

Noteworthy Decision Summary

Decision: WCAT-2005-06104 **Panel:** Heather McDonald **Decision Date:** November 16, 2005

Industry classification – Multiple classification – Subcontracting – Policy items AP1-37-1 and AP1-37-2 of the Assessment Manual

An employer must provide adequate evidence to the Workers' Compensation Board (Board) to support multiple classifications for assessment rate purposes. In the absence of such evidence, the Board must classify the employer under the single classification unit (CU) that best fits its descriptions. For classification purposes, it does not matter whether the employer subcontracts certain aspects of its operations to be done by other firms.

The Board classified the employer in CU 732108 (Garbage, Debris, Industrial Waste, Recyclable Material Removal) for the purposes of assigning a base assessment rate. The employer disagreed with the classification, arguing that it should have been classified under CU 701004 (Composting). The employer requested a review by the Review Division of the Board, which confirmed the Board decision. The employer appealed to the Workers' Compensation Appeal Tribunal.

The panel noted that the employer's website suggested it was engaged primarily in the business of organic waste removal, giving advice, and providing equipment and resources to its clients to assist them in waste removal. The employer subcontracted the work of directly removing waste, to other firms.

The panel held that the employer undertook a variety of activities that, considered as a whole, were not entirely captured by any one CU description. Certain of the employer's activities might attract other CU classifications if they were stand-alone operations or if the employer's business operations fit the multiple classification criteria of policy item AP1-37-1 of the *Assessment Manual*. However, there was insufficient evidence to make a finding as to whether certain aspects of the employer's operations should attract a different CU.

As the evidence did not support multiple classifications, the employer needed to be classified under the one CU that best fit its descriptions. Under item AP1-37-2, it did not matter whether the employer subcontracted the actual removal of waste or directly removed the waste itself. CU 701004 (Composting) included employers primarily engaged in worm farming or vermicomposting. The evidence led to the conclusion that the employer was engaged in industrial undertaking of waste removal. Thus, the Board correctly classified the employer in CU 732108.

The employer's appeal was denied.

WCAT Decision Number : WCAT-2005-06104
WCAT Decision Date: November 16, 2005
Panel: Heather McDonald, Vice Chair

Introduction

The employer is appealing a January 25, 2005 decision of a review officer in the Review Division of the Workers' Compensation Board (Board). In that decision, the review officer confirmed an earlier Board decision dated July 22, 2004 that found the employer to be properly classified in classification unit (CU) 732108 (Garbage, Debris, Industrial Waste, Recyclable Material Removal).

On appeal to the Workers' Compensation Appeal Tribunal (WCAT), the employer submits that it does not provide a hauling service for the removal and disposal of waste, but rather that it "subcontracts services for compost." By way of remedy, the employer requests reclassification to a more appropriate industry classification, and queries whether "Composting –?" might be the more appropriate classification.

Issue(s)

Did the Board correctly classify the employer in CU 732108 (Garbage, Debris, Industrial Waste, Recyclable Material Removal)?

Jurisdiction

WCAT's jurisdiction in this appeal arises under section 239(1) of the *Workers Compensation Act* (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.

The employer represented itself in these appeal proceedings. On its notice of appeal, it did not request an oral hearing, but requested a read and review process, advising that it would send in further written submissions. I agreed that an oral hearing is not necessary in this case, as credibility was not in issue and the necessary information about the employer's business activities could be provided by way of written submissions.

The employer initially requested a stay of the Review Division decision, but did not follow up its request with a submission providing reasons to support the request. Accordingly, WCAT dismissed the request for a stay.

At WCAT's invitation to provide a written submission in support of its position on appeal, the employer responded with a very brief, three sentence submission dated June 21, 2005.

WCAT also invited the Board's Assessment Department to participate in the appeal by providing a written submission in response to the employer's argument. The Assessment Department did participate, providing a memo dated July 11, 2005. WCAT disclosed the memo to the employer and invited a reply on or before July 28, 2005. The employer did not provide any reply to the memo. 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 section 246(2)(i) of the Act. A WCAT panel has the authority 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.

Applicable Policy and Practice

Policy applicable to the issue in this case is found in the *Assessment Manual* (Manual), the version in effect on July 22, 2004 when the Board made its decision.

Manual policy AP1-37-1 describes the Board's employer classification system. It states, in part, as follows:

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.

...

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.

Manual policy AP1-37-2 creates a rebuttable presumption that a firm will be classified in a single classification unit based upon its industry, but that presumption may be rebutted if there is evidence that a firm meets the criteria for certain exceptions, such as multiple classification. Policy AP1-37-2 states that it is the responsibility of an employer to apply to the Board for multiple classification, although if information available to the Board indicates that multiple classification is applicable in a given case, the Board may assign more than one classification unit to an employer.

Manual policy AP1-37-3 states that it is the responsibility of each firm to provide timely, complete, and accurate information to the Board regarding changes in a firm's operations, and to act promptly on information requests and information provided by the Board.

Manual policy AP1-37-4 (Classification – Consulting) provides that a consultant is an employer who performs impartial services for clients on a lump sum fee basis. Services include investigations and analysis, pre-planning, design, or compilation of a report without commercial or manufacturing affiliations that might bias judgment. The policy expressly states that if a firm undertakes directly or indirectly to fabricate, manufacture, or construct a product by any means, or implement the recommendations of a report,

the activity is not considered consulting. Rather, the activity is classified according to the nature of the fabricating, manufacturing, constructing, or implementing activity.

Background and Evidence

A notepad entry dated February 3, 2003 on the employer's firm file indicates that day the employer applied for registration on-line through the Board's website. The evidence is that in attempting to self-register, the employer had described its business as "organic recycling – waste management consulting," and had selected a variety of keywords to describe its operations: "remove waste, treat waste, consulting, waste audits."

Later that same day, a Board employer service representative (ESR) had a telephone conversation with an employer representative, who described its operations as contracting with firms to remove organic waste. The explanation was that the employer contracted to restaurants and cafeterias to remove their organic waste, and the employer paid a third party such as X Waste Management to collect the waste and take it to a compost site. The employer paid both the transportation firm and the composting firm for the services in the contract. Although the employer representative referred to the employer as a "consultant," the ESR decided that as the employer arranged for the transportation and disposal of waste, the correct classification unit would be CU 732108 (Garbage, Debris, Industrial Waste or Recyclable Material Removal).

By way of context, the classification unit description for CU 732108 is found in the "transportation and warehousing" sector and the "transportation and related services" subsector. Its base assessment rate for the year 2003 was \$6.90 per \$100.00 of assessable payroll. Examples of the types of services provided by employers in CU 732108 include collection of garbage and/or recyclable material; garbage collection and disposal; waste removal; and pick-up and disposal of industrial or residential garbage as well as hazardous waste and/or industrial waste. Equipment used includes garbage bins, hydraulic containers, garbage trucks, and vacuum trucks. Under classification specifics, the CU description states that included in the CU are "all employers primarily engaged in industrial, residential, or commercial garbage, recyclable material, or waste collection."

CU 701004 (Composting) is in the primary resources sector and the agriculture subsector. Its base assessment rate in the year 2003 was \$3.43 per \$100.00 of assessable payroll. Examples of the types of goods produced by employers in the classification are "compost" and "manufactured soil." Examples of the types of materials used by employers in the CU are agricultural gypsum, horse bedding, sawdust, turkey bedding, wheat straw, worms, chicken bedding, lime, sludge, water, wood waste, and yard waste. Examples of the types of equipment used by employers in the CU are loader, prewet, turner, and supplemental buggy. The CU includes employers primarily engaged in worm farming or vermicomposting.

CU 763011 (Consulting) is in the service sector and the professional, scientific, and technical services sector. Its base assessment rate for the year 2003 was \$0.37 per \$100.00 of assessable payroll. Examples of the types of services provided by employers in this CU include environmental control consulting, quality control consulting, safety consulting, educational consulting, and design of work. Under classification specifics, the CU description states as follows:

Employers in this classification unit engage in research which may involve limited field investigation. They also generate reports and provide advice, but are not involved in the implementation of their recommendations. Employers in this classification unit also engage in a variety of consulting services not specifically identified elsewhere.

The CU description also states:

A consultant is an independent person or corporation who performs impartial services for clients on a fee basis. Services include investigations and analysis, pre-planning, design or compilation of a report, without commercial or manufacturing affiliations that might bias their judgment.

However, when the consultant undertakes directly or indirectly to fabricate, manufacture or construct a product by any means, or implement the recommendations of their report, then they have gone beyond the scope of this definition.

The CU description also makes it clear that excluded from the CU are employers primarily engaged in business consulting or who implement any or all recommendations provided as part of their consulting services.

The employer's website, as evidenced in print-outs from October 2004 and November 2005, states that the employer is a "technology based Waste Management company focusing on the reduction of waste expense through Education, Equipment Optimization and the application of our advanced Software Programs." The website states that the employer takes a consultative approach to waste operations, applying its exclusive waste management software so that its clients reduce their costs of waste operations management. The employer also provides waste handling equipment, consulting, and software systems to effectively monitor and manage waste operations. The employer's website gives examples of waste handling equipment provided by the employer: self-contained and stationary compactors, vertical and horizontal balers, vertical compactors, and organic recycling containers. Other equipment includes "carboard [*sic*] and organics," stretch wrap and plastics, solid waste, and tin glass and plastic. The website states that the employer "is not just a supplier of waste handling equipment. We provide all the professional services to ensure your application is managed from start to finish." Such services include installation of equipment and ongoing

maintenance and repair. In addition to site reviews and audits for its clients, the employer also provides on site education programs to ensure its clients have “maximized efficiency within their waste operations.” The website states that “Our unique approach to waste management and organic diversion utilizing the very latest in software technologies to track each aspect of our clients’ waste operations provides the client with a “Closed Loop” operation and immediate feedback on all waste activities.”

The website also states that at one of its locations, the employer has natural compost and mulch products available for sale. In this regard, the website states as follows:

[The employer] is a manufacturer of 100% all natural compost and mulch products.

Using high quality feedstock, such as fruits and vegetable waste, we manufacture a high grade soil enhancement product for use in:

- Landscaping
- Farming
- Reclamation
- Gardening *and much more*

All our products are 100% natural and contaminant free and are available with different C:N ratios to meet your needs.

Our bark and mulch products are excellent for use in landscaping or as track bedding. Also available in different sizes and nutrient content these products are available in bulk from our [name of city] location.

Before the Review Division, the employer had submitted that it provided the same services as a consultant or software vendor, and that therefore the correct CU would be CU 763011 (Consulting).

The review officer stated that his review of the employer’s website indicated that the employer’s services went beyond making recommendations to its clients. As the employer also provided waste handling equipment such as compactors and containers, ensuring professional installation and ongoing maintenance and repair of equipment, and as the employer engaged in manufacturing and selling compost, as well as providing a hauling service for the removal and disposal of waste, the review officer concluded that the employer could not be classified in CU 763011 (Consulting). The review officer noted that Manual policy AP1-37-4 (Classification – Consulting) confirmed the statement in the CU description about the scope of a consultant, and that policy provided that where a firm engages in implementing recommendations to clients, its business operations will be classified according to the nature of its implementation activities.

Although the employer submitted that it did not perform the activities described in CU 732108 (Garbage, Debris, Industrial Waste, Removable or Recyclable Material), the review officer found that albeit that the employer's employees did not personally perform the activities, the employer contracted with other firms to perform them. The review officer then referred to Manual policy AP1-37-1, finding that the employer is in the business of moving garbage even though it subcontracts the actual removal.

The review officer went on to state as follows:

The employer performs some activities that might normally fall outside CU 732018, for example, selling, installing and maintaining equipment and recycling the waste material. It is possible that additional lower rated classifications could be assigned to those activities if they meet the requirements of Policy AP1-37-2. For example, CU 764028 covers sales, service and repair of heavy equipment (over 500 lbs) and CU 701004 covers composting. As there is insufficient information for me to make a decision on this, I will leave this matter for the Board to deal with if applicable. In this review, I will confine my decision to finding that the employer was correctly assigned to CU 732018 as its main classification.

Therefore the review officer confirmed the Board's July 22, 2004 decision that classified the employer in CU 732018.

In its notice of appeal to WCAT, the employer disputed the review officer's finding that it provided a hauling service for the removal and disposal of waste. The employer stated that it subcontracted services for compost. It requested re-classification to a more appropriate CU, and queried whether a "Composting" CU would be appropriate. It attached a copy of the review officer's decision, with a handwritten note on the decision challenging the statement that it provided a hauling service for the removal and disposal of waste. The handwritten note stated "No! Compost only."

WCAT invited the employer to provide a written submission in addition to its notice of appeal. The employer responded in a brief note dated May 5, 2005, in which it requested additional time to provide a submission. The note also stated that "As discussed several times with the WCB, our company is new, growing and changing. We will not have our focus, duties and therefore our classification determined until this time." On June 21, 2005, the employer responded with a further submission that stated in full as follows:

[The employer] does NOT "Provide a hauling service for the removal and disposal of waste" and we believe that another classification for our growing business will apply.

We have also requested and are again requesting the procedure for making classification changes as our business changes.

We are currently working on a new project that will again change the business of our company.

The Assessment Department's memo dated July 11, 2005 observed that the employer appeared to be no longer advancing the position that it should be classified as a consulting firm. The Assessment Department said that the information provided by the employer at the time of registration was that it subcontracts with other firms to pay for waste to be taken to a compost site. Although the employer has repeatedly asserted that it does not perform a hauling service for the removal and disposal of waste, the Assessment Department notes that the employer's submissions do not deny that they subcontract with one or more other firms to transport waste.

The Assessment Department submits that the employer has not discharged its obligation under Manual policy AP1-37-3 to provide timely, complete, and accurate information to the Board about changes in the employer's operations. Given the dearth of information available to support a finding that the employer no longer arranges for the transportation and disposal of waste, the Assessment Department submits that the Review Division decision should be confirmed. The Assessment Department states that the best available evidence indicates that the employer continues to subcontract the transportation of waste.

With respect to the appropriate industry classification, the Assessment Department relies on *WCAT Decision #2004-05267* (October 8, 2004), reported on WCAT's website at www.wcat.bc.ca. That decision stated in part as follows:

The Classification Unit descriptions are not intended to be exhaustive, but rather are intended to give a flavour of the type of industry...Each CU description expressly states: "This document provides information about business activities covered by this classification. Items listed are EXAMPLES only and do not apply to every employer." Thus, although a particular CU may not specifically list a firm's business as included in the industry classification, the Board has the discretion to make certain judgement decisions to place the firm in the most appropriate classification.

[capital emphasis in original]

The Assessment Department submits that based on the evidence, the most appropriate classification unit for the employer is CU 732018, and requests that WCAT confirm the Review Division's decision dated January 25, 2005.

Although WCAT invited the employer to provide a submission in response to the Assessment Department's memo, no submission was received from the employer.

Reasons and Findings

After considering the evidence and the submissions, I have decided to confirm the Review Division decision dated January 25, 2005.

I agree with the review officer's finding that CU 763011 (Consulting) is not applicable in this case. As the employer's business activities go well beyond consulting as defined in Manual policy AP1-37-4, being engaged in the implementation of its recommendations to clients, CU 763011 does not apply to the employer's operations.

In reviewing the evidence about the scope of the employer's business activities, it is clear that the employer undertakes a variety of activities that considered as a whole, are not exactly and completely captured by any one CU description. I agree with the review officer's comments that some of the activities, such as the compost manufacturing, and service/repair of heavy equipment, might attract other CU classifications if they were stand-alone operations or if the employer's business operations fit the multiple classification criteria of Manual policy AP1-37-2. There is insufficient evidence in these proceedings to make a finding about multiple classifications, but the employer is free to explore that issue with the Board by providing evidence to substantiate an argument that at this time, at least some aspects of its operations should attract a lower base assessment rate.

Given that the evidence in these proceedings does not support multiple classifications, the task is to classify the employer in the one classification unit that best fits its operations. Manual policy AP1-37-1 states that some of the factors to consider are the type of service and/or product being provided, the processes and equipment that are being used, and the type of industry with which the firm is in competition. The information provided to the Board by the employer at the time of its registration, together with the website information about the type of equipment and services the employer provides its clients, suggest that the employer is engaged primarily in the business of organic waste removal, giving advice, and providing equipment and resources to its clients to assist them in waste removal. The evidence is that the employer's workers may not be directly involved in removing waste, but that the employer subcontracts that work to other firms. As Manual policy AP1-37-1 points out, it does not matter that a particular aspect of business activity is contracted out by an employer to another firm – if an employer is engaged in an industry, even by way of arranging for other firms to directly do the work involved in the industry, that employer will attract the same industry classification as the firms that directly perform the work. In this case, I agree with the Assessment Department's observation that the employer's repeated assertions that it does not perform a hauling service to remove and dispose of waste, viewed in the context of its other statements to the Board that it contracts to remove clients' organic

waste by arranging with other firms to collect the waste, leads to a conclusion that the employer is engaged in the industrial undertaking of waste removal.

Some of the employer's submissions to WCAT state that the employer's business is growing and changing, and that the employer expects different industry classifications to apply to the changing aspect of its business. The employer has failed to provide evidence to WCAT about the manner in which its business has changed, and its November 2005 website information does not reveal changes. If the employer has evidence that supports a finding that its business is now different than when it registered with the Board in 2003, it is open to the employer to provide that information to the Board's Assessment Department to consider a classification change. Based upon the evidence available in these appeal proceedings, however, I find that the Review Division correctly interpreted and applied Manual policy in confirming the Assessment Department's July 22, 2004 decision that classified the employer in CU 732108 (Garbage, Debris, Industrial Waste, Recyclable Material Removal).

Conclusion

For the foregoing reasons, I confirm the Review Division decision dated January 25, 2005. I have found that the Board correctly classified the employer in CU 732108.

Expenses of the appeal proceeding were not requested and none are awarded.

Heather McDonald
Vice Chair

HM/hb