

Noteworthy Decision Summary

Decision: WCAT-2004-05255 **Panel:** James Sheppard **Decision Date:** October 7, 2004

Criteria to use in determining whether there has been a “change in ownership” for the purpose of section 49(2) of the Workers Compensation Act – When a father transfers his business to his sons and it operates in the same location with virtually the same business name, there has been a “change in ownership” - Hence outstanding assessments owed to the Board by the father’s company may be properly transferred to the sons’ company

An employee of Company A, an incorporated company operated by the father, reported that it was sold to the sons of the owner of Company A. The Workers' Compensation Board (Board) informed the employer that \$39,000 in outstanding assessments owing by Company A would be transferred to the employer under section 49(2) of the *Workers' Compensation Act* (Act). The employer appealed. The vehicles registered to Company A were now registered to the employer, and the employer was performing the same type of work in the same business location. Should the outstanding assessments owed to the Board by Company A have been transferred, pursuant to section 49(2) of the Act, to the employer? If the Board properly transferred these outstanding assessments to the employer under section 49(2), could the Board have transferred this amount again under section 49(2) to the father of the employer's owners?

The purpose of section 49(2) is to prevent employers from relinquishing their debt to the Board by a change in ownership or employership. The phrase “a change in ownership” in section 49(2) should not be read so strictly as to include only the most formal of transfers of legal ownership (e.g. transfer of shares or assets), and should include a change of ownership where the functional operations of the business in question is the same. This is reflected in the criteria in the *WCB Collection Officer Procedure Guide* which is helpful in considering what criteria to use in determining whether there has been a change in ownership. Even if the assets transferred from Company A to the employer were in lieu of wage payments owed to the owners of the employer and/or severance, the transfer of assets is not the only criterion for determining whether there has been a change of ownership under section 49(2). The employer did not dispute the other results found in relation to the other Guide criteria for change in ownership. Because the surnames for Company A and the employer were the same except for the use of the word “Bros.”, the goodwill associated with the use of Company A's name would have likely gone to the employer. The panel found the familial relationship between the owner of Company A and the owners of the employer was also a factor to be considered in determining whether there had been a change in ownership. The Board properly exercised its authority under section 49(2) to transfer the outstanding assessments owed to it by Company A to the employer. The evidence establishes that there had likely been a change in ownership between Company A and the employer. The Board could not transfer the outstanding assessments under section 49(2) to the father as a sole proprietor or under a different incorporated company because the evidence did not establish that he or this other company were successive owners of the employer.

An amendment was issued for WCAT-2004-05255 and is attached to this document.

WCAT Decision Number : WCAT-2004-05255
WCAT Decision Date: October 07, 2004
Panel: James Sheppard, Vice Chair

Introduction

The senior vice chair and tribunal counsel of the Workers' Compensation Appeal Tribunal (WCAT) granted the employer an extension of time to appeal a January 30, 2001 and a February 28, 2003 decision of the Workers' Compensation Board (Board) (see *WCAT 2004-00540* dated January 30, 2004 published at www.wcat.bc.ca).

In the January 30, 2001 decision the Board informed the employer that \$39,306.32 in outstanding assessments owing by an incorporated company operated by the father of the owners of the employer would be transferred to the employer. I will refer to this incorporated company operated by the father as Company A.

WCAT 2004-00540 summarized the decision of February 28, 2003 as follows:

The February 28, 2003 decision letter was closely linked to the January 30, 2001 decision. In a letter dated December 19, 2002, a collection officer adviser advised the employer that the Board was prepared to relieve their company of the section 49(2) liability. This liability was to be transferred back to the father's company, together with any assets the son's company had received from the father's company. The December 19, 2002 decision noted:

The remaining \$41,311.32 outstanding on our Writ will be transferred once the assets have been transferred accordingly. However, as [father's company] has been dissolved from the Registrar of Companies, both the assets and their respective liabilities should be transferred to [the father's personal] proprietorship as the limited company no longer exists.

In the February 28, 2003 decision letter, the collections manager advised that the "Asset Transfer Agreement" from the son's company to the father's company was not acceptable to the Board in its present form. This involved a reversal of the position expressed by the collection officer in the December 19, 2002 letter. The collections manager noted that a new name had been added in pen to the agreement, which was the name of the father's new roofing enterprise. He advised that to complete the

proposed transfer, it would be necessary that the father's original roofing company be restored as a company, that it reopen its prior WCB account, and that all assets be transferred back to the company.

[reproduced as written]

The employer's appeals of these two decisions has now been assigned to me to decide these appeals on the merits.

Issue(s)

Should the outstanding assessments owed to the Board by Company A have been transferred, pursuant to section 49(2) of the *Workers Compensation Act* (Act), to the employer?

If the Board properly transferred these outstanding assessments to the employer under section 49(2) of the Act could the Board have transferred this amount again under section 49(2) to the father of the employer's owners?

Jurisdiction

On appeal WCAT can confirm, vary or cancel an appealed decision (section 253(1) of the Act). WCAT may inquire into, hear and determine all those matters and questions of fact and law arising or required to be determined in an appeal, but is not bound by legal precedent (sections 250 and 254 of the Act). WCAT must make its decision based on the merits and justice of the case, but in so doing, must apply a policy of the Board's board of directors that is applicable in the case.

Procedural Matters

The employer requested an oral hearing on its notice of appeal form. The employer's representative wanted to provide a factual account of how a few of the assets of Company A were given to him as wage payment. A copy of the assessment file for both the employer and Company A were provided to the employer's representative. The employer was initially assisted by an employers' adviser but in a letter dated October 24, 2003 she indicated that she was no longer assisting the employer in these appeals.

The appeals coordination officer invited the employer to provide a written submission in support of its appeal by April 8, 2004. She received no reply by this date from the employer. Although this request for a written submission was made before I had a chance to decide whether this special handling matter would be dealt with on the basis of a read and review or oral hearing because I decided (after reviewing the file) that the appeal would proceed by way of read and review, the appeal coordination officer did not re-request a written submission.

The appeal coordination officer did send to the Assessment Department a copy of the notification of appeal dated May 28, 2003, the request for review application form dated May 28, 2003 and an August 5, 2003 letter from the employers' adviser for comment. A June 14, 2004 memorandum from the director of the Assessment Department (director) enclosing a June 14, 2004 memorandum from the manager, Assessment Policy (policy manager), and a June 11, 2004 letter from the Board's manager credit and collections (manager) was received by WCAT. This letter was copied to the employer with an opportunity to provide a written response. No response was received by the appeal coordination officer within the time period prescribed.

I am satisfied that the employer has been given an ample opportunity to provide evidence and a written submission in support of its appeal of the January 20, 2001 and February 28, 2003 decisions.

As previously stated, the issues under appeal involve a consideration of whether the requirements of section 49(2) of the Act were met in order to transfer outstanding assessments from Company A to the employer and whether this transfer (if valid) can be altered. I find that I can render a decision on these issues based upon a review of the evidence and the correspondence on file without an oral hearing.

Reasons and Decision

Preliminary Issue on Requirement for Grounds of Appeal

The employer made a request to the Review Division to review the February 28, 2003 decision. The Review Division could not review the February 28, 2003 decision (or the January 30, 2001 decision) because it had been made prior to March 3, 2003. The Review Division came into existence on March 3, 2003.

The review officer in his June 9, 2003 letter to the employer indicated that this request had been received by the Review Division on May 28, 2003. The employer's representative, on the May 28, 2003 request for review form, indicated that there was an error of fact, law and or policy. He wanted the original application of section 49(2) of the Act to be voided.

On March 3, 2003 the Appeal Division was replaced by WCAT. The request for an extension of time to appeal the January 30, 2001 and February 28, 2003 decisions to WCAT was made after March 3, 2003. Had the employer appealed these decisions to the former Appeal Division prior to March 3, 2003 it would have been continued and completed as a WCAT appeal under section 39 of the transitional provisions of the *Workers Compensation Amendment Act, No. 2 (2002)* (Amendment Act). WCAT has interpreted the provisions of section 39 to require that an employer show grounds (error of law, fact or contravention of published policy) before it can address the merits of an

appealed decision. These grounds were required under the former provisions of sections 96(6) and 96(6.1) of the Act when appealing an assessment decision to the Appeal Division.

The appeal of the January 30, 2001 and February 28, 2003 decisions fall under section 41 of the transitional provisions of the Amendment Act which address the unexercised right of appeal of a decision that could have been appealed to the Appeal Division prior to March 3, 2003.

In a recent decision (*WCAT 2004-04880* dated September 20, 2004 published at www.wcat.bc.ca), I decided along with two other vice chairs that an appeal under section 41 of the transitional provisions of the Amendment Act did not require the employer to show grounds before WCAT could address the decision on its merits. Although this decision involved an appeal of a section 39(1)(e) relief of costs matter, I find that the reasoning (in particular the words in section 41) to be persuasive in finding that the employer does not have to show grounds in the course of this appeal because it falls under section 41 of the transitional provisions of the Amendment Act.

I find that it is not necessary to raise this preliminary issue with the employer for comment prior to rendering my decision because there is no prejudice to the employer in not requiring it to show these grounds and there is no respondent in these appeals.

Transfer of Outstanding Assessments from Company A to the Employer

The background of these appeals is complex and has been summarized in *WCAT 2004-00540*. I find that it is not necessary to restate this background except to indicate that the outstanding assessment owed by Company A to the Board arose from unpaid administrative penalties imposed for health and safety violations. The Board had the power to collect these unpaid administrative penalties from the employer by way of assessment (sections 223(1)(a) and 223(2) of the Act). After the Board could not collect this outstanding assessment from Company A, it transferred this amount to the employer under section 49(2) of the Act.

Section 49(2) of the Act states, in part:

Where in an industry **a change of ownership or employership has occurred**, the Board may levy any part of the deficiency or the unpaid amount of the assessment **on any of the successive owners or employers....**

[reproduced as written, emphasis added]

The phrase: “a change of ownership or employership” found in section 49(2) of the Act is not defined by section 1 of the Act. Neither are the individual words “ownership” or “employership”. These words are not defined in the *Interpretation Act*, RSBC 1996,

c.238. There is no direct Board published policy explaining the meaning of section 49(2) of the Act.

As explained by the manager in her June 11, 2004 letter, the collections officer used the criteria outlined in the *WCB Collection Officer Procedure Guide* (Guide) when determining whether or not a change in ownership had occurred. She outlined the criteria as follows:

Ownership factors which must be taken into account:

- Has the business moved or remained at the same location?
- Has the character of the business changed?
- Is the same property being used?
- Are the customers the same?
- Are the contracts the same?
- Is the business name the same?
- What is the length of interruption of operations?

The manager also states:

The CO's [collection officer's] investigation revealed that the business remained at the same location, the character of the business remained the same – low slope roofing, the same property was being used, and the customers and contracts were those related to the operation of roofing. The business operated under the name of [employer] and there did not appear to be an interruption of operations. The CO decided a successive ownership had occurred.

The collection officer placed a March 10, 2000 memorandum on the assessment file which recorded that an office employee reported that Company A had been sold to the sons of the owner of Company A. Company A had shut down operations and the employer had not yet registered with the Board. The employer's registration with the Board was effective March 15, 2000. A search of vehicles registered to Company A showed they were now registered to the employer. It appeared the employer was operating from the same location based on the motor vehicle search.

A collection officer sent a March 28, 2000 letter (and April 11, 2000 and May 4, 2000) to the employer informing it of the transfer to the employer under section 49(2) of the Act of the outstanding assessments owned by Company A.

The manager has indicated that in May of 2000 the amount owing was transferred from the account of Company A to the employer. After a telephone discussion with the employer's representative in June of 2000, the collections officer agreed to transfer the debt back to the account of Company A based on a payment proposal offered by the

employer's representative that his father would pay the debt. The employer's representative was informed that if the promised payments were not received that the debt would be transferred back to the employer and legal action would be commenced. Between June of 2000 and January of 2001, some small payments were received from the father; however, the bulk of the payment proposal did not materialize. This resulted in the January 30, 2001 decision which again transferred the outstanding assessments to the employer under section 49(2) of the Act.

I take the January 30, 2001 decision to be an original decision to make a transfer of the outstanding assessments to the employer under section 49 (2) of the Act. This decision was not a denied reconsideration decision of the first transfer under section 49(2) to the employer as communicated in the March 28, 2000 letter. This was a re-transfer of the amount owing by Company A back to the employer after Company A failed to make the bulk of the proposed payments.

The purpose of section 49(2) of the Act is to prevent employers from relinquishing their debt to the Board by a change in ownership or employership. This is an important provision afforded to the Board in order to meet its statutory responsibility to continue and maintain the accident fund and manage the accident fund with a view to the best interests of the workers' compensation system (section 36(1) and (2) of the Act).

A purposive interpretation of section 49(2) of the Act should be applied to this section in order to attain its objects. The phrase "a change of ownership" should not be read so strictly as to exclude only the most formal of transfers of legal ownership (e.g. transfer of shares or assets). Section 49(2) of the Act should be interpreted to include a change of ownership where the functional operations of the businesses in question are the same. This is reflected in the criteria used by the Guide in determining whether there has been a change in ownership. Although the criteria set out in this Guide is practice and not Board published policy, I find that it is helpful in considering what criteria to use to determine the issue of a change in ownership.

I note that the criteria in the Guide for a change in ownership does not appear to have been published at www.worksafebc.com. However, the employer's representative had an opportunity to review and comment to WCAT on the Guide criteria for a change in ownership. The Guide criteria for a change in ownership (not employership) was outlined in the manager's June 11, 2004 letter along with the reported investigative results of the collections officer in applying this criteria and concluding there had been a change of ownership.

On his request for review form dated May 28, 2003, the employer's representative wanted to explain how a few assets of Company A had been given to him as wage payment. In his September 27, 2002 letter to the manager of the collection section he listed the assets transferred to the employer from Company A. He states: "The assets he [father] transferred to myself and brothers in lieu of money he owed us for working

for him “18 years of work” and back pay and severance pay. We did not purchase the assets as was suggested in the other collections officers letter dated March 28/2000. As such we don’t believe S-49 can be applied.” [Reproduced as written.] Even if the assets transferred from Company A to the employer were in lieu of wage payments owed to the employer’s representative and his brothers (the owners of the employer) and/or severance the transfer of assets under whatever circumstances is not the only criterion for determining whether there has been a change of ownership under section 49(2) of the Act. The employer’s representative has not disputed the other results found in relation to the other Guide criteria for a change in ownership

Although Company A and the employer were two separate legal entities the surnames are the same except for the use of the word “Bros.” to denote the difference between Company A (owned by the father) and the employer (owned by the sons). I find that the familial relationship between the owner of Company A and the owners of the employer is also a factor (not the sole factor) to be considered in determining whether there has been a change in ownership. Whatever goodwill may have been associated with the use of Company A’s name would have likely gone to the employer by using the same family name and performing the same type of work from the same business location.

I find that the Board properly exercised its authority under section 49(2) of the Act to transfer the outstanding assessments owed to it by Company A to the employer. The evidence establishes that there had likely been a change in ownership between Company A and the employer.

I acknowledge that the manager in her June 11, 2004 letter did not cite the criteria in the Guide with respect to a change of employership. A change in employership is not the same thing as a change in ownership. The Guide criteria for a change in employership include:

- Are the same employees being used?
- Are there previous employees plus new employees?
- What is the length of interruption of operations?

The Guide also states: “The factors will vary from situation to situation. The factors also contain elements of degree such as whether a small number, a large number, or all of the employees are the same.” The Guide also states that the Board’s Legal Services Division is most comfortable where a significant majority (for example 75% or more) of employees continue with the successive owner or employer. As one can see the last criterion for a change in employership is also considered for a change in ownership.

I find that it is not necessary to disclose the Guide criteria on a change of employership to the employer for comment before I render my decision. Although the February 28, 2003 decision refers to the transfer under section 49(2) of the Act was based on a

change of ownership or employership the manager has indicated that the decision to transfer the outstanding assessments was based on a change of ownership not a change of employership. The wording of section 49(2) of the Act indicates that either a change in ownership or a change in employership is required to trigger the Board's discretion to transfer the outstanding assessments to the successor employer. The section does not indicate that both a change of ownership and a change of employership is needed to exercise this discretion. However, where there is both a change of ownership and a change of employership this would likely be even stronger support for exercising the discretion to make a transfer.

Subsequent Transfer of Outstanding Assessments to Father or Other Legal Entity

The manager, in her June 11, 2004 letter, summarized the collection section's efforts to collect the outstanding assessments after the January 30, 2001 decision was made to re-transfer the outstanding assessments to the employer. I acknowledge that part of the monies the Board was seeking at that point were unpaid assessments by the employer and not just the transferred amount. In October of 2002 the employer's representative informed the Board that the assets of Company A were going to be transferred back to Company A. He promised to pay the amount owed by the employer with the proceeds of the sale of the assets back to Company A. Company A committed to settle the amount it owed the Board.

On December 19, 2002 the collection officer indicated to the employer's representative that the Board was prepared to transfer the outstanding assessments back to Company A. However, he noted that Company A had been struck and dissolved from the Registrar of Companies. If Company A was not restored the amount owing would be transferred to the father as a sole proprietor.

On February 4, 2003 the Board received a copy of the Asset Transfer Agreement (Agreement) dated October 1, 2002 (but effective February 1, 2003). This document was reviewed by both the collection manager and the Legal Services Division of the Board. The agreement was considered by the Board to be invalid because changes marked on the agreement were not initialled and there were no corporate seals. The collections manager also concluded that the Board did not have the authority to transfer this debt to a third party (the father as a sole proprietor). The debt could not be transferred back to Company A because it had been struck and dissolved from the Registrar of Companies. This resulted in the February 28, 2003 decision not to re-transfer the amount owing.

I find that based on the circumstances at the time the February 28, 2003 decision was made (as summarized above) the Board did not have the authority under section 49(2) of the Act to transfer to the father as a sole proprietor or some other form of legal entity the amount that had already been transferred to the employer under section 49(2) from Company A. The evidence shows that Company A had been struck and dissolved from the Registrar of Companies and had not been restored. The evidence does not

establish that there had been a change of ownership so as to make the father as a sole proprietor or some other form of legal entity the successive owner of the employer.

Although the Guide criteria is practice (not binding) and not published policy, it indicates that a change in ownership does not simply involve looking at whether there has been a transfer of assets (property) used to operate the business. There are still the factors of carrying on the same type of business in the same location with the same clientele.

Even if a transfer of assets were the sole criterion for determining a change of ownership under section 49(2), the evidence shows the Agreement was not executed properly because the changes were not initialled and no corporate seals were used. The policy manager indicated that there was uncertainty as to who the parties were to this Agreement. He indicated that a search of the Corporate Registry in British Columbia did not reveal that the incorporated entity identified in the Agreement was registered with the registry (albeit the father may have been operating as a sole proprietor and registered with the Board).

I would agree that there is uncertainty as to the identity of the parties to the Agreement. The signature line of the Agreement refers to an incorporated entity whereas the description of the parties to the Agreement (at the beginning) refers to the father operating under a trade name. I also note that the reference to Company A in the Agreement was not completely changed to the father operating as a sole proprietor or some other legal entity. The uncertainty of this Agreement also supports my conclusion that the evidence does not establish that a change of ownership between the employer and the father operating as a sole proprietor or some other legal entity had taken place. Further, this Agreement is between two private parties and cannot bind the Board as to whether or not liability can be imposed on the employer under section 49(2) of the Act.

As I previously mentioned a transfer under section 49(2) of the Act can occur with a change of ownership or a change in employership. There does not appear to have been an inquiry by the Board into whether there was a change of employership between the employer and the father operating as a sole proprietorship or some other legal entity. There is insufficient information on the assessment files to determine this issue. I find that the Board did not make a determination of whether there was a change of employership but only a change in ownership between the employer and the father operating as a sole proprietorship or some other legal entity. It would still be open to the employer to seek such a determination from the Board.

Conclusion

The employer's appeals are denied. I confirm the January 30, 2001 and February 28, 2003 decisions. The Board properly exercised its discretion under section 49(2) of the Act to transfer the outstanding assessments owned by Company A to the employer based on a change of ownership. The Board could not transfer the outstanding

assessments under section 49(2) of the Act to the father as a sole proprietor or under a different incorporated company because the evidence does not establish that he or this other company were successive owners of the employer. Further the evidence indicates that the Agreement was not properly executed. There is also uncertainty as to the contracting parties to this Agreement. This uncertainty also supports that the evidence does not establish a change in ownership.

I find that the Board did not make a determination as to whether there had been a change of employership between the employer and the father operating as a sole proprietor or some other legal entity. The Board decided not to transfer the amount owing from the employer to the father operating as a sole proprietor or some other legal entity under section 49(2) of the Act because the evidence did not establish that there had been a change on ownership.

James Sheppard
Vice Chair

JS/gw

WCAT Amended Decision Number : WCAT-2004-05255a
WCAT Amended Decision Date: October 14, 2004
Panel: James Sheppard, Vice Chair

Amended Decision

In WCAT Decision #2004-05255, issued on October 7, 2004, I denied the employer's appeal. The Workers' Compensation Board has requested a clarification of the use of the word "exclude" in line 3 of paragraph 4 on page 6. After reviewing the original decision and based on the common law principles regarding clarification of decisions, I am amending the penultimate paragraph to read as follows:

A purposive interpretation of section 49(2) of the Act should be applied to this section in order to attain its objects. The phrase "a change of ownership" should not be read so strictly as to **include** only the most formal of transfers of legal ownership (e.g. transfer of shares or assets). Section 49(2) of the Act should be interpreted to include a change of ownership where the functional operations of the businesses in question are the same. This is reflected in the criteria used by the Guide in determining whether there has been a change in ownership. Although the criteria set out in this Guide is practice and not Board published policy, I find that it is helpful in considering what criteria to use to determine the issue of a change in ownership.

James Sheppard
Vice Chair

JS/gw