WCAT panel has the discretion to invite such participation if it believes it would be of assistance in deciding issues in an appeal.

WCAT provided a copy of the Assessment Department's memorandum to the management consultant representing the employer, and the management consultant was given an opportunity to reply, which he exercised by way of a written response dated May 31, 2004.

Section 253(1) of the Act states that on an 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 of directors that is applicable in that case.

Background and Evidence

The employer registered with the Board in 1992. The Board classified the employer in subclass 0706 (construction) and assessed the employer the applicable construction industry assessment rate for each successive year.

By the year 2000, a situation of inconsistent industry classification had arisen involving the log home kit industry. The Board classified some employers, like the employer in this case, in subclass 0706 (construction) but it classified other employers in subclass 0604 (manufacturing). This led to 12 employers in the log home kit industry

initiating appeals to the Appeal Division, challenging their classification in subclass 0706 and requesting reclassification to subclass 0604. The same management consultant who represented the employer in this case also represented those 12 employers in the Appeal Division proceedings. (The employer in this case was not one of the 12 employers involved in the Appeal Division appeals.)

The Appeal Division convened an oral hearing in January of 2001, at which the management consultant appeared as the representative of all 12 "pre-fabricated log-home" employers who had initiated the 12 separate appeals. The Appeal Division panel heard evidence and argument at the oral hearing relating to the 12 separate appeals, and subsequently issued 12 separate decisions in the matters. Those decisions were *Appeal Division Decisions #2001-1831*; *#2001-1832*; *#2001-1833*; *#2001-1834*; *#2001-1835*; *#2001-1836*; *#2001-1837*; *#2001-1838*; *#2001-1839*; *#2001-1840*; *#2001-1841* and *#2001-2234*. The panel issued *Decisions #2001-1831* to *#2001-1841* inclusive on September 19, 2001 and it issued *Decision #2001-2234* on November 9, 2001. I was a member of the three-person Appeal Division panel which rendered those decisions.

The result of those decisions (briefly summarized) was that the Appeal Division decided that the Board had erred in failing to give due consideration to a classification committee minute (CCM), *CCM #381*, as an interpretive guideline to classifying the employers in the appropriate industry. *CCM #381* was issued in January 1993. It is unnecessary for the purposes of this case to relate the content of *CCM #381*. What is important is that the Appeal Division decided that the Board's classification decisions with respect to the 12 appellants should be changed, with an effective date for reclassification in each case that took into account that *CCM #381* constituted a change in Board classification policy. This meant that any "rate down" consequences of reclassification would be effective the first year in which an employer fell within the new definition/parameters established by *CCM #381*. As a practical matter, because *CCM #381* was issued in January of 1993, and there was a new Board classification system effective January 1, 2000, the relevant time period for reclassification focus of log home kit employers was 1993 to 1999 inclusive.

The construction industry (0706) had a higher assessment rate than manufacturing (0604). It is sufficient to relate that the Appeal Division decided that in any year during the period 1993 through 1999 inclusive, the 12 log home industry appellants would be classified in subclass 0604 (manufacturing) if less than 25% of their revenue in a given year came from sales of log homes that they erected. Conversely, they would be classified in subclass 0706 (construction) if 25% or more of their annual revenue came from sales of log homes that they erected. This reflected the application of the following policy in section 30:20:20 (multiple classification policy)

of the *Assessment Manual* (the pre-2000 version in effect and applicable for the time period in question):

> If a firm does not meet the criteria for separate classifications, the unassigned operations will be assessed in one classification at one rate. That classification will be the industry classification with the highest assessment rate for the operations undertaken providing the highest rated category represents at least 25% of the firm's operation. If this is not the case, the next highest classification will be assigned.

During the appeal proceedings involving the 12 log home industry appellants, the Appeal Division panel requested evidence from the appellants regarding its annual revenue from the manufacture and sale of log home kits in which they engaged in onsite erection for clients. This evidence often took the form of a letter from an employer representative (principal of a company or firm) stipulating the revenue from sales of erected log homes as a percentage of total revenue, for each year between 1993 and 1999 inclusive. The Appeal Division panel then evaluated the evidence with respect to each employer and made its decision on a case-by-case basis on each of the separate appeals.

On March 12, 2002, with knowledge of the 12 Appeal Division decisions I have just described, the employer sent a letter to the director of the Assessment Department requesting reclassification, for the years 1993 to 1999 inclusive. The employer advised that its business circumstances paralleled those of other log home manufacturers that were placed in subclass 0604 as a result of the recent Appeal Division decisions. The employer indicated that for each year of 1993 through 1999, the value of sales of erected log homes never exceeded 25% of total sales for each of those years. The employer's comptroller provided a letter dated March 4, 2002 describing the nature of the employer's business activities as follows:

> Our company is solely involved in the manufacturing of log home kits. Once the log work has been completed on our site, the individual pieces are then tagged and numbered. The structure is then dismantled and loaded onto trucks or containers and shipped to the customers' construction site. The customer is given the following options for re-assembly and finishing of their log structure:
>
> - The customer chooses to re-assemble and finish the log structure themselves;
> - The customer hires a local general contractor to re-assemble and finish it for them; or
> - The customer hires and uses general contractors recommended by [the employer];
> - In rare instances, upon request, [the employer] will set up the log structure for the customer.

> When we deliver the log structure to the customer we normally send one or two supervisors to the job-site to supervise the re-assembly ensuring that all the pieces are placed according to the tagging and numbering.
>
> The percentage of revenue from those homes sold which we erect represents only a small portion of our total revenue. Specifically for the following years the revenue from homes sold, which we erected, was:
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> | | |
> |---|---|
> | 1993 | less than 10% |
> | 1994 | less than 10% |
> | 1995 | less than 10% |
> | 1996 | less than 10% |
> | 1997 | less than 10% |
> | 1998 | less than 10% |
> | 1999 | less than 15% |
> | 2000 | less than 10% |
> | 2001 | less than 10% |
>
> Should you require any additional information please do not hesitate to contact the undersigned.

In a letter dated May 1, 2002, the director responded that he would have an assessment officer audit the employer's operations. An assessment officer did the audit and, as earlier indicated, increased the employer's assessable payroll for some years (including 1993), which increases the employer has not disputed.

The audit revealed that the employer's records for 1993 to 1995 inclusive were incomplete, although the 1993 records were sufficient to indicate that an increase in assessable payroll was warranted. An e-mail interchange between the employer's management consultant and the director of Assessments referred to the problem of missing records. The management consultant's e-mail dated January 20, 2003 to the director stated:

> [The auditor] tells me that he is unable to verify the activities of [the employer] for 1993, 4 or 5 because of the lack of records. This would therefore seem to become a decision which has to be made on circumstantial evidence rather than objective finding of fact and I appreciate you need to consider a number of factors. Since the company was clearly a manufacturer for the years where records are available we believe it is reasonable to conclude that they were also a manufacturer for the previous years as well. If you feel anything further such as a letter from the company, declaration, etc. would assist you, please let us know.

The director responded the next day by return e-mail, advising that it would be best for the employer to wait for the Board's decision letter which would be issued very soon.

Nevertheless, the employer went ahead and provided a statutory declaration dated February 10, 2003 from the employer's general manager and company director. The general manager deposed that for the years 1993, 1994 and 1995, the revenue from sales of log homes set up for the clients in each of those years, was always less than 25% of the total revenue for each year.

The director's decision was issued on February 21, 2003. He found that there was a lack of records to support a classification change for 1993, 1994 or 1995. The records did confirm that the employer qualified for reclassification in subclass 0604 (in the Prefabricated Log Home Kit Manufacturing classification unit) for the years 1996, 1997 and 1998. As earlier stated, the director found that the records supported a dual classification for the employer in the year 1999, both in log home construction (0706 subclass) and in subclass 0604 (Prefabricated Log Home Kit Manufacturing). The director stated that the records for 1999 indicated that the employer received 598% of its revenue from log home construction and 41% from prefabricated log home kit manufacturing.

The director stated that he did not know whether the general manager based the statements in the statutory declaration on:

- documentation he had personally reviewed (which should have then been attached to the affidavit);

- a recollection (in which case he should have deposed to his involvement with the firm at the relevant time);

- information provided by another individual (in which case the individual should have made the affidavit); or

- an opinion based on information and belief.

The director stated that the statutory declaration from the employer's general manager had little probative value and that he was unable to give any weight to the declaration that the revenue from sales of log homes that were set up was always less than 25% of total revenue for 1993, 1994 and 1995.

In these appeal proceedings, the employer advises that the reason for the missing records for 1993, 1994 and 1995 was that they were kept at the owner's home and went missing after his divorce.

The Positions of the Employer and the Board's Assessment Department

The employer notes that in the 12 Appeal Division decisions earlier referred to in this decision, the panel required as evidence revenue confirmation by way of letters or statements from knowledgeable persons in the firms. The employer submits that this same standard should apply to it in this case.

The employer submits that as the general manager's evidence was a sworn statement, it should be accepted barring evidence to the contrary. The employer refers to *Appeal Division Decision #2002-0241* (January 28, 2002) and *Appeal Division Decision #2002-3008* (November 29, 2002) as authorities supporting its position that where there is no evidence to challenge the credibility of an employer's statement, and indeed other evidence is consistent with the content of the statement, the credibility of the statement should be accepted.

The employer points out that the general manager, who made the statutory declaration, runs the day-to-day operations of the employer, has been with the employer since 1985, and is the brother of the employer's sole owner. The general manager based his statement on personal knowledge and his recollection of the employer's business activities: it is not and never has been the standard business of the employer to erect the log homes it sells. The employer notes that when the Assessment Department audited the employer, the audit took place at the company location, where the general manager's identity and role was common knowledge. The auditor, who spent considerable time with the company and did a detailed audit, would have known the general manager's position, his background with the company and his awareness of company operations. The employer submits, therefore, that it was not reasonable for the Assessment Department to dismiss the general manager's statutory declaration on the ground that it did not know the basis of his knowledge. The employer indicates that if it would assist to have a statutory declaration to the same effect from the employer's owner, it is willing to provide the evidence in that form as well.

The employer argues that the balance of probabilities weigh in favour of accepting the statutory declaration's evidence that for the years 1993, 1994 and 1995, the revenue from the sale of log homes it erected was less than 25% of its total annual revenue. It notes that the audit by the Assessment Department of the employer's records for 1996 to 1998 supported the employer's position that it was a manufacturing operation each year with respect to the log home kit business. The year 1999 was an aberration due to an extraordinary management contract that led the Board to decide that the employer was qualified for multiple classification: a separate classification in 0706 (construction) regarding the revenue from the management contract, and a separate classification in 0604 (manufacturing) for the revenue from the manufacturing of log homes.

In its memorandum dated May 10, 2004, the Assessment Department submitted that the evidence of the employer's comptroller and the evidence of the employer's general manager was determined to be "insufficient, flawed, mere speculation, or invitation to infer." The Assessment Department argues that it was the employer's obligation to

provide sufficient evidence to support the assertions of company representatives, and in this regard, relies on *WCAT Decision #2004-02270* (April 30, 2004).

The Assessment Department also alleges that the comptroller, the general manager and the management consultant representing the employer all lied in asserting that the employer's 1999 revenue from the sale of erected log homes was less than 25% of the total annual revenue. The Assessment Department points out that the audit revealed that 59% of the employer's revenue that year came from log home construction. In this regard, the Assessment Department submits:

> It is, of course, trite law that a trier of fact upon the discovery of falsity or of concealment, modification, or destruction of evidence by a party is entitled to view other proof of that party with suspicion. This principle of proof is typically engaged in the following circumstances, one or more of which may be applicable in the instant case:
>
> a) Concealment, modification or destruction of key evidence;
> b) Failure to call key witnesses;
> c) Specious testimony; and
> d) Inadequate documentary evidence.

The employer's response to the Assessment Department's allegation of falsehood is to request WCAT to dismiss it outright. The employer points out that the director did not make that allegation when he dismissed the employer's evidence in his February 21, 2003 decision letter. The employer alleges that after it received the employer's submission on appeal, the Assessment Department simply decided to manufacture another reason to bolster its position, and so alleged a falsehood.

The employer says that for the year 1999, the additional "construction" revenue came not from log home kits sold and erected, but from a management contract separate and distinct from the employer's usual log home manufacturing business. The employer submits that even the Assessment Department recognized that the construction revenue was separate and distinct from the log home kit business, as it determined that the employer qualified for two separate industry classifications in that year. The employer's position is that this supports its contention that the 1999 year was an unusual aberration from earlier years.

The employer summarizes its position as follows:

- Its method of business operations has always been to sell log homes with only rare erection of those homes;

- 1999 was an aberration in that the employer undertook a separate management contract (this fact was noted by the employer and the Assessment Department which provided two classifications for that year);

- For those years where complete records were available, they revealed the employer to be a manufacturer of log home kits entitled to an 0604 subclass;

- 1993, 1994 and 1995 had incomplete records due to their separate storage at the owner's home and their loss after his divorce;

- It is logical that where complete records indicate less than 25% revenue attributable to the sale and erection of log homes, then the figures would likely be the same for those years where the records were lost;

- The evidence as a whole supports a finding that the employer's operations in the years 1993, 1994 and 1995 fell into the log home kit manufacturing industry.

Reasons and Findings

I accept the credibility of the evidence provided by the employer's comptroller and corroborated by its general manager in the February 10, 2003 statutory declaration that for the years 1993, 1994 and 1995, the annual revenue from the sales of log homes set up for clients was always less than 25% of the annual total revenue.

In *Faryna v. Chorney*, (1952) 2 D.L.R. 354 (B.C.C.A) at page 357, the Court said:

> ..the real test of the truth of the story of a witness...must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

I recognize the general manager's extensive background with the employer and his personal knowledge of its operations during the time period in question. The employer has provided a credible reason for the loss of company records for the years 1993, 1994 and 1995, and I accept that their loss was not a deliberate evasion by the employer of the Board's audit. Indeed, the evidence supports a finding that the employer fully cooperated with the auditor and leads me to conclude that the employer would have provided the records if they had been available.

I also accept the employer's position that the 1999 year was an unusual situation or aberration in its usual business, involving a special management contract apart from its standard log home kit manufacturing operations. The employer's position in that regard is supported by comments in the auditor's records for the 1999 audit year. The auditor commented that the 59% revenue from "log home construction" related to the "[M] Lake

Project." He also determined that the addition of the new industry classification 0706 (log home construction) for that year represented a "distinct change" in the employer's business from previous years. This evidence supports the employer's evidence that its operations in previous years (specifically 1993, 1994 and 1995) fell into the log home kit manufacturing industry or 0604 subclass. It is also consistent with the auditor's findings that for the years 1996, 1997 and 1998, the employer's business operations fell into the log home kit manufacturing industry or 0604 subclass.

I expressly reject the allegation that the employer's representatives deliberately misled or lied to the Board or to WCAT regarding the 1999 year revenue. Applying the *Faryna v. Chorney* test, the evidence provided by the employer's comptroller and the employer's general manager regarding the 1993, 1994 and 1995 business operations is in harmony with the reasonable probabilities established by the other evidence in this case. The other evidence as a whole is consistent with and supports the evidence from the comptroller and the general manager, which establishes the credibility of their evidence to my satisfaction. This finding is also consonant with the Appeal Division authorities referred to by the employer, regarding weighing of evidence. The *Appeal Division Decision #2004-02270* referred to by the Assessment Department is distinguishable from the case at hand, as in that decision there was no evidence whatsoever to corroborate the bare assertions made by the party in question.

For the foregoing reasons, the evidence supports a finding that the employer's operations in the years 1993, 1994 and 1995 fell into the log home kit manufacturing industry, or 0604 subclass.

Conclusion

I allow the employer's appeal and vary the director's February 21, 2003 decision by finding that the employer should be reclassified in the years 1993, 1994 and 1995 to subclass 0604 (manufacturing), specifically classification unit 060412, manufacturing of prefabricated or precut wood frame buildings.

Heather McDonald
Vice Chair

HM/hb