Noteworthy Decision Summary

Decision: WCAT-2006-03504 **Panel**: Heather McDonald **Decision Date:** September 11, 2006

Industry Classification – Payroll Assessment – Change in operations – Onus on employer to provide evidence to the Workers' Compensation Board operating as WorkSafeBC – Mineral exploration activity – Item #AP1-37-1 of the Assessment Manual – Classification Unit 704016 and 762003

The employer bears the onus of providing evidence to the Workers Compensation Board operating as WorkSafeBC (Board) when disputing its industry classification. Evidence from financial statements and news releases may be sufficient to demonstrate an employer is engaging in mineral exploration activities for the purposes of determining its industry classification.

The employer applied for registration with the Board. The Board initially registered the employer into industry classification unit (CU) 704016 (Oil & Gas or Mineral Exploration, or Prospecting). The employer requested a review of this classification on the basis that it neither earned more than 25% of its revenue in British Columbia nor spent more than 25% of its payroll for British Columbia operations. The Board then changed the employer's classification to CU 762003 (Administration of an Operation Conducted Outside B.C.).

The employer then issued a news release stating that it had acquired a property in British Columbia and had initiated a $1 million mining exploration program on the property. The Board then changed the employer's classification back to CU 704016. The Board stated the change was necessary as a result of a distinct change in the employer's operations, as the employer's accountant had earlier indicated the employer did not do any exploration or prospecting in British Columbia. The employer requested a review by the Review Division of the Board, which confirmed the Board decision. The employer appealed to WCAT.

The panel confirmed that CU 762003 was not the appropriate industry classification for the employer. Although the employer submitted that maintenance work on the property was carried out by subcontractors, item #AP1-37-1 of the *Assessment Manual* states that it is immaterial for classification purposes if the work is carried out directly or by subcontracting the activity.

The panel also confirmed the Board correctly classified the employer in CU 704016. Although there was not extensive evidence regarding the employer's business activities, the Board had made its own inquires and produced relevant evidence which the employer failed to address. The panel noted there were several common-law authorities for the principle that the onus of disproving an assessment rests on the person disputing it. The panel concluded that whether, according to the common law, or according to the more general and basic rules of evidence regarding burden of proof, the employer had not provided sufficient evidence to justify its position.

The panel then considered the meaning of the terms "evaluation" activities and "regional explorations" surveys contained in the description for CU 704016. The employer had stated in its news release that, after acquiring the property, it had completed a mineral resource estimate. The employer's financial statements described itself as an "exploration stage enterprise," and included as a "significant" event or activity in the enterprise, the maintenance work on preserving the core on the H Property. The evidence supported a finding that the employer was engaged in mineral exploration activities within the scope and intent of CU 704016.

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Finally, the panel noted that an employer may be classified under CU 704016 despite earning less than 25% of its revenue in British Columbia and spending less than 25% of its payroll in British Columbia.

The panel denied the employer's appeal.

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Panel: Heather McDonald, Vice Chair

Introduction

The employer is appealing a Review Division decision dated August 10, 2005 that confirmed a Workers' Compensation Board (Board) decision dated March 14, 2005. In the March 14, 2005 decision, a Board employer service representative (ESR) in the Assessment Department changed the employer's classification from Classification Unit (CU) 762003 (Administration of an Operation Conducted Outside B.C.) to CU 704016 (Oil & Gas or Mineral Exploration, or Prospecting). The Board's decision to change the classification was based on a finding that the employer was active in mineral exploration in British Columbia. The Board determined that the change in classification was due to a change in operations, and pursuant to Assessment policy AP1-37-3, made the effective date of the classification change February 7, 2005.

The base assessment rate for CU 704016 is substantially higher than the base assessment rate for CU 762003.

On appeal to the Workers' Compensation Appeal Tribunal (WCAT), the employer submits that it is not the titleholder to the British Columbia mineral property on which exploration work was conducted, nor did it conduct any exploration, nor contract the subcontractors performing the exploration work on the property. The employer states that its role in the exploration work, which commenced March 2005, was strictly as an overseer to the project, and that it terminated this role on May 19, 2005 when it underwent a corporate restructuring.

Issue(s)

Did the Board err in changing the employer's classification to CU 704016 effective February 7, 2005?

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 of an assessment matter under section 96.2 of the Act.

The employer represented itself in these appeal proceedings. In the notice of appeal, the employer requested a "read and review" process, indicating that it was enclosing all its evidence and submissions. I agree that an oral hearing is unnecessary in this case. Although there are evidentiary matters to be resolved, credibility is not an issue. The evidence regarding the employer's activities during the relevant time can be provided by

way of written submissions. As well, the case turns on interpretation and application of law and policy more so than resolving conflicts in evidence. For example, a central conflict in this case relates to the meaning that the employer accords to the term "exploration," and the appropriate interpretation of that term as it is used in CU 704016. My view is that written documentation will be sufficient for me to decide the appeal.

WCAT also invited the Board's Assessment Department to participate in the appeal by providing written submissions and other information in response to the submission from the employer. The Assessment Department did participate, providing a memorandum dated March 17, 2006. 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* (MRPP) 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. Although WCAT provided a copy of the Assessment Department's memorandum to the employer and gave an opportunity for response, there was no submission in response from the employer.

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 final 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's 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 directors) is exhausted.

Applicable Law and Policy

Section 39(1) of the Act provides that every year the Board must, for the purpose of creating and maintaining an adequate accident fund, assess and levy on and collect from independent operators and employers in each class, by assessment rated on the payroll or by unit of production or in a manner the Board considers proper, sufficient funds. Section 39(2) of the Act states the Board may make assessments in the manner and form and by the procedure it 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, among other things, that 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.

The relevant policy in this appeal is found in the *Assessment Manual* (Manual), effective January 1, 2003.

Manual policy AP1-37-1 (The Classification System) 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.*
>
> 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]

Manual policy AP1-38-1 (Registration of Employers) provides that all employers must register with the Board unless exempt from the scope of Part 1 of the Act, and that the responsibility to provide full and accurate initial information and to update this information (by advising the Board of any material changes to the applicant's operations), rests with the applicant for registration.

Manual policy AP1-37-3 (Classification – Changes) provides that it is the responsibility of each firm to provide timely, complete and accurate information to the Board regarding changes in the firm's operations, and to act promptly on information requests and information provided by the Board. The policy goes on to indicate that there are three main reasons for a change in a firm's classification: change in operations with a misclassification as a consequence; no change in operations but the firm is nevertheless misclassified; and misclassification based on the firm's non-compliance with reporting requirements. The effective date of a change in a firm's classification depends on the reason for the change.

Background and Evidence

The evidence is that the employer was incorporated on March 3, 2000 with the original name of "T Company." The employer changed its name to "L Company" on May 23, 2003 and again, as part of the corporate restructuring in May 2005, changed its name to "R Company". During the period of time relevant to these appeal proceedings, the employer's name was "L Company." Hereinafter I will refer to the three different corporate names for the employer depending on the period of time described, and I will refer to "the employer" interchangeably with its three names.

The evidence is that on or about the time of the employer's name change to L Company, it acquired 100% of the outstanding securities of a subsidiary company, "C Company," a copper resource company that owned three Canadian mineral properties, including "H Property" which is located in British Columbia. C Company was not registered with the Board.

On October 13, 2004, the employer, under its then name L Company, made an internet application for registration with the Board. In that application, the employer did not provide any equipment keywords or complete the questionnaires, but did select a

product keyword of "762003," leading to CU 762003 (Administration of an Operation Conducted Outside B.C.) and the CU description. The CU description for CU 762003 stated in part as follows:

> SERVICES: Office for business outside province
>
> CLASSIFICATION SPECIFICS: This classification unit pertains to the administrative staff of employers whose operations are conducted totally outside the province.

In the CU description, the core job descriptions refer to "administrative staff."

After receiving the Board's internet application for registration, the Board registered the employer, L Company, in CU 704016 (Oil & Gas, Mineral Exploration, Prospecting). The description for CU 704016 gives examples of the types of business activities engaged in by employers in that classification: coal exploration, oil or gas exploration, mineral exploration, and prospecting. The core job descriptions for the CU classification include: engineer, geologist, prospector, geochemist, geophysicist and staker. Under "classification specifics," the CU description states in part as follows:

> Exploration firms may hold title to active land claims but engage in no exploration activities. To keep the tenure in good standing the firm must report some financial activity on each of the claims they have in the province. In these cases, where a firm has reported financial activity in the claim but is not actively engaged in or subcontracting physical exploration activities, then the firm can be assigned the Administration of an Operation Conducted outside of BC classification…
>
> Included in this classification unit are prospectors or other private or public mineral exploration companies who operate as oil & gas exploration general contractors or mineral exploration general contractors. These employers may engage in any or all exploration activities or may contract various activities to specialized subcontractors.
>
> There are generally three stages of exploration in the mineral industry – early-stage, advanced-stage, and delineation/development-stage. A brief definition, along with tasks and equipment used, is provided.
>
> Phase 1 Early-stage Exploration
>
> This phase includes prospecting and regional explorations surveys to define potential target areas for staking to establish mineral tenures. A property is then evaluated and explored to delineate trenching and/or drilling targets. Contract companies are hired for specific work such as

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geological mapping, rock and soil sampling, geophysical surveys, and line cutting.

Phase 2 Advanced-stage Exploration:

At this stage heavy equipment, such as diamond drills and excavators, are contracted to drill or expose bedrock. The mineral exploration companies employ geologists and labourers to study and sample the rock; and frequently includes geological, geophysical, and geochemical surveys which may be contracted out.

Phase 3 Delineation-stage Exploration:

When an orebody is discovered, it is drilled in detail. This often involves underground mining. The employees of the exploration company carry out the same tasks as at the advanced-stage, but may carry them out underground during or after the mining stage.

Logistics are also an important consideration. Transportation on some projects may be by helicopter, small plane, all-terrain vehicle, or snowmobile. Exploration projects are often based in camps and it is usually the employees of the exploration company who build or set up the camps.

The CU description includes under "exclusions" to the CU: employers solely or primarily engaged in "analysis of geological, geophysical, geochemical or seismic data or samples generated or collected by other employers."

In November 2004, the employer requested a review of its classification in CU 704016, stating that its understanding was that the classification was only applicable if more than 25% of its revenue was earned in British Columbia or it spent more than 25% of its payroll for British Columbia operations. The employer indicated that this was not the case, and therefore it requested a classification change to CU 762003 (Administration of an Operation Conducted Outside B.C.).

An ESR in the Assessment Department spoke to the employer's accountant and then, by letter dated January 20, 2005, advised that the Board was changing the employer's classification to CU 762003, effective January 1, 2003. The ESR indicated that she understood that the employer had no exploration activities in British Columbia, and that the employer did administration work only for exploration activity outside British Columbia.

The evidence is that before and at the time of its registration with the Board, the employer (L Company at the time) owned an interest in H Property. The third quarter

consolidated financial statements for L Company as of September 30, 2004 described the company as "An Exploration Stage Enterprise" and stated in part as follows:

> [L Company]. is engaged in the identification, acquisition, exploration and development of mineral resources. The *Company is considered to be in the exploration stage as it has not placed any of its mineral properties into production…*
>
> In order to better understand [L Company's] financial results, it is important to gain an appreciation for the *significant events*, transactions and *activities on mineral properties which had occurred during the period ended September 30, 2004 and to the date of this [Management Discussion and Analysis].* Activity during the period was primarily focused on a drilling program at [L Company's] R property…
>
> [*H Property*]
>
> *Maintenance work on preserving the core was completed during the quarter ended September 30, 2004*.
>
> [italic emphasis added]

On February 7, 2005, L Company issued a news release regarding its interest in H Property, which stated in part as follows:

> [L Company] acquired [H Property] in 2002 and completed a NI 43-101 compliant mineral resource estimate that included Measured and Indicated Resources of 231 million tonnes grading 0.28% Cu and 0.31 g/t Au and Inferred Resources of 53 million tonnes grading 0.28% Cu and 0.38g/t Au….
>
> [L Company] has initiated a $1 million exploration program at [H Property] designed to identify additional copper/gold porphyry targets that will add to the existing resources at [H Property] and support the construction of a large-scale mining operation.

The first quarter consolidated financial statements for L Company as of March 31, 2005 recorded costs of $22,603 for the H Property and stated in part that during that quarter, L Company:

> …initiated a data compilation and review process in preparation for an exploration program scheduled to begin during the second quarter. The exploration program will include an airborne geophysical program, surface mapping and sampling and a summer drilling program to evaluate resource expansion opportunities at [H Property] and other targets.

On March 14, 2005, the Assessment Department ESR wrote to the employer indicating that she had seen the February 7, 2005 news release and had now concluded that the employer was operating (beyond administrative activities) within British Columbia. Accordingly, the ESR changed the employer's classification to CU 704016 (Oil & Gas or Mineral Exploration, or Prospecting). The ESR determined that the change was necessary as a result of a distinct change in the employer's operations, as the employer's accountant had earlier indicated that the employer did not do any exploration or prospecting in British Columbia. Referring to Manual policy AP1-37-3, the ESR made the effective date of the classification and rate change February 7, 2005.

The employer's president responded by letter dated April 4, 2005, advising that its accountant had been correct in stating that the employer "undertakes no activity in British Columbia." The employer's president stated that there had been no change in the employer's operations and that the only business carried out on the British Columbia properties "is strictly administrative." The employer's president further advised that "When the time comes to begin work on any of these properties, all activities will be subcontracted. We will not work on these properties ourselves." The employer's president requested that the Board change the employer's classification back to CU 762003 (Administration of an Operation Conducted Outside B.C.). The matter proceeded to the Review Division.

In a written submission dated June 22, 2005 to the Review Division, the employer's chief financial officer clarified the employer's "current position with regards to its WCB status." The letterhead was that of R Company. The submission stated as follows:

> 1) The Company was formally known as [L Company] and owns, or has rights to, mineral properties located in South America and Canada.
>
> 2) [L Company] was restructured into four companies on May 19, 2005 and changed its name to [R Company].
>
> 3) Prior to the restructuring, [L Company] had a 100% interest in a subsidiary, [C Company]. [C Company] owns all three of the Canadian mineral properties. One of these properties, [H Property] is located in B.C. Pursuant to the restructuring, [C Company] was sold to a new company, [LR Company].
>
> 4) No exploration work was conducted on [H Property] prior to March, 2005. In March, 2005, [C Company] commenced exploration work on [H Property]. The exploration work is being carried out by outside contractors, all of which are incorporated companies. [C Company's] role in the exploration program is to act as overseer of the exploration program.

5) Subsequent to the restructuring, [R Company] owns one mineral property located in Chile.

The employer also reiterated as follows in its written submission attached to its request for review to the Review Division:

> It was our understanding that [CU 704016] is only applicable if more than 25% of our revenue is earned from BC or we spend more than 25% of our payroll for BC.
>
> We did not spend more than 25% of our payroll in BC and requested that our Class be changed to 762003, *Admin/Mineral Exploration Operating Outside BC*. Which we believe it was changed to.
>
> In March, we were then advised that because of a news release we issued stating that we acquired additional property surrounding our existing [H Property], this is considered a change in operations and have been re-assessed as Class 704016 again.
>
> We have not changed our operations.
>
> We sent a letter on April 4th, further explaining that, yes, [L Company] does own several properties in British Columbia. The only business carried out on these properties, is strictly administrative.
>
> When the time comes to begin work on any of these properties, all activities will be subcontracted. We will not work on these properties ourselves.
>
> We therefore are filing this Request for Review, to have our Class remain at 762003, *Admin/Mineral Exploration Operating Outside BC.*

The employer's position was that it (under its current name R Company) should be classified to Class 762003 (Administration of an Operation Conducted Outside B.C.).

In the August 10, 2005 Review Division decision, the review officer referred to Manual policy AP1-37-1 and found that the employer, in its later letters, had contradicted its earlier statements that it did not subcontract out exploration work. The review officer found that part of the employer's operations carried on through subcontractors included non-administrative work in British Columbia, and therefore it could not be assigned to CU 762003.

With respect to the employer's June 22, 2005 submission, the review officer noted that as a result of the corporate restructuring in May 2005, the employer's circumstances may have changed in that it no longer owns the H Property through its subsidiary, and now only owns property outside Canada. In confirming the Board's March 14, 2005

decision that the employer was correctly classified in CU 704016 effective February 7, 2005, the review officer concluded as follows:

> It is not clear what (if any) is the relationship of the employer to the company that acquired ownership of the subsidiary or whether the employer is still entering into subcontracts for the work done on the property. However, it is not necessary for me to resolve these questions as part of this review. The issue before me is the classification of the employer as of the date of the decision under review, not whether that classification continued to be valid after subsequent changes to the employer's operations. The Board will, if required, have to make a new decision on those changes.

The evidence is that L Company completed corporate restructuring on May 19, 2005 into four companies: R Company, LR Company, NP Company and GP Company. On March 6, 2006, the Board contacted LR Company and established a registration for that firm effective May 19, 2005 in CU 704016. The evidence is that with the corporate restructuring, the H Property devolved into ownership by LR Company. R Company now owns one mineral property in Chile. The Board also established registrations for NP Company and GP Company effective May 19, 2005 in CU 762003, on the basis that both companies have head offices in British Columbia involved in administrative operations, but are doing mining and/or exploration outside of the province.

With respect to C Company, evidence on file is that R Company's internal bookkeeper spoke with the Board ESR on March 8, 2006 and confirmed that C Company holds the H Property in British Columbia, and is affiliated with LR Company (C Company being a subsidiary of LR Company) which is marketing the development and doing the exploration. The internal bookkeeper stated that there is payroll "run through" C Company for accounting purposes.

On appeal to WCAT, the employer, now known as R Company, submitted as follows:

> 1) [R Company] is not the titleholder to the B.C. mineral property on which exploration work was conducted nor did this company conduct any exploration or contract the subcontractors performing the exploration work on the property.
>
> 2) [R Company's] role in the exploration work, which commenced in March 2005, was strictly as an overseer to the project and this role was terminated on May 19, 2005 when [R Company] underwent a restructuring.

The employer requests that it be assigned to CU 762003.

In its memorandum dated March 17, 2006, the assessment department policy manager submitted that the employer's framing of the issue is somewhat ambiguous, as it suggests that it seeks a current rather than historical remedy. The policy manager submits that the issue on appeal stems from the Review Division review of the Board's March 14, 2005 decision, and thus it is the employer's classification at the date of the Board's decision which is at issue, not whether the Board's decision continued to be valid after subsequent changes to the employer's operations.

The policy manager submitted that the Board has undertaken reasonable efforts to research the employer's operations, but that the employer has failed in its responsibility under Manual policy AP1-38-1 to provide timely, complete and accurate information to the Board regarding its operations and changes in its operations as they occurred. The policy manager notes that through the Board's own initiative, it discovered that the employer was representing that it had undertaken activities for and at the H Property. Relying on that evidence, the Board classified the employer in CU 704016.

The policy manager submits that in classifying the employer in CU 704016, the Board made reasonable assumptions based on facts not disclosed to the Board by the employer. Now that the employer challenges that classification, the policy manager submits that it is the employer's obligation to produce at least *prima facie* evidence to disprove the facts upon which the Board relied in its classification decision. In this regard, the policy manager refers to common law authorities for the principle that the onus of disproving an assessment rests on the person disputing it. See *Pollock v. Canada*, (1993) 161 N.R. 232 (F.C.A.), [1993] F.C.J. No. 1055 (QL); *Island Telecom Inc. v. Prince Edward Island (Regulatory and Appeals Commission)*, 1999, 176 D.L.R. (4th) 356 (P.E.I.C.A), [1999] P.E.I.J. No. 63 (QL); *Dwyer v. Canada,* 2003 FCA 322, [2003] F.C.J. No. 1265 (QL); *Trac v. British Columbia*, 2006 BCSC 355, [2006] B.C.J. No. 481 (QL); *B.D.N. Mechanical Ltd. v. British Columbia*, 2006 BCSC 78, [2006] B.C.J. No. 83 (QL). The policy manager submits that in the workers' compensation system, classification and assessment are closely linked. Therefore, he submits that these common law authorities are relevant, supporting the Board's position that it must of necessity rely on the information provided and the disclosures made by a firm on registration and thereafter as material changes occur.

The policy manager submits that although the employer has advanced the position that it was misclassified in CU 704016 as of March 15, 2005, it has failed to produce evidence of its operations in British Columbia at and prior to that date. The policy manager argues that notably, the employer has not addressed the evidence in its third quarter 2004 Consolidated Financial Statements that it had undertaken work on preserving the core at the H Property. Although the employer stated that it had not undertaken any exploration work on the H Property prior to March 2005, the assessment department policy manager submits that whether or not the work was "exploratory" in nature is immaterial with respect to classification in CU 762003 (Administration of an Operation Conducted Outside British Columbia). The policy manager submits that the description for CU 762003 applies only to those employers

whose operations (apart from administrative operations) are conducted totally outside the province. Because the evidence indicates that in 2004 the employer had undertaken operations on preserving the core at the H Property, in British Columbia, the Board was correct not to classify the employer in CU 762003. The policy manager submits that it is incumbent upon the employer to sufficiently set forth the activities it undertook with respect to its interests in British Columbia, and that it is not sufficient for the employer to merely assert that exploration was not undertaken.

The policy manager also referred to authorities supporting its argument that the employer had an obligation to provide specific evidence to support its position on appeal. See *WCAT-2005-02027* (April 21, 2005); *Canadian National Railway Company v. Assessor of Area 9 – Vancouver*, [1990] B.C.J. No. 570 (B.C.C.A.) (QL).

On the merits of the Review Division decision, the policy manager submits that the review officer correctly identified and applied Manual policy AP1-37-1 in finding that a firm's participation in an industry is measured by the operations it directly undertakes through the efforts of its own workers and the operations it vicariously undertakes through the efforts of others with whom it contracts. The policy manager submits that the evidence establishes that from at least May 23, 2003 through to May 19, 2005, the employer's business was not restricted to operations conducted totally outside British Columbia, as the evidence indicates that the employer had an interest in and undertook work with respect to the H Property. Thus, submits the policy manager, the employer was specifically excluded from CU 762003 (Administration of an Operation Conducted Outside British Columbia).

The policy manager further submits that for the time period relevant to the Board's classification decision of March 14, 2005, the best fit within the Board's employer classification system for the industry in which the employer was operating was CU 704016 (Oil and Gas or Mineral Exploration or Prospecting). The policy manager acknowledges that from and after May 19, 2005, it is more probable than not that the employer's business was restricted to operations conducted totally outside British Columbia. However, as the Review Division decision was confirming a Board decision of March 14, 2005, the policy manager submits that the Review Division decision was correct and should be confirmed.

As earlier noted, WCAT provided the employer with a copy of the policy manager's memorandum dated March 17, 2006, and gave the employer an opportunity to provide a rebuttal submission, but no response was received.

Reasons and Findings

I agree with the policy manager's submission that the employer's submission on appeal deals with matters that are not relevant to the Board's classification decision of March 14, 2005, which considered evidence regarding the employer's business activities in preceding months and changed the employer's classification effective February 7, 2005. The employer's appeal submission also does not deal with matters

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relevant to the Review Division's August 10, 2005 decision confirming the Board's decision. Instead, the employer's submission focuses on its activities and operations from March 2005 onward and does not respond to critical evidence about the activities undertaken by L Company on the H Property during the third quarter of 2004 and L Company's own characterization of its activities as "in the exploration stage." The employer's June 22, 2005 submission to the Review Division indicated that it was clarifying its "current" position regarding classification status, and I find that it has erroneously maintained that approach on appeal to WCAT.

I agree with and confirm the review officer's finding that the issue is the classification of the employer during the period relevant to the Board's March 14, 2005 decision, not whether the classification continued to be valid after that date and beyond the events related to the employer's corporate restructuring in May 2005. I recommend that the employer take note of the policy manager's acknowledgement in the March 17, 2006 memorandum that from May 19, 2005 onward, it is more probable than not that the employer's business was restricted to operations conducted totally outside British Columbia. The employer (now R Company) may wish to request a new classification decision from the Board relating to the time period after the Board's March 14, 2005 decision. That time period is not in issue in these appeal proceedings.

I also agree with and confirm the review officer's finding that CU 762003 (Administration of an Operation Conducted Outside B.C.) was not the appropriate industry classification for the employer at the time of the ESR's March 14, 2005 decision. The CU description for that industry classification is clear that it pertains to the administrative staff in British Columbia of employers whose operations are conducted totally outside British Columbia. In this case, L Company's own consolidated financial statements provide evidence that on the H Property, during the third quarter of 2004, L Company was involved in maintenance work on preserving the core. As Manual policy AP 1-37-1 indicates, it is immaterial for classification purposes whether L Company undertook this maintenance activity with its own workers or subcontracted the activity. This evidence alone indicates that L Company had operations in British Columbia beyond administrative activity during the period of time relevant to the ESR's classification decision, and accordingly it did not qualify for classification in CU 762003. There is other evidence to support this finding, given that L Company's February 7, 2005 news release referred to the company having completed an NI 43-101 compliance mineral resource estimate with respect to the H Property. I will refer to this evidence in more detail later in this decision. It is sufficient to state at this point that the evidence supports a finding that the company was involved in business activities, beyond administrative operations, in British Columbia during the relevant time period for the ESR's classification decision.

The next issue is whether the ESR correctly classified the employer in CU 704016 (Oil & Gas or Mineral Exploration, or Prospecting). Manual policy AP1-37-1 states that in assigning an industry classification, some of the factors to consider 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. As well, occupations of individual workers may be reviewed, but only as an indicator of the type of industry in which the firm is involved.

In this case, as the assessment department policy manager has pointed out, the evidence is not comprehensive regarding the employer's business activities during the period of time relevant to the ESR's March 15, 2005 classification decision. There is some evidence, however, and I am satisfied that I am able to decide this appeal on the basis of that evidence. I note that under Manual policy AP1-38-1, employers registered with the Board have an obligation to provide full and accurate information to the Board regarding their business activities and to update that information promptly if there are any material changes to their operations. In this case, the Board made its own inquiries and produced relevant evidence which the employer has failed to address either in the Review Division proceedings or these appeal proceedings. Whether pursuant to the common-law authorities regarding onus and burden of proof in taxation/assessment cases on which the policy manager has relied, or according to the more general and basic rules of evidence regarding burden of proof, I find that the employer has not provided sufficient evidence to justify its position that the ESR erred in her March 14, 2005 decision when classifying the employer in CU 704016. The available evidence supports the employer's classification in CU 704016.

Although the employer has maintained that exploration work on H Property commenced in March 2005, I disagree with that position. The evidence satisfies me that the employer (then L Company) was engaged in early-stage exploration activities as described in the description for CU 704016 well before that, during the time period relevant to the ESR's March 14, 2005 classification decision. It is not sufficient for the employer to simply state that no exploration work was done before March 2005, while failing to address the evidence regarding its activities as described in its February 2005 news release and its consolidated financial statements for the third quarter of 2004.

The February 7, 2005 company news release stated that after acquiring the H Property in 2002, the company had completed an NI 43-101 compliant mineral resource estimate that included measured and indicated resources as described in the news release. In my view, this type of activity falls within "evaluation" activities and "regional explorations" surveys referred to in "Phase 1 Early-stage Exploration" activities as outlined in the description for CU 704016. I also note the evidence in L Company's third quarter consolidated financial statements that it described itself as an "exploration stage enterprise," and included as a "significant" event or activity in the enterprise, the maintenance work on preserving the core on the H Property. Again, as indicated in Manual policy AP1-37-1, it is immaterial whether the employer contracted out the work activities or used its own workers to complete them.

The evidence from both the February 7, 2005 L Company news release and the third quarter 2004 consolidated financial statements supports a finding that the employer as L Company was engaged in mineral exploration activities within the scope and intent of

CU 704016. I have considered these types of activities (evaluation surveys and maintenance work on mineral property) in conjunction with factors such as the type of industry with which L Company would be in competition when engaging in these activities (mineral exploration), the type of process involved (evaluation and estimation of mineral property, maintenance of mineral property), and the type of occupations involved in conducting the activities (engineering or geological occupations or related to those occupations). In my view, the description for CU 704016 encompasses the employer's business activities, processes, occupations and general industry involvement. It was the "best fit" to classify the employer's industry activity as of March 14, 2005

In its submission to the Review Division, the employer referred to its understanding that CU 704016 would only be applicable if more than 25% of its revenue was earned in British Columbia or if it spent more than 25% of its payroll for British Columbia. These are not condition precedents for industry classification in CU 704016, and the employer is under a misapprehension in that regard.

For all the foregoing reasons, I confirm the Review Division's August 10, 2005 decision that confirmed the Board's March 14, 2005 decision changing the employer's industry classification from CU 762003 to CU 704016.

On the issue of effective date of the change, the ESR found that there had been a distinct change in the employer's operations that necessitated the classification change. Referring to Manual policy AP1-37-3, the ESR made the effective date of the classification change February 7, 2005. In this "rate up" situation, my interpretation of Manual policy AP1-37-3 in a "distinct change of operations" situation would make the effective date January 1, 2005. However, I note the employer's position that it did not change its operations, and I agree that on the evidence about its activities in 2004, the situation is not one of "distinct change in operations/rate up." Under Manual policy AP1-37-3, the reason for the need to change the classification would be "firm non-compliance" in the sense of a failure to provide timely, complete or accurate information to the Board about firm operations. Under the policy, in a "rate up" situation as this, the Board has a discretion to make the effective date of the change "up to three (3) years before the date of the decision to change the firm's classification." Given this policy, and noting that the Board has not put in issue the effective date of the classification change, I confirm as correct the Review Division decision (confirming the ESR's decision) that the effective date of the employer's classification change to CU 704016 is February 7, 2005.

Conclusion

I deny the employer's appeal and confirm the August 10, 2005 Review Division decision that the Board did not err in its March 14, 2005 decision changing the employer's industry classification to CU 704016 ((Oil & Gas or Mineral Exploration, or Prospecting), effective February 7, 2005.

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The employer has not requested reimbursement for expenses of the appeal proceeding and my review of the file does not indicate any such expenses. Accordingly, I make no award in that regard.

Heather McDonald
Vice Chair

HM/mm

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