Noteworthy Decision Summary

Decision: WCAT-2006-03676 **Panel:** H. McDonald **Decision Date:** September 27, 2006

Assessment – Payroll allocation to appropriate classification unit – Estoppel argument

This decision is noteworthy as the employer's estoppel argument regarding a payroll allocation change to another classification unit was successful to the extent that the employer was entitled to rely on the representations of the assessment officers, but only until the employer became otherwise aware, or should have been otherwise aware, that the Workers' Compensation Board operating as WorkSafeBC (Board) had officially clarified its practice and its position with respect to the payroll allocation for ski rental activities/payroll.

The employer, which operates a resort in British Columbia, appealed a Board Review Division decision that moved the payroll allocations for its ski rental operations from Classification Unit (CU) 741013 (General Retail) to CU 761038 (Ski Hills) for the years 1999 through 2003. CU 761038 has a higher base assessment rate than CU 741013.

The employer raised arguments based on the principles of natural justice, unlawful discrimination and estoppel. The panel denied the natural justice and unlawful discrimination arguments. The panel found that the estoppel argument was successful to the extent that the employer was entitled to rely on the representations of the assessment officers, and the fact that the employer included ski rentals in the retail classification as those assessment officers had directed, but only until the employer became otherwise aware, or should have been otherwise aware, that the Board had officially clarified its practice and its position with respect to the payroll allocation for ski rental activities/payroll. In this case, the employer knew, or should have known, about the Board's official position with respect to ski rental payroll allocation in 2004 when the Board completed its audit of the employer's records and sent its decision to employer's representative. The panel allowed the appeal in part, confirming the classification unit, but finding that the effective date of the payroll allocation change was January 1, 2005.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

WCAT Decision Number: WCAT-2006-03676
WCAT Decision Date: September 27, 2006
Panel: Heather McDonald, Vice Chair

Introduction

The employer operates a resort in British Columbia. It is appealing a Workers' Compensation Board (Board) Review Division decision dated July 8, 2005. In that decision, a review officer varied a December 22, 2004 decision by a Board audit manager. Among other things, the audit manager's decision advised the employer that the payroll allocations for its ski rental operations would be moved from Classification Unit (CU) 741013 (General Retail) to CU 761038 (Ski Hills) for the years 1999 through 2003. CU 761038 has a higher base assessment rate than CU 741013. In the July 8, 2005 decision, the Review Division confirmed the Board's decision to assign the employer's ski rental payroll to CU 761038. With respect to the effective date of the payroll allocation change, however, the Review Division decision varied the audit manager's decision by making the effective date of the change to CU 761038 January 1, 2002.

On appeal to the Workers' Compensation Appeal Tribunal (WCAT), the employer submits that the Review Division decision was based on incomplete and inaccurate information, as at the time the decision was issued, the Board's Assessment Department had just issued decisions, for three other employers in the same industry and with similar background circumstances, to allow their ski rental payrolls to continue to be allocated to CU 741013 (General Retail) through the 2005 calendar year. By way of remedy, the employer requests that WCAT vary the Review Division decision by allowing its ski rental payrolls to continue to be allocated to CU 741013 (General Retail) through the 2005 calendar year. In other words, the employer is asking that the effective date for the allocation of ski rental payrolls to CU 761038 be January 1, 2006 rather than January 1, 2002.

Issue(s)

Did the Review Division err in making January 1, 2002 the effective date for the allocation of the employer's ski rental payrolls to CU 741013 (General Retail)? If so, what should be the effective date for the change?

Jurisdiction

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

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

A management consultant represented the employer in these 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 credibility is not in issue, and in addition to reviewing the file evidence, giving the employer an opportunity to provide documentary evidence and written submissions would be sufficient to decide the appeal. The employer provided written submissions in this case.

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 October 17, 2005, and the employer responded to that submission. 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 sections 246(2)(i) of the Act. A WCAT panel has the discretion to invite such participation if it believes it would be of assistance in deciding issues in an appeal.

At one stage in these appeal proceedings, on March 2, 2006, I suspended the proceedings under section 252(1) of the Act. This was because there was evidence on file indicating that the Board's Assessment Department was undertaking an investigation on the issue of whether the Board was classifying ski rental operations on a consistent basis. I understood that the investigation was initiated by a request from Canada West Ski Areas Association (an industry association) for the Board to determine the appropriate allocation of ski rental payrolls to Classification Units. Given my understanding in that regard, I suspended the appeal proceedings, pending the outcome of the Board's investigation and report on proper allocation of ski rental payrolls.

Subsequently WCAT was advised that on February 13, 2006, the Board's Employer Classification Committee had issued a Resolution regarding the matter (*Resolution of the Employer Classification #2006/02/13-001 Re: The Classification of Ski Rental*). The employer requested WCAT to reactivate its appeal. WCAT reactivated the appeal and invited further written submissions from the employer and the Board's Assessment Department. The employer provided a further submission, but the Board did not.

Section 253(1) of the Act states that on an appeal, WCAT may confirm, vary or cancel an appealed decision or order. Section 250 of the Act provides that WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. WCAT has jurisdiction to consider the record in the proceedings before it, to consider new evidence, and to substitute its own decision for the decision under appeal. Thus, this is an appeal by way of a rehearing. This is the final level of appeal.

Further, WCAT must make its decision based on the merits and justice of the case, but in so doing, it must apply a policy of the board of directors that is applicable in the case.

Section 251 provides that WCAT may refuse to apply a policy only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations. If a WCAT panel considers that a policy should not be applied, that issue must be referred to the WCAT chair, and the appeal proceedings must be suspended until the procedure described in section 251 (involving the referral to the WCAT chair and/or a referral to the board of directors) is exhausted.

The law applicable in these appeal proceedings is found in the Act. The applicable policy is in the current *Assessment Policy Manual* (Manual) that came into effect on January 1, 2003, as the Board's decision regarding effective date of the allocation of the ski rental payroll to CU 761038 (Ski Hills) was made in December 2004.

Background and Evidence

The employer registered with the Board effective March 1993 and the Board assigned its operations to the former CU 062703 (Auto Courts, Campgrounds, Motels, Resort Cabins, Trailer Courts, Mobile Home Park or other Tourist Resorts.)

The evidence is that in 1998, a Board assessment officer contacted the employer and, according to the Assessment Department's submission in these proceedings, "offered advice" regarding the allocation of the employer's payroll. The employer characterizes the officer's role as having given "explicit instructions" in the context of an off-site audit. (The assessment officer did not visit the employer's premises, but communicated with the employer by telephone, fax machine, and e-mail.)

In his communications with the employer, the Board assessment officer gave the employer a spreadsheet template or matrix for allocation of payroll, based on the information he received from the employer's then payroll administrator. The assessment officer also added, effective January 1, 1999, two CUs: CU 062203 (Operation of Cable Car, Gondola) and CU 067302 (Retail Stores) to the employer's account. The effect of this was that for the 1999 year (and thus immediately prior to the change to the Board's classification system on January 1, 2000) the employer had three industry classifications: CU 062203, CU 067302 and CU 062703 (Auto Courts, Campgrounds, Motels, other Tourist Resorts etc.)[1]

The employer allocated its 1998 payrolls to the "Resort" CU 062703, as that was the only classification established by the Board for that calendar year. Based on the assessment officer's advice and template, the employer allocated its 1999 payrolls to CUs (also then identified as CLSBINs) 062203, 067302 and 062703 and prorated its administration payroll according to those three classifications. Although the Assessment Department says in its submission that the headings on the template were based on activity and did not necessarily correspond with the CU names, the employer advises that the assessment officer's handwriting next to each departmental payroll line

[1] See employer's history reviewed in *WCAT-2006-00955* (February 27, 2006)

was "explicit, unambiguous and clearly associated with" the CU names. By way of example, the employer says that "In particular, [the assessment officer] wrote "RTL" (for Retail) next to all departmental payrolls involved with the rental of ski equipment and all other retail activities."

I have searched the Board's employer e-file system for this employer's account, and thereby located in audit working papers for 1998, a memorandum dated November 18, 1998 sent by the employer's payroll administrator to the Board's assessment officer, in which she enclosed a spreadsheet listing each department and its payroll location. There are handwritten notes on the spreadsheet, next to departmental payrolls, which I take to be in the assessment officer's handwriting. I agree with the employer's interpretation of the notes that the assessment officer was indicating that departmental payrolls involved with the rental of ski equipment (and all other retail activities), were to be allocated to the retail classification, as the handwritten notes also provided a type of "legend" in which "RTL" corresponded to "673." This supports the employer's submission that it was a reference to the 067302 (Retail Stores) classification.

As aforesaid, based on the assessment officer's advice and templates, the employer allocated its 1999 payrolls to the three industry classifications and also prorated its administration payroll between those three classifications. In particular, based on the instructions from the Board's assessment officer, the employer allocated its ski rental payroll to the retail classification.

The Board's new classification system took effect on January 1, 2000 and in May 1999, the Board sent the employer a letter advising that it would be classified in the new system as follows:

CU 741013 (General Retail, not elsewhere specified)

CU 761008 (Cabin, Cottage, Lodge, Resort or other Overnight Rental Accommodation)

CU 761038 (Ski Hill or Gondola Ride)

The Assessment Department's submission states that the employer's allocations of payroll for 2000 to 2004 inclusive did not incorporate the CU changes that took effect on January 1, 2000. The employer responds that there were only slight changes to the "titles" of the new CUs compared to the descriptive titles in the former CUs (or CLSBINs). The employer says that the three classifications were essentially the same classifications. Therefore, for the 2000 through 2004 calendar years, the employer's payroll administrator continued to allocate its departmental payrolls along the same classification lines (that is: Retail; Resort; Ski Hill/Gondola Ride) as she had been instructed to do by the Board's assessment officer in 1998. In particular, the employer continued to allocate its ski rental payroll to the retail classification.

In 2001, another Board assessment officer conducted an on-site audit of the employer for the 1999 assessment year, and confirmed that the employer had correctly allocated its 1999 payroll according to the instructions given by the other assessment officer in 1998. By that time the new 2000 classification system was in effect, and although the auditor was dealing with the 1999 audit year, he titled the three CU columns using the new classification system terminology, including CU descriptions and numberings. Thus, the employer continued to report its ski rental payroll in the general retail classification.

In October 2000, the employer's representative, while acting as the representative of another firm (identified as firm "P"), wrote to the Assessment Department and requested a director's review of one element of a manager's decision to include P's ski rental payroll in the ski hill classification rather than the general retail classification. By letter dated May 22, 2001, an Assessment Department manager responded to that request by determining that the Board would permit P to allow the ski rental payroll to be allocated to the retail classification effective January 1, 1999.

In its submission in these appeal proceedings, the Assessment Department says that in reaching his conclusion in the May 22, 2001 letter, the manager stated that he had reviewed a previous decision applying to the employer (the employer in this appeal) and another firm, which decision allocated their ski rental operations to the retail classification. He determined that this previous decision was based on the following:

1. The rental operations were part of the retail store operations that the employers had in the village;

2. There were other firms in the village that also granted ski rental equipment in addition to their retail sales and those firms were classified in the retail classification.

3. By allowing the retail classification there was no competitive advantage for one firm over the other, the playing field was levelled and each firm's rate would only be governed by its own experience rating within the industry.

The Assessment Department's submission in these proceedings relates that in the May 22, 2001 letter, the manager expressly stated that his decision was based on the reasoning of the assessment officer in the previous decision, that his decision was in no way to be considered to be precedent-setting, and that all future appeals of this nature would have to be reviewed and adjudicated based on the merits of each individual case. In its submission in these proceedings, the employer says that the Assessment Department has recited accurate facts in describing the May 22, 2001 letter, but says that the description is incomplete. The employer indicates that the May 22, 2001 letter also stated that the manager had thoroughly investigated the operations of three other firms in P's immediate vicinity, that he had determined that they competed directly with P in offering ski equipment rentals and that all three of them had only the retail

classification. The employer submits that in reaching his conclusion in the May 22, 2001 letter, the manager relied not only on the other assessment officer's reasoning in the previous decision, but also "equally (or more) on his own findings."

At this point I observe that in their submissions in these proceedings, neither the Assessment Department nor the employer's representative included a copy of the May 22, 2001 letter, but instead offered their own descriptions of what it said. From the employer's e-file, I see that in a letter dated February 14, 2005 to the Board's Assessment Department, the employer's representative states that he was enclosing a copy of the May 22, 2001 letter (blacking out the identities of the other firms referenced in the letter for "privacy reasons"), but that enclosure was not scanned onto e-file.

I could not find on the employer's e-file any copy of the May 22, 2001 decision letter, not even a severed version of it as apparently enclosed by the representative in his February 14, 2005 letter to the Assessment Department. This illustrates the limitations of e-file, and the importance of advocates for appellants including copies of all documentation to which they refer in their appeal submissions. It may have been helpful for me to have been able to read the actual letter, as an aid to interpreting the manager's reasoning in reaching his conclusion. Further, as the submissions in these proceedings only refer to firm "P", I do not know the identity of P, and therefore I have been unable to access P's employer e-file to try to find the letter there. It would have been helpful even if the employer's representative had indicated the identities of the other firms referenced in the May 22, 2001 letter. He knew them, because he blacked them out when enclosing a copy of the letter in his February 14, 2005 submission to the Board's Assessment Department. I find it curious that the representative would fail to identify them for me or that he would have bothered to black out the identities for the Assessment Department. Since the May 21, 2001 letter was written by an Assessment Department manager, there would be no privacy issue in simply reminding the department about the letter by enclosing a complete copy for them. Further, it is difficult to see any privacy issues under the *Freedom of Information and Privacy Act* (FIPPA) requiring the representative to hide the identity of the other firms from his employer client in this case.

To move on with the chronology of events, by letter dated August 26, 2004 the employer's representative requested the Board to "correct" the employer's payroll reports since 1999. He said that the reported payrolls were incorrect in part because they were based on a flawed template for allocating departmental payrolls that had been supplied by a Board assessment officer in 1999.
This led to the Board conducting audits of the employer's payroll for the years 1999 to 2003, and the Board's decision letter dated December 22, 2004 in which the audit manager determined that the employer's payroll for ski rental operations should be allocated to CU 761038 (Ski Hill or Gondola Ride) instead of CU 741013 (General Retail), for the years 1999 through 2003. In the December 22, 2004 letter, the audit manager stated that he was including ski rental operations in the ski hill classification rather than the general retail classification because:

a. The ski rental operations do not operate in conjunction with the retail operations during the ski season.

b. At the end of each season they sell their rental equipment and then purchase new equipment for the following year.

c. The ski rental operations are considered to be supportive of the ski hill operations.

d. The "reason for being" of the ski rental operations is to support the ski hill operations and to ensure the ski hill patrons can rent equipment to ski.

The end result of the audit was the employer had overpaid some assessments and the Board would be issuing a cheque to the employer to refund the overpayment.

The evidence is that as of December 22, 2004, the date of the audit manager's decision, there were 36 firms with the classification CU 761038 (Ski Hill or Gondola Ride).

By letter dated February 14, 2005, the employer's representative requested the audit manager to reconsider one element of his December 22, 2004 decision, as "additional evidence and information." The representative advised that the inclusion of ski rental operations in the ski classification rather than the retail classification, retroactive to 1999, appeared:

1. To directly conflict with the May 22, 2001 manager's decision on the same issue, made with respect to other employers, one of whom was a client of the representative;

2. To be "eminently unfair," because no ski hill employers were ever notified that the term "ski rentals" had been added as a supportive activity to CU 761038 (Ski Hill or Gondola Ride) in 2001, almost two years after the CU description for Ski Hills was first circulated to employers;

3. Not to take into account the fact that the employer directly competes for ski and equipment rentals with at least one other firm ("C") in the same town at the base of the mountain. The representative stated that C was classified in the general retail classification CU 741004, and that numerous clients skiing on the mountain choose to rent their skis and equipment from C rather than the employer's ski rental location. The representative submitted that C would have an unfair competitive advantage if the employer was required to allocate its ski rental payrolls to the ski hill classification rather than the general retail classification.

By letter dated March 10, 2005, the Assessment Department's policy manager declined to reconsider the December 22, 2004 audit manager's decision, advising that the Board was then undertaking a "comprehensive investigation on the very issue that is before me in order to ascertain whether the Board is classifying ski rental operations on a consistent basis." The policy manager concluded that it would be inappropriate to render a decision on reconsideration at that time.

By letter dated April 27, 2005, the Assessment Department's policy manager undertook a reconsideration of a February 2005 decision that retroactively assessed the ski rental payroll of another firm (firm "S") into the general retail classification for 2002, 2003 and 2004. In its submission in these proceedings, the Assessment Department stated that based "on the unique circumstances of that case," the policy manager determined that it would be "neither meritorious nor just for the Board to retroactively reallocate [S's] 2002, 2003, and 2004 payrolls respecting ski rentals from CU 741013 to CU 761032 or both." Therefore in the April 27, 2005, the policy manager set aside the February 2005 decision.

The employer advises that the very next day, April 28, 2005, another member of the Assessment Department also issued a reconsideration decision to another firm, (firm "C") with similar, but not identical circumstances. The employer submits that the wording was almost identical to the wording of the policy manager's April 27, 2005 letter with respect to S. The employer advises that firms S and C are two of the three firms alluded to in its submissions in these appeal proceedings. The employer advises that the third firm (firm "W") was audited in June 2005 and the assessment officer decided to leave W's ski rental payrolls in the retail classification unit, indicating that "The Rentals payroll will be assessed in the Ski Hill classification effective January 1, 2006 to be consistent with other appeal outcomes in the industry."

No copies of the April 27, 2005 or April 28, 2005 reconsideration decisions were provided in these appeal proceedings. No account numbers or other identifying information was provided for me to identify Firms S, C or W, and thus I have not been able to access the appropriate employer e-files to try to find those decisions myself to read. I request that in future appeal proceedings, the employer's representative include copies of all documentation to which he refers and upon which he relies. This assists a WCAT panel in making a decision based on a thorough appreciation of the relevant evidence. In any event, apart altogether from the lack of identifying information about other firms, there remains the critical problem that the employer's representative has not explained or supported his statement that the circumstances of the other firms were "similar, but not identical" to that of the employer, linking that explanation with his argument alleging unfairly discriminatory treatment by the Assessment Department.

The employer requested the Review Division to review the December 22, 2004 audit manager's decision. In its submissions, the employer made the same points that it made in its February 14, 2005 letter to the Assessment Department requesting a reconsideration of the December 22, 2004 decision. In addition, the employer advised

the Review Division that it competes with at least one other firm in the same area that also rents ski equipment, but is classified in CU 741004 (Bicycle Shop or Sports Shop Equipment Rental.)

The Review Division decision dated July 8, 2005 noted that the employer's submission raised two issues: whether the classification of the equipment rental activities was correct and if so, the effective date of the change.

In confirming the Board's decision that the employer's ski rental payroll was correctly allocated to the ski hill classification, the review officer noted that although he was not strictly bound by the CU descriptions (which are not Board published policy), it would not be appropriate for him to disregard them in the absence of good reason, or to require that a specific process should be followed in changing the descriptions. He stated that the fact that the Board may in the past have adopted a different practice does not invalidate the change to the CU description. Further, the change in 2001 to allocate ski equipment rental activity to the ski hill classification rather than retail generally seemed to be a reasonable and justifiable decision. The review officer remarked as following, in concluding his reasons to confirm the classification change assigning the employer's ski rental activities to the ski hill classification:

> …I appreciate the concerns expressed by the employer about its ability to compete. Policy AP1-37-1 requires the Board to consider who are an employer's competitors and the effect of a classification on the ability to compete, but these are not the sole factors. Employers who choose to undertake several types of business take the risk that the Board will not be able to assign a separate classification to each activity and that therefore an activity may be associated with another activity that gives rise to competitive difficulties for the employer. However, the employer may derive other advantages from carrying on different activities within one company that are not available to firms carrying out only one line of business. The approach taken by the Board may ensure that all operators of ski hills that also rent equipment will be treated the same, whether or not they have competitors renting equipment in the same area. Presumably, there is competition between ski hills as well as between ski hills and other types of business.

With respect to the effective date for the classification change, the review officer observed that the December 22, 2004 decision did not refer to applicable policy or give reasons for the choice of an effective date of January 1, 1999. The review officer referred to policy AP1-37-2(f), which provides that the addition or deletion of a CU in accordance with multiple classification policy is a change in classification, and that the effective date should be determined in accordance with policy AP1-37-3 (Classification Changes.)

The review officer stated that in the case at hand, there had been no addition or deletion of a CU. He observed that policy AP1-37-3's explanatory notes referred to the Board making changes "with respect to all or part of" a firm's operation. He also observed that the Board had changed the employer's classification with respect to part of its operations, namely, the ski rental operations. The review officer noted that if policy AP1-37-3 applied, it would make a significant difference as it would limit the Board's ability to make the changes retroactive.

In the result, the review officer concluded that policy AP1-37-3 did not apply, as he inferred from the wording in policy AP1-37-2(f) that with respect to the effective date for a change in classification policy, policy AP1-37-3 would apply only to the "addition or deletion of a classification unit in accordance" with policy AP1-37-2. The review officer decided that policy AP1-37-3 would not apply to the case at hand, which did not involve an addition or deletion of a classification unit. In that regard, he reasoned as follows:

> Whenever an employer is assigned more than one CU, decisions will have to be made about which activities are assigned to which CU. These assignments may be based on different factors, including factual information as to the nature of an activity and its purpose, comparisons between an activity and other activities of the employer and the Board's policy or practice as to how it normally assigns an activity. Board officers may change assignments on the basis of their reviews of employers' account books because of changes in these factors. The principles in Policy AP1-37-3 should not be invoked just because an auditor reassigns a certain amount of payroll from one CU to another. Such reassignments could, for example, be due to simple factual mistakes or a misunderstanding by the employer as to how payroll should be reported. In the present case, where though there is no change to the CUs, an almost separate part of the employer's business is reassigned to a different CU, the situation may feel much like a classification change covered by Policy AP1-37-3. However, it would be difficult in practice to differentiate between reallocations of payroll in such situations and reallocations due to simple factual errors.

The review officer decided that the applicable policy in this case is AP1-188-1, which deals with audits. That policy states:

> The purpose of an audit is to verify compliance with legislation and policy requirements during a prior period. Therefore, legislation and policies in effect during the time period under review in the audit will be used to determine compliance, unless otherwise specified by a subsequent legislation or policy change.

The review officer observed that although the policy became effective on April 1, 2005, it states general principles that have always existed. He also noted that although the policy only refers to law and policy, the principles apply equally to Board practice not covered by Board policy. Thus the audit in this case, conducted in 2004, for the audit years 1999 to 2003, would be concerned to see that the law, policy and Board practice as it existed in those years would be followed, not the law, policy and practice in effect in 2004.

The review officer interpreted the Board's submissions as indicating that the May 22, 2001 management decision was wrong in allocating ski rental payroll to the retail classification, and that the employer and its representative knew that the regular Board practice was to assign ski rental operations to the ski hill classification. The evidence before the review officer illustrated that the situation was ambiguous before January 1, 2002, because on one hand the Assessment Department did correspond with the employer and its representative before May 22, 2001 advising that ski rental operations should be allocated to the ski hill classification, but on the other hand, the May 22, 2001 decision assigned ski rental operations in one firm to the general retail classification (while referring to two other cases where the same assignment was made).

The review officer decided that the evidence did not support a finding that the Board did have a clear practice, before the ski hill CU description was changed in 2001, to assign ski rental operations to the ski hill classification. He found, however, that the published CU description did establish a clear Board practice, by 2002, that ski rental activities be included in the ski hill classification. Therefore the review officer concluded that the Board was correct to reallocate the employer's ski rental payroll commencing in 2002, but that for the period 1999 to 2001, there was no clear Board practice requiring the allocation of ski rental payroll to the ski hill classification. The Board's audit of the employer in 2001 did not change the employer's payroll allocations, and the review officer found this fact, together with the Board manager's decision of May 22, 2001, to be further evidence confirming that there was no clear Board practice on the matter before 2002.

Therefore in his July 8, 2005 decision, the review officer varied the effective date of the change in the employer's payroll allocation from January 1, 1999 to January 1, 2002.

On July 22, 2005, the employer's representative wrote to the Assessment Department's policy manager and advised that the review officer would not have known that recently the department had allowed at least two other ski resort firms, with similar background circumstances, to continue to allocate their ski rental payrolls to their general retail classification through 2005. The representative submitted that the employer was "entitled to the same treatment as its peers and competitors and that in fairness it too should be allowed to continue to allocate its ski rental payrolls" to the general retail classification through 2005. I note that in his submission to WCAT dated September 22, 2005 in these appeal proceedings, the representative advised that in addition to representing the employer, he was also the representative for the other ski resort firms

in question who had received what he characterized as more favourable treatment from the Board.

By email dated September 7, 2005, the policy manager of the Assessment Department responded to the representative's July 22, 2005 request, advising that because the employer had initiated an appeal to WCAT of the Review Division's July 8, 2005 decision, the department would not address the employer's request. In another email of the same date to the employer's representative, the policy manager advised that with respect to the employer's request regarding allocation of its ski rental payrolls through 2005, the Assessment Department was expecting the Canada West Ski Areas Association to address the issue of ski rental payroll in the near future. The policy manager stated that "as it appears that the entire industry has concern with the underlying policy and practice, I have delayed determination in order to take into consideration the industry's input on this issue."

The evidence is that the Assessment Department began discussions in late October 2005 with the Canada West Ski Areas Association regarding, among other things, the allocation of payroll respecting ski rental to the general retail classification.

On October 12, 2005, the same review officer in the Review Division who had issued the July 8, 2005 decision, which forms the basis of this appeal by the employer, also issued two other decisions: *Review Division Decisions #R0053396* and #*R0053404*.

In *Review Division Decision #R0053396*, the Board decision under review concerned an audit of a ski resort firm for the years 2001 to 2003 inclusive. The Board officer had deleted the general retail classification CU 741013 and found that the payroll relating to ski rentals and retail operations should be allocated to the ski hill classification CU 761038. The Board made these changes effective January 1, 2006. On review, the firm disputed the deletion of the general retail classification. In confirming the Board's decision, the review officer stated as follows:

> In 2001 "ski rentals" were added to the description of CU 761038 as a supportive activity. The employer states that this was done without consultation with or notification to the industry; the change to the CU description should not have been done without consultation with the persons affected; the decision creates an unfair competitive disadvantage for ski resort operators as a whole; and the Board should continue to allow ski rental payroll to be allocated to CU 741013 pending review of the issue and consultation with employers. The employer also relies on a May 22, 2001, letter from an Assessment Department Manager allowing ski rentals to be allocated to the retail classification.

The review officer then referred to his comments in *Review Division Decision #28597* (the July 8, 2005 decision under appeal in these proceedings), and found that the Board

was correct in allocating the firm's ski rental and retail operations payroll to the ski hill classification.

In *Review Division Decision #R0053404*, the relevant facts were essentially the same as in *Decision #R005396*, with the Board auditing a ski resort for the years 2002 through 2004. The firm was also disputing the deletion of the general retail classification from its account. The review officer's reasoning was the same. Again, the Review Division confirmed the Board's decision to delete the general retail classification from a firm's account and to allocate payroll related to retail operations and ski rentals to the ski hill classification, effective January 1, 2006.

The Employer Assessment Classification Committee considered submissions from the Assessment Department as well as Canada West Ski Areas Association and two major ski hill firms. It is unnecessary for me to describe in detail the content of the submissions or the various options put forth for the Committee's consideration. It is sufficient to relate the *Resolution* that was passed by the Committee on February 13, 2006. The Committee resolved as follows in *Resolution 2006/02/13-001*:

> 1. Ski Rental is not a distinct industry but is supportive of the ski hill industry, the retail sales industry and the sports equipment rental industry.
>
> 2. Ski Rental, when conducted in conjunction with the operation of a Ski Hill, is appropriately classified as a supportive activity in Classification Unit 761038 [Ski Hill].
>
> 3. Ski Rental, when conducted as a supportive activity of an independent retail operation, is appropriately classified in Classification Unit 741013 [General Retail].
>
> 4. Ski Rental, when conducted in an independent sports equipment operation, is appropriately classified in Classification Unit 741004 [Bicycle Shop or Sports Equipment Rental].

Thus the *Resolution* did not address, as I had been anticipating when I suspended these appeal proceedings, the issue of effective date for reallocation of ski rental payroll to the ski hill classification.

Submissions

The employer's submission is that it is unjust for the Board's Assessment Department to treat the employer any differently than the "three other employers in this industry with similar circumstances." The employer says that it is a victim of timing and circumstance. It requested a review from the Review Division of the Board's December 22, 2004 decision in order to preserve its review/appeal rights, simply in

order to meet the 90 day deadline for review. The employer says that the Assessment Department's policy manager then declined to reconsider the December 22, 2004 decision, on the basis that review proceedings were underway.

Shortly thereafter, the Assessment Department completed its audits/reconsiderations of the other three employers, and decided to allow their ski rental payrolls to continue to be allocated to the general retail classification through 2005. The employer says that the Assessment Department had the same discretion to apply the same treatment to the employer, but declined to do so, relying on the review proceedings as a technical roadblock. The employer says that it would have simply withdrawn its review and appeal applications if the department had exercised its discretion "rather than non-cooperation."

The employer says that it has not been treated the same as its peers and competitors, and that the review officer did not know about the other employers with "similar circumstances" being treated differently than the employer nor did he know about the Board's consultation with the ski industry regarding appropriate allocation for ski rental payrolls. Thus, the employer requests that the review officer's decision be varied to allow the employer's ski rental payroll to continue to be allocated to the general retail classification, at least through the 2005 calendar year.

The Assessment Department submits that the review officer correctly applied the Act and Board published policy in confirming the Board's December 22, 2004 decision to make the effective date of the employer's ski rental payroll allocation change to CU 761038.

The Assessment Department characterizes the employer's allegations of "technical roadblocks" and unfair discrimination as natural justice issues. The department submits that in light of section 96(5) of the Act, it had no discretion to reconsider the Board's December 22, 2004 decision after the employer initiated its request for review of that decision to the Review Division. Further, the department submits that the employer's "technical roadblocks" allegation is premised on the belief that the department can agree with an employer to resolve an issue conditional on the employer withdrawing its request for review to the Review Division or its application to appeal to WCAT. The department's position is that for the department to make such an agreement would constitute an improper interference in the appellate process and would bring the Board's administration of the Act into disrepute. The reason that the department does not consider or reconsider a decision before the Review Division or WCAT is because of section 96(5) of the Act and also to avoid a multiplicity of proceedings and the possibility of conflicting decisions.

The Assessment Department observes that because 3 out of 36 firms assigned to CU 761038 (Ski Hills) have been allowed to allocate payroll in a certain way as a result of circumstances particular to their individual cases, the employer alleges that it is unjust and unfairly discriminatory for the Board to not also allow the employer to allocate

its payroll in the same way. The department submits, however, that discrimination only exists when persons in identical situations are treated differently for no valid reason. (See *Appeal Division Decision 335*, (1981) 5 W.C.R. 101.) The department notes the circumstances of the other three firms are not identical to that of the employer, and indeed, the employer has only alleged "similar" circumstances. The department also says that there was a valid reason for the differential treatment – at the time the department had undertaken a comprehensive investigation on the very issue of consistent treatment for ski rental operations, and was trying to address the issue globally and not on the basis of three or four firms in the industry. The department notes that in the *Review Division Decisions #R0053396* and #*R0053404*, the review officer was comparing the class as a whole (not just 3 or 4 resort firms out of 36) when he was discussing the importance of not creating an unfair competitive disadvantage for ski resorts.

With respect to the employer's reliance on the instructions and template prepared by a Board assessment officer in 1998, the Assessment Department submits that as the assessment officer did not provide a legal opinion, the defence of "officially induced error" is not available to the employer. See *Regina v. Cancoil Thermal Corporation and Parkinson*, (1986) 27 C.C.C. (3d) 295, [1986] O.J. No. 290 (Ont. CA) (QL) (the Cancoil case.)

The Assessment Department submits that with respect to at least one of the other three firms, the Board believed that the circumstances gave rise to the principle of *estoppel in pais*, and therefore the Board was estopped from relying on its established practices respecting the allocation of payroll relating to ski hill rental operations. The department submits that in this case, it is questionable whether the assessment officer's template and instructions were intended to induce a course of conduct by the employer; that the employer made the allocations because of the assessment officer's actions and representations; and/or that the employer's allocation was to its detriment. In any event, the department submits that the assessment officer's template and instructions could only apply to the facts then in place, and that any reliance on them by after the introduction of the new classification system in the year 2000, was not reasonable. As the review officer concluded, since the Board practice in 2002 and 2003, evidenced by the published CU description, clearly required that the ski rental activities be included in the ski hill CU, the Board was correct to reallocate the employer's ski rental payroll for those years.

In the result, however, the Assessment Department concluded its submission by taking no position on whether WCAT should confirm, vary or cancel the Review Decision of July 8, 2005.

The employer's response was to concede that section 96(5) may have indicated to the Assessment Department that there was no room for discretion in this case, and further, that for the department to change its position and require an appellant to withdraw a request for review or an application to appeal, might constitute interference with the

review and appeal system. The employer also stated that it did not knowingly rely on "officially induced error" argument in these proceedings.

The employer disagrees with the Assessment Department's reliance on the consultative process with respect to the industry, as the employer says:

> …If the assessment department is addressing the issue globally, surely it is imperative that until the issue is resolved they must not initiate differential treatment among the 36 employers in that universe. To our knowledge, not a single other one of the 36 firms, many of whom we represent, has been assessed for its ski equipment rentals in the same manner as [the employer.]

The employer submits that the facts in this case support an estoppel by the Board. Further, the employer reiterates that after the assessment officer formulated his template and gave his instructions, the only thing that changed from 1999 to 2000 and beyond was the slight wording changes to the titles and the numberings of the classifications. This was confirmed by the audit in 2001 by a different Board assessment officer who confirmed, on site, that the 1999 payrolls had been properly allocated according to the instructions given by the former officer in 1998. That auditor, although dealing with the assessment year 1999, titled the three CU columns using the new year 2000 descriptors and numberings.

Reasons and Findings

The employer has not alleged that the Review Division decision dated July 8, 2005 erred in law in applying the Act or Board policy, but rather has raised new arguments based on the principles of natural justice, unlawful discrimination, and estoppel, referring in that regard to evidence of which the employer says that review officer would not have been aware. These arguments apply with respect to whether the Board can rely on its practice with respect to the allocation of ski rental activities/payroll as of the date that the CU 761038 (Ski Hill) description was changed to clarify that those activities were supportive of the ski hill industry.

I agree with the interpretation and application of law under the Act and Board policy in the Review Division decision insofar as the review officer responded to the submissions made by the employer at that time. Therefore, I restrict my following comments to the new arguments raised by the employer in these appeal proceedings.

With respect to the "natural justice" arguments made by the employer, I am satisfied that they do not justify a change to the Review Division's July 8, 2005 decision. First, I agree with the Assessment Department's point (and it appears that the employer has also come around to understanding the point), that sections 96(5)(b) and (c) of the Act prevent the Board from reconsidering a decision or order if a review has been requested or an appeal has been filed in respect of the decision or order. I also agree with the

Assessment Department's submission that it does not constitute unfairness, a failure to exercise reasonable discretion, or putting in place technical roadblocks for the department to refrain from negotiating agreements with firms to withdraw their applications for review or appeal in exchange for offering an informal resolution of the matters at issue on review or appeal.

I also deny the aspect of the employer's appeal that alleges unjust discrimination by the Assessment Department in failing to treat the employer (with respect to effective date of the allocation of ski rental payroll to the ski hill classification) the same way as three other firms in the industry "with similar circumstances." Simply put, the employer has failed to make its case on this issue.

In alleging unfair discrimination, it is essential that an appellant present all the relevant evidence in sufficient detail for the appellate tribunal. See *WCAT-2004-05845* (November 5, 2004), reported on the WCAT website www.wcat.bc.ca, in which a reconsideration panel observed that: "It is not the responsibility of a WCAT panel to evaluate an appeal, and then to notify the parties of the weaknesses of the case for the purposes of obtaining further evidence. While WCAT is an inquiry body, and has a discretion to seek further evidence, it is not obliged to do so." In this case, evidence relevant to support the employer's allegation of unfair discrimination would include a description of the relevant situations and circumstances of all the persons in the class among which unfair treatment is alleged (in this case, that would mean at least the three other firms to which the employer referred in its submissions,) including the way in which the situations and circumstances were similar and dissimilar to the employer.

But a failure to meet the evidentiary burden is only one flaw in the employer's submissions. In addition to providing relevant evidence, in order to make a case of unfair discrimination, the employer would then need to explain the aspect of unfairness in the different treatment (the "discrimination,") indicating why the dissimilar circumstances or situations were irrelevant to the issue of reallocation of ski rental payroll and/or effective date of the reallocation, and why the similar circumstances or situations were relevant to that issue.

In these proceedings, both the employer and the Assessment Department have agreed in their submissions that the circumstances of the three firms referred to by the employer were not identical to those of the employer. The Assessment Department has referred to one of the other firms fulfilling the criteria of an estoppel claim. The department stated that in addition to different circumstances of the several firms concerned, it also took into account that the Board was in the process of trying to address the concerns of ski resort operators by considering the issue of ski rental payroll allocation on a global basis applicable to all firms with the ski hill industry classification, not just on the basis of several firms in the industry.

On the matter of the department's consultation with the industry "on a global basis," the employer has countered that surely it is imperative that until the issue of payroll

allocation was finally resolved, the Board should not have initiate differential treatment among the 36 employers in the industry. But in making that argument, the employer has still neglected to explain why, where the Board allowed certain firms to maintain ski rental payroll allocated in the retail classification through 2005, the circumstances and situations in those cases were the same, in relevant ways, to those of the employer. Therefore, for the foregoing reasons, I find that the employer has failed to provide sufficient evidence and argument to support its allegation of unfair discrimination by the Board.

Next, I consider the "officially induced error" characterization that the Assessment Department suggested was raised by the employer's submissions in this appeal. The Cancoil case describes the defence of "officially induced error." The Cancoil case indicates that the defence is applicable in criminal and quasi-criminal proceedings, where there is an alleged violation of a regulatory statute and the accused has reasonably relied upon the erroneous legal opinion or advice of an official who is responsible for the administration or enforcement of the particular law. This case does not involve criminal or quasi-criminal proceedings and I am satisfied that the principle is not applicable in this appeal. In any event, as the Assessment Department has pointed out, the defence requires reliance on a legal opinion or advice and that is not the situation in this case with the instructions, advice or conduct of either of the Board assessment officers who audited the employer's payroll in 1998 and 2001.

I have also considered the estoppel issue raised by the employer. Although in his July 8, 2005 decision, the review officer did not use the term "estoppel," he did refer to the two Board audits of the employer by the Board assessment officers and the fact that the employer included ski rentals in the retail classification as those assessment officers had directed. He took this into account in finding that there was no clear evidence that the employer or its representative knew of the Board's practice clarification in 2001 represented in the change to the CU 761038 (Ski Hill) description. I find that in this case, the elements of an estoppel are raised to the extent that the employer was entitled to rely on the representations of the assessment officers, but only until the point the employer became otherwise aware, or should have been otherwise aware, that the Board had officially clarified its practice and its position with respect to the payroll allocation for ski rental activities/payroll.

I agree with the employer's submission in this case that during the audit that took place in 2001, when the new classification system was in place, the assessment officer used the new classification terminology in auditing the employer's 1999 payroll, indicating that ski rental payroll should be allocated to the general retail classification. I also note that the May 22, 2001 decision referred to by the employer, albeit that it was considered to be erroneous by the Board, is further evidence that there was no clear Board practice in May 2001 regarding the correct allocation for ski rental payroll. The evidence is that later in 2001, the Board changed the description for the ski hill classification unit to make it clear that ski rental was an activity supporting ski hill operations. The review officer found that this established a clear industry practice regarding payroll allocation

for ski rental activities operated in conjunction with a ski hill operation. The Board did not take steps to directly notify ski resort employers about this clarification to the CU description.

Like the review officer, I am satisfied that the clarification to the CU description was evidence of a clear Board practice that contradicted the former practice of allocation ski rental payroll to the general retail CU. Normally I would find that this type of change is one which employers in a particular industry should be expected to know about, even in the absence of a direct notice about the change to them from the Board. In other words, it is reasonable to expect that an employer (particularly one which uses professional advocates and/or consultants to assist it with workers' compensation matters) should, from time to time, check the classification unit descriptions applicable to its operations by, among other ways, checking the Board website.

In the particular circumstances of this case, however, specifically taking into account the representations of the Board assessment officer to the employer in 2001, I have found that it was not reasonable to expect that the employer would have known or should have known about the Board's change to the description for the ski hill CU as early as 2001. In this case, the evidence satisfies me that the employer knew or should have known about the Board's official position with respect to ski rental payroll allocation in 2004. It was in August 2004 that the employer's representative contacted the Board about correcting the employer's payroll reports since 1999, and in 2004 the Board completed its audit of the employer's records for the calendar years 1999 through 2003, sending its decision to the employer's representative.

I understand that the employer (as well as the ski resort industry association) continued to challenge, through 2005 and into 2006, the Board's position regarding allocation of ski rental activities/payroll to the general retail classification. However, the Board's position was firm on the point (whatever the status of the various circumstances of individual firms affecting effective date for the reallocation of payroll), and I am of the view that an employer cannot successfully portray the Board as being "undecided" or "unclear" on an issue merely because the Board agrees to consult with affected firms and/or an industry association seeking a change in the Board's position. I also note that although the employer was relying on the May 22, 2001 decision of a Board manager that was inconsistent with the change to the description in CU 761038 (Ski Hills), the evidence is that the decision expressly stated that it was not to be considered a precedent and that it was restricted to the circumstances of the firm involved. Further, the Board made it clear to the employer's representative that the Board considered the decision to be wrong. Therefore, in my view it was not reasonable for the employer to rely on the May 22, 2001 decision as evidence of the Board's position regarding allocation of ski rental activities/payroll with respect to the employer's situation.

For the foregoing reasons, I am satisfied that the employer has fulfilled the criteria of an estoppel claim. It relied on the template created by a Board assessment officer in 1998, as well as the representations (by advice and instructions) of that officer and another

officer in 2001 regarding allocation of payroll, that induced (and were intended to induce) the employer to follow those representations. The employer's allocation of ski rental payroll to the general retail classification, both before and after the new classification system introduced in 2000, followed the representations. I am satisfied that it was to the employer's detriment to follow instructions that were incorrect for the new classification system.

Turning to the matter of effective date, I agree with the review officer that policy AP1-88-1 (effective in 2005) codified general auditing principles that have been followed by the Board for years. Those principles indicate that with respect to an audit, one applies the law, policy and Board practice as it existed in the years under audit. I am satisfied that that the principle of estoppel can apply in making a determination in a given case as to the validity of, indeed the existence of, legitimate Board practice during a relevant audit year applicable to a particular firm.

Therefore, I allow the employer's appeal only in part, however, as the evidence does not support that the employer's reliance on the assessment officers' representations was reasonable beyond the 2004 year, for the reasons I have earlier provided. Therefore, I vary the Review Division decision dated July 8, 2005 by finding that the employer's ski rental activities are properly allocated to CU 761038 (Ski Hills) as of January 1, 2005.

Conclusion

I have allowed, in part, the employer's appeal. I confirm the Review Division decision dated July 8, 2005 that confirmed the Board decision dated December 22, 2004 finding that the employer's ski rental payroll/activities are properly allocated to CU 761038 (Ski Hills), but vary the Review Division decision by finding that the effective date of the payroll allocation change is January 1, 2005.

Expenses of the appeal proceeding were not requested, none are apparent on the file, and therefore I make no award in that regard.

Heather McDonald
Vice Chair

HM/mm