

Noteworthy Decision Summary

Decision: WCAT-2006-00104 **Panel:** Heather McDonald **Decision Date:** January 12, 2006

Payroll assessment – Non-active shareholders – Family members – Sections 39 and 42 of the Workers Compensation Act – Policy item #AP1-38-2 of the Assessment Manual

When the Workers' Compensation Board (Board) defines assessable payroll, its jurisdiction is broader than payments made to workers or active principals and shareholders of a company and includes payments made to the active shareholder's mother.

The employer was registered with the Board in the General Trucking industry classification unit. The Board included amounts paid to shareholder J, the mother of the active shareholder, in the employer's assessable payroll. The employer appealed to the Review Division of the Board, which confirmed the decision. The employer appealed to the Workers' Compensation Appeal Tribunal.

The employer submitted that shareholder J was not its employee, had never been its employee and was never remunerated for active work. The employer argued that payments made to shareholder J were simply "benefits" paid to her as widow of the company founder and mother of the active shareholder. The employer stated that the payments to shareholder J had been reported to the federal government for taxation purposes as earnings, but that this was an oversight and the payments should have been reported as benefits. The employer in a later submission characterized the payments to shareholder J as "superannuation". The employer argued that policy item #AP1-38-2 of the *Assessment Manual* was in conflict with section 42 of the *Workers Compensation Act* (Act) in that it defines categories of assessable payroll as being broader than payments made to workers or active principals and shareholders of a company.

The panel noted that section 39 of the Act provides the Board with a very broad responsibility and authority to assess, levy on and collect assessments from employers, not only by assessments rated on the payroll or unit of production, but in any "manner the Board considers proper." The panel further noted that section 39(2) emphasizes the Board's broad powers to make assessments in the "manner and form and by the procedure the Board considers adequate and expedient." Based on its statutory authority, the Board has developed assessment policies to be applied in a practical and expedient way to ensure the collection of adequate assessments to meet the Act's objectives. These policies will not necessarily be consistent with tax planning strategies developed by employers with regard to federal tax legislation.

The panel held that section 39 authorizes the Board to give an expansive definition to the term "payroll" that includes amounts that do not necessarily come within the popular layperson's use of the term "payroll." The panel further held that the policy of determining assessable payroll based on the employer's records (item #AP1-38-2) made sense given the goal of the Board's assessment policy to ensure an adequate and expedient collection of assessments.

The panel concluded that section 39 and item #AP1-38-2 entitled the Board to include as part of assessable payroll, payments made to family members of a principal or shareholder that have been recorded as earnings to the family member by the company in official income tax



statements issued by the company, whatever the nature or degree of the family member's activity for or with the company. The panel also held that item #AP1-38-2 is not in conflict with section 42 and is not patently unreasonable. The employer's appeal was denied.

WCAT Decision Number : WCAT-2006-00104
WCAT Decision Date: January 12, 2006
Panel: Heather McDonald, Vice Chair

Introduction

The employer is registered with the Workers' Compensation Board (Board) in the industry classification unit (CU) 732019 (General Trucking). The employer is appealing a decision dated April 15, 2005 of the Board's Review Division. In that decision, a review officer confirmed an earlier Board decision dated November 18, 2004 by a Board assessment officer who, by including amounts paid by the employer to two shareholders (J and P), increased the employer's assessable payroll by \$56,500. This resulted in an increase of \$3,503 in assessments owed to the Board by the employer for the year 2003.¹

On appeal to the Workers' Compensation Appeal Tribunal (WCAT), the employer's position is that Board policies AP1-37-1 and AP1-38-2 in the *Assessment Manual* (Manual) are in violation of section 42 of the *Workers Compensation Act* (Act) and should not be applied. The employer asserts that the payments made to shareholder "P" should not be assessed at the base assessment rate applicable to CU 732019, but at a lower base assessment rate, as P was not a truck driver, but rather a "desk-tied administrator whose duties attracted no hazards or suffered real costs." The employer submits that the Board was wrong to ignore P's "low-risk office-strapped occupation" by assessing payroll attributed to him at the base assessment rate for the general trucking industry.

The employer further asserts that payments it made to J should be totally excluded from its assessable payroll, because J was not an employee and was never remunerated for "active work." The evidence on the file is that J is the mother of P, the other shareholder of the employer, as well as the mother of R, the shareholder of X Systems Ltd. R and P are brothers. The employer submits that section 42 of the Act requires that classification rates be determined on the basis of the costs and hazard related to work performed for an employer, not determined on the basis of payments made by an employer to a person who did not "earn" the payments by actively working for the employer.

¹ In the November 18, 2004 decision, the assessment officer also increased the assessable payroll of an associated firm, X Systems Ltd., by \$21,500, by including amounts paid to R, the shareholder of X Systems Ltd. (R is the brother of P and the son of J.) That resulted in an increase in assessments owed to the Board by X Systems Ltd. for the year 2003. This decision deals only with the increase to the employer's assessable payroll for the year 2003. X Systems Ltd. is not a party to this appeal. The matter of the increase to X Systems Ltd.'s assessable payroll for the year 2003 is the subject of a different appeal filed by X Systems Ltd.

Issue(s)

Do Manual policies AP1-37-1 and AP1-38-2 conflict with section 42 of the Act? Should WCAT refuse to apply those policies as so patently unreasonable as not capable of being supported by the Act? Did the Board correctly assess the payments made by the employer in 2003 to the two shareholders J and P at the base assessment rate for CU 732019?

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. In the notice of appeal, the employer requested a "read and review" process, indicating that it would be providing written submissions. I agree that an oral hearing is unnecessary in this case, as the issues in this case turn on interpretation of law and policy. The 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 December 12, 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 Procedures*, and is grounded in WCAT's statutory authority under section 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.

Applicable Law and Policy

Section 39(1) of the Act states in part as follows:

For the purpose of creating and maintaining an adequate accident fund, the Board must every year assess and levy on and collect from independent operators and employers in each class, by assessment rated on the payroll, or by assessment rated on a unit of production, or in a manner the Board considers proper, sufficient funds, according to an estimate to be made by the Board...

Section 39(2) of the Act states that:

Assessments may be made in the manner and form and by the procedure the Board considers adequate and expedient, and may be general as applicable to a class or subclass, or special as applicable to an industry or part or department of it.

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 policy for the audit year in question (2003) is found in the version of assessment policy found in the Manual, effective January 1, 2003. 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 Decision #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 other than the audit year or years in question, 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.

The relevant portion of policy AP1-37-1 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]

Assessment policy AP1-38-2 refers to section 39(1) of the Act, and goes on to state that:

Assessable payroll is considered by the Board under four general categories, any one of which may or may not be applicable to an employer. These are:

- wages and salaries;
- principals' earnings;
- contractors earnings; and
- Personal Optional Protection amount (covered in Item AP1-2-3).

Under item (c) in AP1-38-2, entitled "Shareholders' earnings," the policy states in part as follows:

The total remuneration paid to each active principal, shareholder, director or officer of a corporation is assessable. *Remuneration is defined as any payment made to the principal regardless of the label attached to it. It includes:*

- *earnings shown in official statements of remuneration issued by the corporation for income tax purposes;*

- management fees;
- payments purporting to reimburse business expenses except for the payment of out-of-pocket expenses; and
- payments of personal expenses made on behalf of the active shareholder, director, or officer.

If a director of a publicly traded company receives an official income tax statement from the company for directors' fees, these are not assessable if the director:

- only attends periodic meetings;
- is not a part-time or full-time employee; and
- is not an officer of the corporation.

Fees paid to directors of private companies are assessable.

Dividends are not considered part of payroll unless paid as remuneration for activity in the company.

Earnings in official income tax statements issued by the corporation to a spouse, child or family member of a principal or shareholder are included in payroll and are assessable.

[italic emphasis added]

Background and Evidence

The assessment officer's November 18, 2004 decision states that he conducted an audit of the employer's books and records for the assessment year 2003, and that he had increased the employer's 2003 assessment payable to the Board by \$3,503. The assessment officer said that the adjustment resulted from including additional shareholder earnings in the amount of \$21,500 paid by the employer to shareholder P and \$35,000 to shareholder J. In making that decision, the assessment officer referred to assessment policy AP1-38-2. That policy stems from section 39(1) of the Act, earlier referred to in this decision.

In its request to the Review Division for review of the assessment officer's November 18, 2004 decision, the employer attached a submission dated October 18, 2004 relating to a different review application. That matter eventually went on appeal to WCAT, and was the subject of *WCAT Decision #2005-01851* (April 14, 2005). Before

the Review Division in this matter, the employer relied on many of the same arguments that were made to the Board in that other matter, submitting that the assessment officer's November 18, 2004 decision and policies AP1-37-1 and AP1-38-2 (or the Board's interpretation of those policies) conflicted with section 42 of the Act. The employer requested that payments to non-driving shareholders (that is, P) be "sub-classified" pursuant to section 42 of the Act, so that payments would be assessed at an office clerical rate rather than the rate for the general trucking industry. The employer also requested that payments to J be assessed at the office clerical rate, stating that "an elderly lady who seldom leaves her kitchen and has no working involvement with either trucking or trucks" should not be assessed in the same way as a truck driver. The employer also proposed, however, that payments to non-active shareholders (that is, J) be excluded entirely from assessable payroll.

In the Review Division decision dated April 15, 2005, the review officer stated that he was required under section 99 of the Act to apply a Board policy applicable in the case, and that the Review Division lacked the authority of WCAT under section 251 of the Act to declare a policy so patently unreasonable that it was not capable of being supported by the Act and its regulations. The review officer went on to observe that even if he had such authority, he would find that policies AP1-37-1 and AP1-38-2 did not conflict with section 42 of the Act. He found that the Board's experience rating system met the Board's statutory responsibilities under section 42. Further, he stated that nothing in section 42 of the Act requires the Board to set up "subclassifications, differentials and proportions" that relate to individual employees or groups of employees engaged in particular occupations. The review officer stated that the Board might have the authority to act in that way under the Act, but it was also entitled not to adopt such an approach.

In response to the employer's argument that payments to P and J should be assessed at a clerical or office industry rate, the review officer referred to assessment policy AP1-37-1. On the basis of that policy, the review officer disagreed with the employer's argument that the Board should assess shareholders P and J at a clerical or office industry rate rather than the base assessment rate for CU 732019 (General Trucking).

The review officer further decided that he was required to apply policy AP1-38-2 which requires that the "total remuneration paid to each active principal, shareholder, director, or officer of a corporation is assessable." The review officer noted that the employer had requested exclusion of payments made to "inactive shareholders," but the review officer stated that in that regard, it was not clear to whom the employer was referring. The review officer took into account the references in the employer's submission to J, P's mother, as not active as a worker for the employer, but also noted part of the employer's submission which suggested that payments to J be assessed at the lower clerical/office rate. In any event, the review officer concluded that "insufficient grounds have been provided for excluding payments to her on the basis that she is inactive in the company."

On appeal to WCAT, with respect to the payments the employer made to P during the 2003 year, the employer submits that the Board erred in assessing those payments at the base assessment rate for CU 732109 (General Trucking), the industry in which the Board has classified the employer. The employer's position is that policies AP1-37-1 and AP1-38-2 contravene section 42 of the Act and are "ultra vires" the Board. The employer says that section 42 requires the Board to "conduct its insurance operations in accordance with the general principles of risk assessment used throughout the insurance industry for setting premium rates." In this regard, the employer also relied on arguments it made to WCAT in *WCAT Decision #2005-01851*. Although I have considered them in full, I will refer only briefly to them in this decision.

In essence, 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 in formulating its assessment policies, the Board has ignored section 42's references to "subclassification," "differentials," "proportions," "just," "differs," "plant" and "special." According to the employer, the practical effect of this allows the Board to completely disregard the circumstances of an individual firm. The employer submits that classifications under the Act are by industry, and that sub-classifications are intended to apply to particular kinds of work with the focus on the hazard ratings of specific jobs. The employer says that rather than determining premium rates by "stratifying, specifying and evaluating the defined risks, hazards and perils inherent in the work" the Board sets its rates using a "rough rule-of-thumb system of classification by industry." The employer submits that all insurance premiums are set according to the calculated or estimated risk of the insured event actually occurring. The employer says 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." According to the employer, the Board has failed to comply with that statutory obligation and therefore its assessment policies contravene section 42 of the Act.

With respect to payments it made to J in 2003, the employer has argued that J is not its employee, has never been its employee and has never been remunerated for "active work" by the employer. The employer states that payments it made to her are "simply company benefits paid to the widow of the company founder, and the mother of" P and R. The chartered accountant representing the employer stated as follows in a submission dated November 5, 2005 to WCAT:

...[J's] benefits ought to have reported to Revenue Canada for taxation purposes on a **T4A** supplementary as a Benefit, and NOT on a T4 Earnings supplementary.. This was purely a technical oversight and it has been used by the Board as a device to increase premiums assessed on bona fide payroll for active trucking activities. This explanation has been

repeatedly reported to the Board's auditor and officials who have chosen to disregard it, and have continued to assess her benefits as active payroll

[reproduced as written]

The employer refers to assessment policy AP1-37-1, submitting that it contradicts the "generally accepted principles of commercial insurance which are inescapably tied to hazard and risk." However, the employer says that the policy does emphasize that it applies only to "workers doing the work," which would not include "ladies living in their own homes far removed from the company worksites" and having no active association with the employer's business. The employer refers to the review officer's finding that under policy AP1-38-2, payments to J fell within the policy that "total remuneration" paid to each active principal, shareholder, director, or officer of a corporation is assessable. The employer submits that payments it made to J "were taxable income, to be declared for income tax purposes, yet were not remuneration. To repeat, she was not employed, nor did she perform any work." The employer says that J's inactive role in the employer's trucking business is indisputable, and that payments it made to her were not "earnings." On this basis, the employer submits that all payments it made to J during the year 2003 should be excluded from its assessable payroll.

In its submission, the Assessment Department relies on *WCAT-2005-01851* in support of its position that the applicable policies in this case do not conflict with section 42 of the Act, and that the Board correctly applied those policies in assessing the employer's payments to P at the base rate for the general trucking CU in which the employer is classified.

With respect to payments made to J, the Assessment Department says that if WCAT finds the employer's assertions regarding J's inactive status to be credible, then it would follow that J was not an "active" principal, shareholder, director or officer" of the company. The Assessment Department submits, however, that there has been no inquiry into whether J might also be a director of the private company, and thus the payments to her in 2003 might be assessable under policy AP1-38-2's statement that "Fees paid to directors of private companies are assessable." Further, the Assessment Department submits that the evidence and the employer's submission support a finding that the payments to J are assessable under the statement in policy AP1-38-2 that "Earnings in official income tax statements issued by the corporation to a spouse, child or family member of a principal or shareholder are included in payroll and are assessable." In that regard, the Assessment Department says it has been established that J is a family member of the employer's principal or shareholder, that J was remunerated by the employer, and that the remuneration was noted in official income tax statements issued by the employer.

In response, the employer says that the Board has wrongfully characterized payments to J as remuneration when in fact they were "superannuation." The employer says that

the payments are “wholly gratuitous, not earnings or remuneration.” In its December 20, 2005 submission, the employer states in part as follows:

...the board has been told repeatedly, in clear and unequivocal language that [J] is a kitchen-pottering elderly lady who never even gets close to her late husband’s companies, much less provide a service for remuneration. The money she receives is superannuation, paid in consideration of her late husband’s role in the founding and growth of the family enterprises.

Admittedly payments made to [J] have been reported, in the past, on a T4 payroll supplementary as ‘employment income’. So what? The Income Tax Act relates to taxable income, which takes many forms other than income earned from employment. The correct tax reporting is on a T4A Return as ‘superannuation’, taxable it is true, yet not earnings. THAT is the way it will be reported for 2005 and future years, and [X Systems Ltd.] will be advised to go through the clerical chore of filing for prior years AMENDED returns to correctly reflect the true nature of her company income.

[reproduced as written]

I note that the December 20, 2005 submission was the first time in these appeal proceedings that the payments to J were characterized as “superannuation.” In previous submissions the payments were characterized as income in the nature of benefits, and in *WCAT Decision #2005-01851*, the position was that the payments to J were in the nature of an honorarium from her sons as a token of their love and affection. As well, however, in a letter dated March 18, 2004 to the Board’s director of Revenue Services, the chartered accountant representing the employer referred to J as well as R and P in noting that “there [sic] non-hazardous duties differ markedly from the primary industry classification for general trucking,” suggesting that J performed duties of some nature for the employer.

The employer also denies that J receives director’s fees, although the employer does not indicate whether or not J is a director of the company.

The evidence on the firm file is that the employer’s records described the payments to J as “management fees” and that the payments were stated on T-4 forms to be “income from employment” with the employer. Further, the employer claimed the payments to J as a business expense to the federal income tax authorities.

Reasons and Findings

Correct industry classification for the employer

In this case, I am satisfied on the basis of the file documentation that the Board correctly classified the employer in CU 732019 (General Trucking). I also note that the employer has not disputed the correctness of its industry classification in these appeal proceedings. Although in its submissions, the employer has disputed the correct classification of X Systems Ltd., X Systems Ltd. is not a party in these proceedings, and that issue will be dealt with in the other WCAT appeal filed by X Systems Ltd.

Are policies AP1-37-1 and AP1-38-2 in conflict with section 42 of the Act? Is the Board's interpretation of those policies so patently unreasonable that it cannot be supported by the Act, in particular section 42 of the Act?

In *WCAT Decision #2005-01851*, I considered this argument with respect to policy AP1-37-1. The employer is aware of the decision in that case because the appellant in that case was one of the companies in the employer's family of companies, and the same chartered accountant who represented the employer in this case represented the appellant in the other appeal. I have considered the submissions made by the employer in these proceedings which referred in part to submissions made in the other appeal, but they do not change my conclusions regarding the validity of policy AP1-37-1 that I stated in *WCAT Decision #2005-01851*. In that decision, I stated as follows:

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 workers’ compensation 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.

In this case, applying the foregoing reasoning, I find that policy AP1-37-1 as interpreted and applied by the Board in this case to assessing payments by the employer to P, is a viable interpretation and application of section 42 of the Act. I find that policy AP1-37-1 is not patently unreasonable as alleged by the employer in this case.

With respect to policy AP1-38-2, although the employer has referred to that policy together with policy AP1-37-1 in alleging inconsistency with section 42 of the Act and

that the policy is *ultra vires* the Board, the employer's arguments were made in the context of policy AP1-37-1 and did not expressly identify the problems with policy AP1-38-2 vis-à-vis section 42 of the Act. Policy AP1-38-2 is directed at categories of assessable payroll rather than the classification system and the assessment rate paid by employers. I have earlier observed in this decision that policy AP1-38-2 is based on the Board's obligations under section 39 of the Act to "assess and levy on and collect from independent operators and employers in each class, by assessment rated on the payroll, or by assessment rated on a unit of production, or in a manner the Board considers proper" sufficient funds to create and maintain an adequate accident fund. In considering this expansive obligation and authority granted to the Board by the Act, and taking into account the employer's submissions in this case, I have been unable to find that policy AP1-38-2 is in conflict with section 39 or 42 of the Act, or that the policy is so patently unreasonable that it cannot be supported by the Act and regulations.

Did the Board correctly include payments made by the employer to P in 2003 as part of the employer's assessable payroll?

Under section 251 of the Act, having found that policies AP1-37-1 and AP1-38-2 are consistent with the Act, I must apply those policies. The evidence on file supports a finding that P was an active shareholder of the employer during 2003, and that the employer made payments to him during that year. Applying policies AP1-37-1 and AP1-38-2, I find that the Board correctly assessed the payments made by the employer to P during 2003 as part of the employer's assessable payroll, and that those payments were correctly assessed at the base rate applicable to the employer's CU 732019 (General Trucking).

Did the Board correctly include payments made by the employer to J in 2003 as part of the employer's assessable payroll?

The employer's position with respect to payments it made to J is that unless those payments in fact represented payments for services actively rendered to the employer, the Board is unable to assess those payments by considering them part of the employer's assessable payroll. I disagree with that interpretation of section 39 of the Act as well as policy AP1-38-2.

It is clear that section 39 of the Act provides the Board with a very broad responsibility and authority to assess, levy on and collect assessments from employers, not only by assessments rated on the payroll or unit of production, but in any "manner the Board considers proper," so that there will be sufficient funds to meet amounts payable from the accident fund as well as amounts necessary to provide the other reserves referred to in section 39(1). Section 39(2) of the Act goes on to emphasize the Board's broad powers in that regard by stating that assessments may be made in the "manner and form and by the procedure the Board considers adequate and expedient." With that statutory authority in mind, the Board has developed assessment policies that could be

applied in a practical and expedient way to ensure the collection of adequate assessments to meet the Act's objectives. The statutory goals of adequate and expedient collection of assessments may not, however, always meet the expectations of every employer or be perfectly consistent with tax planning strategies developed by employers with regard to federal tax legislation.

I am satisfied that section 39 of the Act authorizes the Board to make policy that gives an expansive definition to the term "payroll" and that allows the Board to assess on amounts that do not necessarily come within the popular layperson's use of the term "payroll." Further, my interpretation of policy AP1-38-2 is that in defining categories of assessable payroll for the purpose of fulfilling the Board's statutory obligations under section 39 of the Act, the policy intends to include payments beyond payments for services rendered by a worker or other person actively providing services to an employer. In determining assessable payroll, policy AP1-38-2 focuses on payroll as determined by documentary evidence, including income tax documentation, found in employer records.

I have reached this interpretation of policy AP1-38-2 by examining the various categories of payments referred to in the policy, and noting that some categories include payments beyond payments made to active principals or shareholders of a company or to those persons who fall within the definition of a "worker" under the Act. For example, fees paid to directors of private companies are assessable, even though they may never attend a meeting, may never provide services as employees or workers, and are not company officers. Such directors' fees, however, are considered under Board policy to be part of an employer's "payroll" and are assessable. Further, as noted in *Appeal Division Decision #2000-1457* (September 19, 2000) (reported at the Board's website at www.worksafefbc.com), section 39 of the Act entitles the Board to levy assessments on an amount that may not be considered "earnings" by the Board for compensation purposes.

Policy AP1-38-2's reference to "remuneration paid to each active principal, shareholder, director or officer of a corporation," requires that there must be some degree of activity in the corporation by those persons, for payments made to such persons to be included as part of the company's assessable payroll. Similarly, policy AP1-38-2's category of "wages and salaries" includes earnings of workers, implying that the payments made in that category have been made for work activity on behalf of the employer.

If policy AP1-38-2 required that, in order for a company's payments to family relatives of a principal or shareholder to be considered part of assessable payroll, the payments in fact needed to represent remuneration or earnings for actual work activity for the company, then policy AP1-38-2 would not need to go further. This is because such payments would come within the category of "wages and salaries" in policy AP1-38-2, or if the relative was a shareholder, principal or officer of the company, the payments would be included in assessable payroll because the relative's activity on behalf of the

company (whatever the degree of activity), would render the payment as “remuneration,” whatever the label attached to it.

Policy AP1-38-2 does go further, however, by expressly referring to “Earnings in official income tax statements issued by the corporation to a spouse, child or family member of a principal or shareholder” as included in assessable payroll. The policy does not state that the spouse, child or family member must be “active” in the company. It does not require that the payments to the spouse, child or family member be linked in fact to work activity performed by the relative for the company; rather, the policy focuses on the company’s characterization of the payments for income tax purposes. In my view this suggests an intention in Board policy to include in assessable payroll payments made to family members that a corporation has documented as earnings in official income tax statements and has declared as an expense for income tax purposes, even though, in fact (like a director in a private company who holds a titular position only and does not provide active services for a company) the relative may not have actively worked in the business.

J’s situation provides a good example of why policy AP1-38-2 would take that further step by expressly describing as assessable, payments that have been recorded as “earnings in official income tax statements issued by the corporation” to a relative of a principal or a shareholder. Keeping in mind that one purpose of the Board’s assessment policy is to ensure an adequate and expedient collection of assessments in order to meet the Act’s objectives, it makes sense to determine assessable payroll based on the company’s own records for income tax purposes. In this case, at various times in these proceedings as well as in the proceedings in *WCAT Decision #2005-01851*, payments to J have been characterized by the employer and its related family group of companies as:

- company benefits;
- in the nature of an honorarium as a token of love and affection from her sons;
- payments for non-hazardous duties; and
- superannuation.

Some of these descriptions collide with other statements in the employer’s submissions, as it is difficult to find that the payments are “superannuation” in the face of the employer’s statement that J never, in fact, worked for the employer or in the company group of businesses. Similarly, a payment for non-hazardous duties implies that J did undertake some duties for the employer. Again, an honorarium is defined in the *Concise Oxford Dictionary* (8th ed., 1990) as a “voluntary payment for professional services rendered without the normal fee.” But the employer has used honorarium more in the sense of a simple gift from sons to their mother, without an explanation of why the gift would need to be recorded in company records as a management fee, and reported to the federal tax department as employment income she earned when working for the company.

In my view, it is no accident that Board policy in AP1-38-2 has focused on company payments to family members of company principals or shareholders, and has deemed that company payments made to those persons that are recorded as “earnings in official income tax statements issued by the corporation” are included in assessable payroll. If the Board were required to go behind a company’s records for income tax purposes to examine whether in fact the payments were made for actual services rendered to the company, the Act’s objectives of an expedient and adequate collection of assessments would, in many cases, be undermined.

In this case, even if I were prepared to accept the employer’s submissions that J never worked for the employer as an employee and that she was not an “active” shareholder or principal in the sense that her sons or other workers were active in the employer’s business, I would find that under policy AP1-38-2, the employer’s payments to J in the year 2003 should be included as part of the employer’s assessable payroll. This is because I have found that section 39 of the Act and policy AP1-38-2 entitles the Board to include as part of assessable payroll, payments made to family members of a principal or shareholder that have been recorded as earnings to the family member by the company in official income tax statements issued by the company, whatever the nature or degree of the family member’s activity for or with the company. As the mother of shareholder P, and as the recipient of T4 forms issued by the employer which characterized its payments to her as income from employment with the employer, J falls within that policy and those payments to her fall within the employer’s assessable payroll in 2003.

The employer has indicated that it intends to change its method of income tax reporting: That is a choice it is entitled to consider. Again, I emphasize that the statutory goals of adequate and expedient collection of assessments for the purpose of maintaining an accident fund may not always be consistent with tax planning strategies developed by employers with a regard to federal tax legislation. It is important that employers understand the categories of assessable payroll and their obligations under the Act, as well as their obligations under federal tax legislation.

Having found that the payments to J formed part of the employer’s assessable payroll for 2003, I also conclude, for reasons earlier given in this decision, that it was correct for the Board to have assessed those payments at the base assessment rate for the employer’s CU 732019 (General Trucking).

Conclusion

For the foregoing reasons, I deny the employer's appeal of the Review Division decision dated April 15, 2005. I have found that *Assessment Manual* policies AP1-37-1 and AP1-38-2 do not conflict with section 42 of the Act and are not patently unreasonable. I have found that the Board correctly included as part of the employer's assessable payroll in 2003, payments it made to shareholders J and P in 2003. I have also found that the Board correctly assessed those payments at the base assessment rate for the employer's CU 732019 (General Trucking). Therefore I confirm the Review Division decision dated April 15, 2005.

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

Heather McDonald
Vice Chair

HMCD/hb