

Noteworthy Decision Summary

Decision: WCAT-2005-01851 **Panel:** Heather McDonald **Decision Date:** April 14, 2005

Industry Classification – Payroll Assessment – Related Employers – Sections 1 and 42 of the Workers Compensation Act – Policy Item # AP1-37-1 of the Assessment Manual

The Workers' Compensation Board (Board) policy of classifying employers based on industrial undertaking rather than on occupation or hazard is consistent with section 42 of the *Workers Compensation Act* (Act). Where a firm's operations are an essential part of another firm's operations, the firm's classification will be the same as that of the other firm, regardless of the occupations of the firm's workers.

The employer was one of three family-owned and operated companies, all of which were classified by the Board in the industry classification unit (CU) 732019 [General Trucking (not elsewhere specified) or Domestic Freight Forwarding] for the purpose of assessing levies payable to the Board. The employer's activities related to the administration and direction of the two operating companies that provided trucking services. In the employer's assessable payroll, the Board had included payments made to two manager shareholders who were not employed as truck drivers in the employer's business. The Board assessed those payments at the assessment rate applicable to CU 732019. The employer's request for a review was denied.

The employer appealed to the Workers' Compensation Appeal Tribunal arguing that the policy item #AP1-37-1 of the *Assessment Manual*, which provides that the Board's classification system is based on industrial undertaking rather than on occupation or hazard, is contrary to section 42 and should not be applied.

The panel found that the Board correctly classified the employer in CU 732019. Under item #AP1-37-1, where a firm's operations are an inescapable part of another firm's operations, such as sales, administration, and management, the firm's classification will be the same as that of the other firm, regardless of ownership. The panel also found that the Board correctly assessed the payroll attributed to the two manager/shareholders.

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. The classification system is based on industrial undertaking rather than on occupation or hazard.

Section 42 requires the Board to establish subclassifications, differentials and proportions between different kinds of employment as may be considered just and to consider the relative hazard of an industry or plant when imposing rates, differentials or assessments. Section 1 defines "employment," when used in Part 1, as "all or part of an establishment, undertaking, trade or business".

The panel concluded that as "employment" is defined in broad terms under the Act, and is not confined to employment in the popular sense of a specific job or type of work, the Board's decision to reject an occupational rating approach does not breach section 42. Board policy of classifying employers based on industrial undertaking rather than on occupation or hazard is consistent with section 42. There was no patent unreasonability, injustice, or legal inconsistency in the Board's interpretation and application of section 42 as found in its assessment policies.



The employer's appeal was denied.

WCAT Decision Number : WCAT-2005-01851
WCAT Decision Date: April 14, 2005
Panel: Heather McDonald, Vice Chair

Introduction

The employer is registered with the Workers' Compensation Board (Board) and is classified in the industry classification unit (CU) 732019 [General Trucking (not elsewhere specified) or Domestic Freight Forwarding]. It is one of three family-owned and operated companies, all of whom are classified by the Board in CU 732019. The employer is appealing an October 6, 2004 decision of the Board's Review Division. In that decision, the review officer confirmed a March 2, 2004 decision by the Board audit manager to include in the employer's assessable payroll for the years 1997 - 2002, payments made to two individuals who were not employed as truck drivers in the employer's business, and to assess those payments at the assessment rate applicable to CU 732019. For the year 2002, the base assessment rate applicable to CU 732019 was \$5.87 per \$100.00 of assessable payroll.

On appeal to the Workers' Compensation Appeal Tribunal (WCAT), the employer's position is that Board policy in AP1-37-1 of the *Assessment Manual* (Manual), which provides that the Board's classification system is based on industrial undertaking rather than on occupation or hazard, is contrary to section 42 of the *Workers Compensation Act* (Act) and should not be applied. The employer asserts that payroll attributed to two of its manager shareholders should not be assessed at the base assessment rate applicable to CU 732019, but rather assessed at a lower base assessment rate applicable to "lawyers, accountants, bank clerks and other similar low-risk commercial enterprises in a low-rate category" (see submission dated April 9, 2004 to the Review Division from the employer's representative). The employer asserts that it is a "purely administrative company." It says that although its activities relate to the administration and direction of the two family operating companies that provide trucking services, it is an entirely separate legal entity that does not directly involve itself in trucking activities. Thus payroll attributed to the two non-driving manager shareholders should not be assessed at the base assessment for the truck driving industry.

The employer has also raised an issue regarding the appropriateness of the Board including, as part of assessable payroll, payments to the elderly mother of the two shareholders. The employer's position is that the mother is not employed in its business, but rather receives an honorarium from her sons as a token of their love and affection. The employer characterizes the mother as a "non-operative tied to her kitchen" (see letter dated February 18, 2004 from the employer's representative to the Board).

Issue(s)

Is the employer appropriately classified in CU 732019? Did the Board correctly assess the payroll attributed to the two manager/shareholders at the base assessment rate for CU 732019? Is Manual policy AP-1-37-1 (former policies 30:20:00 and 30:20:10 in the *Assessment Policy Manual*) contrary to the Act? Did the Board correctly include, as part of assessable payroll, the amounts paid to the mother of the two shareholders?

Jurisdiction and Procedural Matters

WCAT's jurisdiction in this appeal arises under section 239(1) of the Act, as an appeal of a final decision made by a review officer in a review of an assessment matter under section 96.2 of the Act.

A chartered accountant represented the employer in these appeal proceedings. The employer requested an oral hearing, but I have decided that an oral hearing is unnecessary in this case, as the issues in this case turn on interpretation of law and policy. The substantial documentary evidence and the written submissions on file are sufficient to decide the issues on appeal. WCAT also invited the Board's Assessment Department to participate in the appeal by providing a written submission and other information in response to the submission from the employer. The Assessment Department did participate, providing a written submission dated March 14, 2005. The Assessment Department's participation in this case falls within the role referred to in item 8.82 of WCAT's *Manual of Rules of Practice and Procedure*, and is grounded in WCAT's statutory authority under sections 246(2)(i) 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.

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. WCAT has jurisdiction to consider the record in the proceedings before it, to consider new evidence, and to substitute its own decision for the decision under appeal. Thus, this is an appeal by way of a rehearing. This is the final level of appeal.

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 the case. Section 251 provides that WCAT may refuse to apply a policy 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.

The relevant policy for the audit years in question (1997 – 2002) is found in the version of assessment policy that applied in those years, in the former *Assessment Policy Manual*. As stated in *Review Division Decision #3876* (October 15, 2003), reported at the Board's website www.worksafebc.com, and followed by WCAT in WCAT-2005-01226 (March 10, 2005), reported at WCAT's website www.wcat.bc.ca, audits are a special function of the Board for checking whether employers have complied with the rules of the system (under the Act and Board policy) in the applicable audit years. It would make no sense to base audits on policies in effect in years subsequent to the audit years, since employers during the audit years in question could only base their reports to the Board on the policies and statute law in effect at the time. This principle has been recently affirmed (on March 22, 2005 – see *Resolution 2005/03/22-03*) by the Board's board of directors which amended the current assessment policy in the Manual to add a statement in policy AP1-88-1 providing that the law and policy in effect at the time period covered in an audit is used to determine compliance, unless a subsequent law or policy change provides otherwise.

Having said that, the specific assessment policies in the current Manual referred to in this case by the employer, the Assessment Department, and the review officer are not, in substance, different than their counterparts in their applicable former versions in the *Assessment Policy Manual*. Accordingly, in this decision, to avoid confusion, I will refer to the policies in the current Manual but provide, in parentheses, the reference to the correct version of the applicable former policies in the *Assessment Policy Manual*.

Background and Evidence

The background and evidence to this case is comprehensively outlined in the audit manager's decision of March 2, 2004 and the review officer's decision of October 6, 2004, and I will not repeat all of it here. Rather, I will summarize the important points of evidence, including the employer's challenge to the Board's characterization of some of the facts, as I provide my reasons in the "Reasons and Findings" portion of this decision.

Reasons and Findings

Is the employer appropriately classified in CU 732019 (General Trucking – not elsewhere specified)?

While this issue was not expressly identified in the Review Division proceedings, it underpins the other issues, and therefore I will deal with it expressly in this decision.

From the employer's submission dated April 9, 2004 to the Review Division, the evidence is that the employer is one of three family-owned and operated companies. The other two companies "X Fuels Limited" and "X Systems Ltd.," are, according to the employer's submission "both active operating trucking companies, engaged in trucking

and recycling wood chips and other “waste” products of the B.C. forest industry. Both companies are Board classified CU 732019.”

Although in its submission dated April 9, 2004, the employer characterizes itself as “a purely administrative Company,” it also states in that submission that its activities “relate to the administration and direction of the two family operating companies” that are involved in the trucking industry. In a submission dated January 29, 2004 to the Board, the employer submitted that it was incorrectly classified as it “never owned a truck.” However, the employer subsequently changed its position in that regard, as in a submission dated February 3, 2004 to the Board, the employer stated in part as follows:

We KNOW the type of industry being carried on by the [X – family name referred to in employer’s corporate name] Group of Companies. It is General Trucking or Domestic Freight, Classification UNIT 732019. We have no quarrel with the CLASSIFICATION, per se. Our dispute lies with the SUB claSSIFICATION.

[reproduced as written]

In a document dated July 10, 2003 provided to the Board, the employer also provided evidence of the corporate structure of the X group of companies, noting that the employer’s two manager/shareholders were also principals of the other two companies X Systems Ltd. and X Fuels Ltd.

Having reviewed the evidence and the employer’s submissions in this case, I find that the Board correctly classified the employer in CU 732019 (General Trucking). There is no dispute that X Systems Ltd. and X Fuels Ltd. are correctly classified in CU 732019 as actively and directly involved in trucking activities in the trucking industry. Under Manual policy AP1-37-1 (former assessment policy 30:20:10), where a firm’s operations are an inescapable part of another firm’s operations, such as sales, administration, management, etc., the firm’s classification will be the same as that of the other firm, regardless of ownership. The evidence in this case satisfies me that the employer’s operations, providing administrative and management services in the direction of the two related companies in the trucking industry, are an inescapable part of the operations of the other two firms. Therefore, under Board policy, the Board has correctly classified the employer in the same industry classification as those two other firms, namely, CU 732019.

Did the Board correctly assess the payroll attributed to the two manager/shareholders at the base assessment rate for CU 732019? Is Manual policy AP-1-37-1 (former assessment policies 20:30:00 and 20:30:10) contrary to the Act?

The law and policy relevant to this issue are found in section 42 of the Act, the definition section 1 of the Act, and Manual policy AP1-37-1 (formerly assessment policies 20:30:00 and 20:30:10). Section 42 of the Act provides:

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.

Section 1 of the Act defines “employment,” when used in Part 1 (section 42 is in Part 1 of the Act), as meaning and referring “to all or part of an establishment, undertaking, trade or business within the scope of that Part, and in the case of an industry not as a whole within the scope of Part 1 includes a department or part of that industry that would if carried on separately be within the scope of Part 1.”

Section 1 of the Act defines “industry” as including “establishment, undertaking, work, trade and business.”

The relevant portion of assessment policy AP1-37-1 (former assessment policies 30:20:00 and 30:20:10) states as follows:

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 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.

Employers and independent operators are assigned to classification units on the basis of the industry in which the firm is operating. In assigning the classification, some of the factors considered are the type of product or service being provided, the processes and equipment that are used, and the type of industry with which the firm is in competition. *Occupations of individual workers may be reviewed when assigning the classification, but only as an indicator of the type of industry being carried on.* The fact that an employer contracts out parts of an industry to other employers does not mean that the employer cannot be classified in that industry. The assessment classification system should not unfairly discriminate between firms competing for the same business.

Where a firm's operations are an inescapable part of another firm's operations, the firm's classification will be the same as that of the other firm regardless of ownership.

[italic emphasis added]

The employer's position is that the assessment policies contravene section 42 of the Act. The employer has submitted that Board assessment policy contradicts the spirit and intent of the Act by "adopting a one-size-fits-all system of industry ratings, a form of blanket general coverage, with no regard for work units whose hazards are far removed from the across-the-board industry rating." In its submission dated February 18, 2004 to the Board, the employer argued in part as follows:

Classifications under the Act (11 categories all told) are by Industry, defined in broad terms. Sub-classifications are intended to apply to particular kinds of work with the focus on the hazard ratings of specific jobs.

The Act recognizes that particular lines of work (eg: airport checkout counter clericals and airline flight personnel) have unrelated hazard ratings and, must be so treated for hazard-rating purposes. The key word in the Act is JUST, meaning fair, reasonable and equitable.

Applied to the case at hand, the employer submits that section 42 of the Act requires the Board to assess the employer's two manager/shareholders at a lower clerical rate, not at the rate of a truck driver "negotiating all day congested Lower Mainland traffic."

In his letter dated March 2, 2004, the Board audit manager did not specifically address the employer's argument that Board assessment policies contravened section 42 of the Act. He explained the Board's rationale in rejecting a system of occupational rating in favour of a system that classifies and rates self-sufficient groups of employers on the basis of the industries in which they operate. He corrected the employer's assumption, (made as part of its argument that the Board should focus on the degree of hazard relating to clerical and administrative office functions) that in the forest industry a payroll clerk is assessed at a different rate than a faller. The audit manager advised that under the Board's classification and assessment system, an office clerk and a faller working for the same firm in the forest industry would have their payroll assessed at the same rate.

The audit manager also explained that under section 42 of the Act, the Board had established a system of experience rating that allows the Board to confer a special rate or assessment on an employer that corresponds with the relative hazard or cost of compensation for that employer. The audit manager observed that under the Board's experience rating system, the employer has had a discount from the basic rate applied to all firms in the trucking industry, a discount of 16.7% for the years 1997 through 2002, and discounts of 17.2% for 2003 and 20.5% for 2004. The audit manager noted that the employer's rates had been discounted under the experience rating system to reflect the hazards that its workers encountered in the workplace.

The employer requested the Review Division to review the audit manager's March 2, 2004 decision. The employer argued that the Board had abandoned the principles of insurance for the sole purpose of simplified assessments and administration. The employer focused on the words "employment" and "plant" in section 42 of the Act, noting that the statute requires the Board to establish "subclassifications, differentials and proportions in the rates as between different kinds of employment in the same class as may be considered just," and requiring the Board, where the hazard or cost of compensation of a particular plant is different from the average of the class or subclass assigned, to confer on the plant a different rate to correspond with the plant's relative hazard or cost of compensation. The employer argued that there is a significant differential, under section 42 of the Act, between the hazard or cost of compensation in the employment of a "desk-bound executive in a non-trucking company, and his kitchen-bound mother," and the hazard or cost of compensation in employment of "a truck driver spending his working hours manoeuvring [*sic*] a fuel-truck around the Vancouver Lower Mainland." In ignoring those differences in employment, argued the employer, and applying one base assessment rate to all workers in a firm (plant) or industry classification, the Board's policies contravene section 42 of the Act. In its submission to the Review Division dated September 8, 2004, the employer submitted that the Board should comply with section 42 of the Act as follows:

...by using a SPECIAL RATE, based on an EXPERIENCE RATING, for those [employer] officials whose work is DIFFERENT from that of the general class of truck drivers, and who enjoy a far lesser exposure to JOB HAZARD.

[reproduced as written]

In the October 6, 2004 Review Division decision, the review officer confined his review to the issue of the audit manager's decision to include in the employer's assessable payroll payments made to the two manager/shareholders. He did not refer to or deal with the issue of the payments made to the mother of the two manager/shareholders, although the audit manager's decision had dealt with that matter, and the employer's submission to the Review Division included the status of the payments to the mother.

The review officer characterized the employer's position as interpreting section 42 of the Act to require the Board to assess each individual worker on the basis of the occupational hazard of that worker's employment. The review officer rejected that interpretation, stating in part as follows:

Although I agree that the Board must consider hazards, it is unclear to me why the representative thinks these hazards must be assessed from the perspective of each individual worker. Indeed, I see no mention in section 42 of the word "worker".

On the contrary, the Board's obligation to consider "hazards" is expressly limited to the hazards relative to an "industry" or "plant". "Industry" is non-exhaustively defined in section 1 of the Act as including an "establishment, undertaking, work, trade and business". In either case, neither "industry", nor "plant" can be taken to mean "worker". To conclude otherwise would be too [*sic*] strain beyond recognition the clear wording of the statutory provision in question.

The review officer concluded that the Board's policy in AP1-37-1 (former assessment policies 30:20:00 and 30:20:10), to consider the hazard associated with a particular employer, was a correct interpretation of section 42's requirement that the Board confer or impose a different rate on a "plant" or an "industry" in consideration of a difference in hazard or cost of compensation from the average of the class or subclass to which the industry or plant is assigned. The review officer rejected the employer's argument that section 42 of the Act required the Board to assess employers on the basis of the hazard to which each individual worker is exposed.

On appeal to WCAT, the employer submits that the Board has truncated section 42 of the Act to read as though it says: "The Board must confer on an industry a rate to correspond with the relative hazard of that industry and may adopt an experience

rating.” The employer submits that the Board ignores section 42’s references to “subclassification,” “differentials,” “proportions,” “just,” “differs,” “plant” and “special.” The employer says that the practical effect of this allows the Board to completely disregard the circumstances of an individual firm:

Thus, a trucking business with one truck driver and eleven non-driving shareholders who are paid for vague services is to be assessed at the same rate as a company with eleven drivers and one non-driving clerk. How can such an arbitrary system be considered to be “just”?

The employer submits that all insurance premiums are set according to the calculated or estimated risk of the insured event actually occurring. The employer submits that the word “hazard” and the term “relative hazard” enter into section 42 “to direct the Board to take into account the need for a more precise assessment of the risk probability for identified sub-classifications.”

The employer disagrees with the review officer’s characterization of its argument as submitting that the Board should assign assessment rates to each individual worker based on specific occupational hazard. The employer says that its argument is that the Board should comply with section 42’s obligation to assess with due regard to “subclassifications.” The employer says that it is just by chance that the clerical/administrative subclassification in this case involves two individuals. By way of summary of its position, the employer says that:

This Appeal is directed to the sub-classification to the basic office clerical rate for the salaries paid to the two non-driving shareholders of a company that didn’t even own a truck; and also,

At the same time, and as a natural derivative of the sub-classifying the Appellant company would ask for the same clerical rate to be applied to the mother of the Appellant company shareholder-managers. An elderly lady who seldom leaves her kitchen and has no working involvement with either trucking or trucks is assessed the rate as a Lower Mainland heavy-truck driver.

[reproduced as written]

After reviewing the employer’s arguments, I have decided that the employer is incorrect in alleging that the assessment policies in question contravene section 42 of the Act. The employer’s submissions in this case do not, in my view, support a finding that the Board’s classification/assessment system and the assessment policies that implement that system contravene section 42 of the Act. I find that the Board’s classification/assessment system and policy AP1-37-1 (formerly assessment policies 20:30:00 and 20:30:10) are a viable interpretation and application of section 42 of the Act, not patently unreasonable or otherwise inconsistent with section 42 of the Act.

The major flaw in the employer's argument is its assertion that while "classifications" under the Act refer to industries, in broad terms, section 42's reference to "subclassifications" is intended to refer to "particular kinds of work with the focus on the hazard ratings of specific jobs" (see the employer's February 18, 2004 submission). This is why the employer disagreed with the review officer's characterization of its argument as requiring assessment of hazards to which individual workers are exposed. The employer's focus is not on individuals, but rather the types of jobs they perform, or as the employer has also described it in its submissions, their "work units."

Thus the employer interprets section 42 as requiring different subclassifications for clerical/administrative type of work and truck driving work. The employer does not offer any source for its interpretation in this regard. I believe it is because the employer is interpreting the word "employment" in the first phrase in section 42 to mean "types of jobs, differentiated by hazard or risk." Thus the first sentence "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" would mean that the Board must make subclassifications and other differences in the assessment rates as between different types of jobs or work activities. Having established that as the basic principle, then the latter part of section 42 would require, as the employer argues, that experience rating would also be applied to categories of jobs, rather than the Board's policy of applying experience rating to employers whose firm hazard as a whole, or compensation costs as a whole (applied across all job functions in the firm) differs from the average of the class to which the employer is assigned.

The flaw in this argument is that section 1 of the Act defines "employment" in broad terms, not confined to employment in the popular sense of a specific job or type of work. "Employment" in part 1 of the Act means and refers to "all or part of an establishment, undertaking, trade or business" within the scope of Part 1 of the Act. Thus the Board's decision to reject occupational rating (which, as the audit manager observed, is a decision that other Canadian Boards have adopted) is not a decision to reject a statutory requirement mandated under section 42 of the Act. Section 42 allows the Board to make subclassifications, differentials and proportions in the rates as between different establishments, undertakings, trades or businesses (or parts thereof). The Board has chosen to base its classification system on "industrial undertaking" (see AP1-37-1), and thus all occupations within a particular industrial undertaking are included, no matter the differences in risks or hazards as between distinct types of occupations.

With respect to the latter part of section 42, in which the Board must confer a special rate, differential or assessment on an "industry or plant" whose hazard or cost of compensation is different, relative to the average of the class or subclass to which the industry or plant is assigned, I agree with the review officer's reasoning. The Board's experience rating system falls within that latter part of section 42. I do not see any

basis for interpreting that part of section 42 as requiring the Board to apply experience rating by conferring special rates, differentials or assessments on particular “work units,” “types of jobs” or “types of work activities” within registered firms.

The employer has described the Board’s assessment/classification system as an arbitrary, unjust system, as the employer does not understand the actuarial principles that justify the Board assessing one firm in the trucking industry (albeit composed mainly of workers in clerical jobs) at the same base rate as another firm in the trucking industry (composed of numerous truck drivers and only one worker in a clerical position). 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. Modified collective liability avoids the extremes of a purely collective liability system or a system of pure self-insurance. For a more comprehensive description of the modified collective liability system, I direct the employer to *Appeal Division Decision #2002-2844* (November 7, 2002), found at the Board’s website www.worksafebc.com. The employer may also wish to request the Board’s Policy and Research Bureau to provide it with relevant discussion papers on the topic that give detailed explanations of the Board’s reasons for choosing a system of modified collective liability.

To conclude, the employer may disagree with the Board’s policy decision to reject occupational rating, and find its own choice of system to be preferable or the “just” choice. I will not repeat the defences offered by the audit manager in his October 2, 2004 decision, of the Board’s choice to adopt an assessment/classification system based on industrial undertaking. But the employer’s disagreement with the Board’s exercise of a policy choice does not translate into the Board having contravened section 42 of the Act. The Board’s choice was a viable one, made within the authority granted to it under section 42 of the Act. I see no patent unreasonability, injustice, or legal inconsistency in the Board’s interpretation and application of section 42 as found in the assessment policies at issue in this case.

Therefore, for the foregoing reasons, I find that Manual policy AP1-37-1 (former assessment policies 20:30:00 and 20:30:10) is consistent with section 42 of the Act. Under section 251 of the Act, having found that the policy is not patently unreasonable but a viable interpretation and application of section 42, I must apply that policy. Applying the policy, I find that the Board correctly assessed the payroll attributed to the two manager/shareholders at the base assessment rate for CU 732019.

Did the Board correctly include in assessable payroll the amounts paid to the mother of the two manager/shareholders?

The Assessment Department submitted that WCAT has no jurisdiction to deal with this issue. The Assessment Department submitted that the review officer made no “final decision” on the issue. As WCAT’s jurisdiction stems from section 239(1) of the Act

which says that a final decision made by a review officer in a review under section 96.2 may be appealed to WCAT, the Assessment Department has argued that as there is no decision by the review officer about the status of the payments made to the manager/shareholders' mother, WCAT has no jurisdiction to deal with the issue.

I agree with the Assessment Department that WCAT, in these appeal proceedings, does not have jurisdiction to deal with the issue of the assessability of payments to the mother of the manager/shareholders. I have earlier observed that in his decision of October 6, 2004, the review officer did not refer to or deal with the issue of the audit manager's decision of March 2, 2004 to include, as part of assessable payroll, the payments made to the mother. This is because the audit manager's decision of March 2, 2004 was a decision involving three firms registered with the Board as employers: the employer, X Systems Ltd., and X Fuels Ltd. The audit manager's decision stated that it was X Fuels Ltd. that made the payments to the mother, with the mother receiving T-4s for income received from X Fuels Ltd. in the amounts of \$42,500.00 for the year 2001 and \$52,613.00 for the year 2002. The audit manager's decision indicates that it was not the employer that made payments to the mother, and that the Board did not include such payments in the employer's assessable payroll. Rather, the Board included payments to the mother in the assessable payroll of X Fuels Ltd. The audit manager had observed that the earnings received by the mother were stated on T-4s to be "income from employment" from X Fuels Ltd., and he noted that payments made to all three individuals (the two manager/shareholders and the mother) were claimed by "the various companies" as an expense to the Canada Customs and Revenue Agency.

The employer requested the Review Division to review the audit manager's March 2, 2004 decision. The review officer's decision of October 6, 2004 dealt with the employer's request for review. But there was no request for review from X Fuels Ltd. before the review officer regarding the status of the payments it had made to the mother as part of its assessable payroll. X Fuels Ltd. was not a party to the proceedings before the review officer, and therefore that issue was not before the review officer in the review proceedings involving the employer. Thus the review officer, in his decision of October 4, 2004, referred only to the payments made by the employer to the two manager/shareholders.

X Fuels Ltd. is not a party in these appeal proceedings. I note that by letter dated December 8, 2004, the employer's representative wrote to WCAT requesting advice on how to proceed with further appeals involving X Systems Ltd. and X Fuels Ltd., regarding similar issues of the Board's assessment of payments made to "clerical family members." WCAT's deputy registrar responded in a letter dated December 15, 2004, advising the employer's representative that WCAT could not give advice on the merits of appealing, but referred the representative to the Employers' Advisers Office. The deputy registrar also commented that to challenge a Board decision, the Act generally required an applicant to first request a review from the Review Division, before appealing to WCAT.

In this case, the employer's representative has made references to the status of the payments made to the mother, and objected to the Board including them as part of assessable payroll. But as the Board included those payments as part of X Fuel Ltd.'s assessable payroll, not the employer's payroll, it is X Fuel Ltd. that has standing to challenge the auditor's March 2, 2004 decision confirming the Board's decision in that regard. WCAT has no jurisdiction to deal with that issue in these appeal proceedings, which are confined to the issues before the review officer in the review requested by the employer.

Conclusion

I deny the employer's appeal and confirm the Review Division decision dated October 6, 2004 that confirmed the Board auditor's decision dated March 2, 2004 with respect to the employer.

I have found that the Board appropriately classified the employer in CU 732019. I have found that the Board correctly assessed the payroll attributed to the two manager/shareholders at the base assessment rate for CU 732019. I have found that Manual policy AP1-37-1 (former policies 30:20:00 and 30:20:10) is not contrary to the Act, and that specifically, it does not contravene section 42 of the Act. I have found that WCAT has no jurisdiction in these appeal proceedings to deal with the issue of the inclusion in assessable payroll of X Fuels Ltd., payments made by X Fuels Ltd. to the mother of the employer's two manager/shareholders.

Expenses were not in issue in these proceedings and none are awarded.

Heather McDonald
Vice Chair

HMCD/hb