NOTEWORTHY DECISION SUMMARY

Decision: WCAT-2005-00258 **Panel**: Herb Morton **Decision Date**: January 19, 2005

Review Division Jurisdiction over the Application of Assessment Rates – Section 96.2(2)(f) of the Workers Compensation Act – Section 96.2(1)(b) of the Workers Compensation Act – Federal Undertakings – WCAT Jurisdiction over Constitutional Issues – Section 44 of the Administrative Tribunals Act

As a result of section 96.2(2)(f) of the *Workers Compensation* Act (Act), the Review Division does not have jurisdiction to review a Board decision regarding the application of an assessment rate for a class or subclass of employers to a particular employer, including a Board decision not to reduce the assessment rate for an employer which is a federal undertaking where it is argued that the rate for such employers should be reduced as they are not required to participate in the Act's prevention scheme.

As a result of section 44 of the *Administrative Tribunals Act* (ATA), WCAT does not have jurisdiction to determine the constitutionality of a provision of the Act even where the constitutionality of the provision has already been determined by previous decisions.

In this case, the employer was a federal undertaking and as such not subject to the Board's prevention scheme. The employer was nonetheless required to pay the same assessment rate as provincial employers in the same classification unit and who are subject to the prevention scheme. The employer argued that the Board's refusal to refund the portion of the assessment rate attributable to prevention costs is both discriminatory and unconstitutional. The Review Division rejected the employer's request for a review of the Board's decision (Review Division Decision) on the basis that it lacks jurisdiction to review decisions concerning assessment rates for classes or subclasses of employers under section 96.2(2)(f) of the Act.

The employer appealed the Review Division Decision to WCAT on the grounds that the Review Division does have jurisdiction under section 96.2(1)(b) of the Act, which allows an employer to request a review of assessment or classification matters. The employer also argued that it was not requesting a review of the assessment rate itself, but rather the application of the whole of the rate to the employer. The WCAT panel found that this was not a meaningful distinction, and that either situation would contravene section 96.2(2)(f) of the Act. Furthermore, the specific language in section 96.2(2)(f) of the Act prevails over the more general provision in section 96.2(1)(b) of the Act. For this reason, the WCAT panel confirmed the Review Division Decision.

The employer further argued that WCAT does have constitutional jurisdiction despite section 44 of the ATA as the WCAT panel was not required in this case to make an original determination on the constitutional validity of particular provisions in the Act. Rather, the WCAT panel could merely apply existing constitutional jurisprudence which establishes that the prevention scheme in the Act is inapplicable to federal undertakings. The WCAT panel refused to limit the effect of section 44 of the ATA by adopting this argument, and found it did not have jurisdiction over the constitutional aspect of the employer's claim.

WCAT Decision Number: WCAT-2005-00258
WCAT Decision Date: January 19, 2005
Panel: Herb Morton, Vice Chair

Introduction

The employer appeals *Review Decision #12651* dated April 14, 2004. The Review Division rejected the employer's request for review of the Workers' Compensation Board's (Board's) decision dated October 20, 2003, for lack of jurisdiction.

The employer objects that it is a federal undertaking which is not subject to Part 3 of the *Workers Compensation Act* (Act) with respect to the Board's prevention regime, yet is required to pay the same rate of assessments as other provincial employers in the same classification unit who are subject to Part 3 of the Act. The employer notes that the Board does not incur any costs in applying the prevention scheme to federal employers (because the scheme does not apply to federal employers), the Board does not charge federal employers in "all-federal-employer" classes with the costs the Board incurs in connection with the prevention scheme contained in the Act, but the Board does charge such costs to federal employers in "mixed-provincial-and-federal employer classes". The employer submits that the Board's decision is both unconstitutional and discriminatory.

The employer requested that its appeal be considered on a "read and review" basis. I agree that the legal issues raised in this appeal can be properly considered on the basis of written submissions without an oral hearing.

By letter dated July 14, 2004, the appeals coordinator wrote to the employer noting that in its decision of April 14, 2004, the Review Division declined to review the Board's October 20, 2003 decision citing lack of jurisdiction. She invited comments as to whether this appeal concerned a refusal to review and the scope of issues to be addressed by WCAT. She enclosed a copy of *WCAT Decision #2004-03344*, in which it was reasoned:

> Accordingly, I find that the sole issue for my decision is whether the refusal to review was correct. If not, the decision to refuse to review may be varied or cancelled, and the matter will be returned to the Review Division to proceed with a review of the Board officer's decision on the merits. I find that to be the appropriate outcome in this case.

Counsel for the employer provided extensive written submissions dated August 5, 2004 (with a brief of authorities).

Counsel for the employer served notice of the constitutional question raised in its appeal on the Attorneys General of Canada and British Columbia. However, effective December 3, 2004, legislative changes contained the *Administrative Tribunals Act* (ATA) removed WCAT's jurisdiction to consider constitutional issues. Section 44 of the ATA applies to WCAT pursuant to section 182 of the ATA. Section 44 (as amended by section 4 of the *Attorney General Statutes Amendment Act, 2004*) provides:

> (a) The tribunal does not have jurisdiction over constitutional questions.
> (b) Subsection (1) applies to all applications made before, on or after the date that the subsection applies to a tribunal.

By memorandum of December 6, 2004, I advised counsel for the employer of these changes and inquired whether the employer's appeal was moot (in light of the fact the review officer had provided a decision regarding the employer's constitutional arguments by way of an alternative analysis, and the fact that WCAT lacks jurisdiction to consider such arguments). On December 21, 2004, counsel for the employer provided further submissions to support consideration of the employer's appeal.

Issue(s)

At issue is whether the Review Division had jurisdiction to consider the employer's request for review.

Jurisdiction

Under section 239(1) of the *Workers Compensation Act* (Act), a final decision made by a review officer in a review under section 96.2, including a decision declining to conduct a review under that section, may be appealed to WCAT. WCAT may consider all questions of fact, law and discretion arising in an appeal, but is not bound by legal precedent (sections 250(1) 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 published policy of the board of directors that is applicable (section 250(2) of the Act).

Background

Appeal Division Decision #2003-0577 dated May 21, 2003 denied the employer's appeal regarding the decision of the director, Assessment Department, in not exempting the employer under section 2(1) of the *Act* from paying assessments in 1998 – 2002 for its United States' drivers while operating in BC. With respect to the employer's constitutional arguments (on which notice to the Attorneys General had not been provided), the Appeal Division panel referred back to the Assessment Department the issue of whether the Board has the constitutional authority to charge the employer an assessment rate which includes a portion of the costs associated with the Board's preventive scheme. The Appeal Division panel noted:

> The employer has indicated [as confirmed in the assessment file] that the director has advised that the Board does not charge federally regulated businesses, who are in Rate Groups [deposit accounts] comprised solely of federally regulated businesses, with the cost of the Board's occupational health and safety regulatory scheme. The cost reductions to these employers do not appear to account for all the costs, such as Board health and safety education costs, as well as the Employers' and Workers' Advisers, the Appeal Division, and other activities related [e.g. Policy and Regulation Development Bureau, general and safety advertisements, and the Research Secretariat] to the Board's provincial health and safety activities. However, federally regulated businesses in Rate Groups that contain a mixture of both provincially and federally regulated businesses are charged these costs. No explanation was given as to why these federally regulated businesses were not given reduced rates when federally regulated businesses in rate groups comprised solely of such businesses are given such reduced rates. This raises a significant policy issue and one that may have to be addressed by the Board of Directors.

This resulted in the October 20, 2003 decision by the manager, Assessment Policy, which is at the root of the current appeal. The manager denied the employer's request for a reduction in its assessment rate in connection with any portion attributable to the Board's prevention activities under Part 3 of the Act.

Analysis

Counsel for the employer has provided extensive and detailed submissions regarding the merits of the employer's objections to its assessment rate.

The decision of the review officer was to reject the employer's request for review for lack of jurisdiction. The employer's appeal from this refusal to review is properly before WCAT under section 239(1) of the Act. WCAT's decision in such an appeal will normally be limited to the narrow issue as to whether the initial decision by the Board officer was one within the jurisdiction of the Review Division to review.

The two key provisions concerning the Review Division's jurisdiction which are relevant to the employer's appeal are section 96.2(1)(b), and section 96.2(2)(f) of the Act. These provide:

> **96.2** (1) Subject to subsection (2), a person referred to in section 96.3 may request a review officer to review the following in a specific case: . . .
>
> (b) a Board decision under Part 1 respecting an assessment or classification matter, a monetary penalty or a payment under section 47 (2), 54 (8) or 73 (1) by an employer to the Board of compensation paid to a worker;

> (2) No review may be requested under subsection (1) respecting the following: . . .
>
> > (f) the determination of an assessment rate for a class or subclass, except the modification to the assessment rate determined for an employer on the basis of the employer's own experience;

The review officer concluded that the employer's request for review came under section 96.2(2)(f) of the Act, and the Review Division lacked jurisdiction to consider the request for review. The employer submits that their request for review was properly before the Review Division pursuant to section 96.2(1)(b) of the Act. The review officer reasoned:

> The employer clearly does not fall into the express exception allowed by this provision since the employer is not suggesting that the rate be varied on the basis of its experience.
>
> I have considered whether the review might be allowed to proceed on the basis that the employer is not challenging the determination of the assessment rate for the CU [classification unit]; it is only suggesting that that [sic] its personal rate be adjusted to reflect the constitutional restrictions on the Board's jurisdiction over occupational health and safety. I have concluded that this argument must be rejected. If the Board granted an individual adjustment to one federally regulation employer, it would have to grant the same adjustment for all federally regulated employers. This would likely be a substantial proportion of the employers or the payroll in the CU. Furthermore, an adjustment downwards for these employers would also mean an adjustment upward for non-federally regulated employers in the CU. The rate paid by one employer cannot be isolated from the rate paid by all employers in the CU. The employer is in reality challenging the general practice by which assessments are determined, not just the rate applied to it alone.

By submission dated August 5, 2004, counsel for the employer argues:

> [The review officer] erroneously concluded that the review in question was prohibited under section 96.2(2)(f) of the *Act*. In the Employer's submission, the Review Division's jurisdiction to conduct the review in question arises from section 96.2(1)(b) of the *Act*. This is so because the Employer is not challenging the determination of the assessment rate for the Classification Unit 732019. Rather, the Employer is arguing that the whole of that rate cannot be applied to it because the Board lacks the

constitutional authority to charge it for the costs of the provincially-enacted safety and preventative scheme. Accordingly, the amount charged against the Employer should be adjusted to reflect the constitutional restrictions on the Board's jurisdiction over occupational health and safety.

The Employer also says that [the review officer] erroneously concluded that the Employer was challenging the general practice by which assessment rates are determined. This, however, was and is not the case. The Employer challenged the application of an assessment rate, howsoever determined, which the Board charges the Employer for costs of the provincially-enacted safety and preventative scheme.

In the Employer's submission, the Board Decision was a reviewable submission and, on this basis, the Review Decision should be overturned.

[reproduced as written]

Section 82(1) of the Act provides:

82 (1) The board of directors must
(a) set and revise as necessary the policies of the board of directors, including policies respecting compensation, assessment, rehabilitation and occupational health and safety, and
(b) set and supervise the direction of the Board.

In Board of Directors' *Decision No. 2003/02/11-04*, "Policies of the Board of Directors", February 11, 2003, published at 19 WCR 1 (accessible at: http://www.worksafebc.com/publications/wc_reporter/default.asp), a policy, resolution and bylaw relating to the policy of the directors was made and enacted as follows:

1.0 **Policies of the Directors**

1.1 As of February 11, 2003, the policies of the directors consist of the following: . . .
(a) The statements contained under the heading "Policy" in the *Assessment Manual;* . . .
(e) The *Classification and Rate List*, as approved annually by the Directors;

Section 99(2) of the Act provides:

> The Board must make its decision based upon the merits and justice of the case, but in so doing the Board must apply a policy of the board of directors that is applicable in that case.

Under the clear wording of section 96.2(2)(f) of the Act, no review may be requested of the determination of an assessment rate for a class or subclass. The only exception to this prohibition which is authorized under section 96.2(2)(f) of the Act is the modification to the assessment rate determined for an employer on the basis of the employer's own experience. I agree with the review officer, that contemplation by the Review Division of an adjustment to the employer's assessment rate, on the basis of some ground other than the employer's experience rating, would contravene section 96.2(2)(f) of the Act.

The employer submits that it is not challenging the rate established by policy for its classification unit. Rather, the employer challenges the application of the whole of the rate to the employer. I am not persuaded, however, that this is a real or meaningful distinction. In effect, the employer seeks a modification to its assessment rate on the basis of an exception not contemplated by section 96.2(2)(f) of the Act. Accordingly, I find that the employer's request for review was correctly rejected by the Review Division.

In reaching this conclusion, I considered whether the employer's appeal is one which might properly be addressed under section 96.2(1)(b) as concerning a Board decision under Part 1 respecting an assessment. I consider, however, that the specific wording of section 96.2(2)(f) must prevail over the more general wording of section 96.2(1)(b) of the Act.

By submission of December 21, 2004, counsel for the employer submits that WCAT has jurisdiction to consider the employer's constitutional arguments. Counsel submits that in light of certain Court decisions, it is not necessary for WCAT to make an original determination about the constitutional validity of particular provisions and their application to federal undertakings. Counsel submits that jurisprudence directly binding on the Board establishes that the prevention scheme contained in the Act is inapplicable to federally regulated employers. Counsel submits that WCAT need only recognize that these judicial stipulations are binding on it, and interpret the Act in a manner that is consistent with them, gives effect to them, and addresses the consequences that flow from them. I find, however, that such an approach would be contrary to section 44 of the ATA, which stipulates that WCAT does not have jurisdiction over constitutional questions. I do not consider that section 44 may be so readily distinguished or limited in its effect.

The Review Division considered, by way of an alternative analysis, whether a different decision was warranted on the basis of the employer's constitutional arguments. To the

extent it may be argued that the Review Division was obliged to consider the employer's constitutional arguments, it would serve no purpose to return the matter to the Review Division in view of the Review Division's alternative analysis.

Counsel also argues that the application of an exception to some, but not all, federal employers from the costs of the prevention scheme under the Act is arbitrary, discriminatory, unfair and patently unreasonable. It creates inequality between federal employers (some must pay prevention costs while others need not), based merely on the Board's classification structure. Counsel submits that the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations, and should not be applied by WCAT pursuant to section 251 of the Act.

Section 250 of the Act provides in part:

> **250** (1) The appeal tribunal may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent.
>
> (2) The appeal tribunal must make its decision based on the merits and justice of the case, but in so doing the appeal tribunal must apply a policy of the board of directors that is applicable in that case.

Section 251 of the Act provides in part:

> **251** (1) The appeal tribunal 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.
>
> (2) If, in an appeal, the appeal tribunal considers that a policy of the board of directors should not be applied, that issue must be referred to the chair and the appeal proceedings must be suspended until the chair makes a determination under subsection (4) or the board of directors makes a determination under subsection (6), as the case may be.

The former *Rehabilitation Services and Claims Manual* also provided, at #96.10, as follows:

> In the adjudication of individual claims, the Board is not "bound" by either internal policy directives or by external authorities in the field of compensation, at least not in the sense of the word "bound" as understood at common law. However, in issuing internal directives, the Board gives general indications of how it will act when certain circumstances come before it. When these circumstances arise, the applicable directive will normally be followed. It is recognized that there is an infinite variety of

> circumstances that can arise and that it is not possible to lay down in advance policies to finally determine every conceivable situation. Furthermore, there is the obligation on the Board to decide each case in accordance with its merits and justice and the right of individual persons affected under the rules of natural justice to present argument and evidence on their own behalf. Therefore, regard must always be had to the particular circumstances of each claim to determine whether an existing policy should be applied or whether there are grounds for a change in or departure from a policy. There will also be situations arising from time to time which are not covered by existing policy.

By resolution dated January 21, 2003, the board of directors amended the policy at #96.10 to delete the above wording concerning how policy is to be applied, effective March 3, 2003, in light of the new statutory regime established by the *Workers Compensation Amendment Act (No. 2), 2002*.

Counsel cites *WCAT Decision #2004-03600*. That decision summarized the effect of section 251 of the Act as follows:

> 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.

Section 251 provides a mechanism for a WCAT panel to seek a determination from the chair, and the Board of Directors if necessary, as to whether a policy is lawful under the Act, for the purpose of the WCAT panel then proceeding to make its decision in an appeal. Given that the merits of the employer's objections to the policy of the Board of Directors (contained in the *Classification and Rate List* regarding the employer's assessment rate) are not before WCAT in this appeal, I find no basis for contemplating such a referral.

Accordingly, I confirm the Review Division decision, and deny the employer's appeal. In view of my conclusion on this jurisdictional issue, I do not consider it necessary or appropriate to proceed to further address the merits of the employer's objections to its assessment rate. WCAT has no jurisdiction to consider constitutional arguments and the merits of the employer's objections to its assessment rate are not properly before WCAT in this appeal with respect to the Review Division's refusal to review.

Conclusion

The Review Division decision is confirmed. The review officer correctly rejected the employer's request for review pursuant to section 96.2(2)(f) of the Act.

Herb Morton
Vice Chair

HM/gw