Noteworthy Decision Summary

Decision: WCAT-2007-01737 **Panel**: Herb Morton, Warren Hoole, Terri White **Decision Date:** June 6, 2007

Status Determination – Independent Operator – Labour Contractor with Personal Optional Protection – Worker – Practice Directive 1-1-7(A) – Item #AP1-1-7 of the Assessment Manual

This decision is noteworthy as the three person (non-precedent) panel discusses the measure of deference to be given to a non-binding Practice Directive of the Workers' Compensation Board, operating as WorkSafeBC (Board), when determining the status of an individual under the *Workers Compensation Act* (Act) and Board policies.

W, a faller, suffered a compensable left hand injury. W's initial wage rate, pursuant to section 33.6 of the Act, was based on the amount of personal optional protection (POP) he purchased. W sought to have his initial wage rate based on his actual earnings and not the amount he purchased under POP. W disputed his status as an independent operator, that is, a labour contractor who had purchased POP coverage. W had registered as a sole proprietor with the Board and his registered classification unit (CU) was 703013 (manual tree falling and bucking).

The panel denied W's appeal. They found that W was an independent operator by virtue of his being a labour contractor who had purchased POP coverage from the Board. Accordingly, his initial wage rate was properly based on the gross earnings for which POP coverage was purchased. Policy item #AP1-1-7, Coverage under Act – Labour Contractors, of the Board's *Assessment Manual*, provided that labour contractors included proprietors who may or may not have workers but who contracted a service including one piece of major revenue-producing equipment to a firm or individual.

A central issue in this appeal concerned the effect to be given to Practice Directive 1-1-7(A) which treated a professional grade chainsaw as a major piece of revenue-producing equipment in the manual tree falling and bucking industry. The rationale for this was that chainsaws used to fulfill contracts in this industry were generally required by the contracts to be of the highest professional grade (thus very expensive) and of a large size. Although Practice Directive 1-1-7(A) was stated to be effective May 1, 2005, the panel inferred that it represented, at least in its treatment of chainsaws, a written statement of what had been the Board's prior practice at the time of W's registration in July 2004.

The panel found that the application of the criteria in policy item #AP1-1-3, Coverage under Act – Distinguishing Between Employment Relationships and Relationships Between Independent Firms, did not so strongly point to W as being a worker as to show that the Board's acceptance of his application for POP coverage was in error. The panel stated that it was evident from court decisions cited, and the policies contained in the Board's *Assessment Manual* that there was no single test to be applied in determining the issue of status. In this context, the desirability of having policies and practices to promote a consistent approach was obvious, and long-standing practices were deserving of some measure of deference. To conclude otherwise could lead to an unacceptable level of uncertainty regarding the status of such persons, with far-ranging

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consequences. Although there might be significant concerns respecting the application of Practice Directive 1-1-7(A), the panel stated that consideration as to a possible change in the Board's approach was better addressed by the workers' compensation system and its stakeholders in some broader fashion than in the context of this particular appeal.

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WCAT Decision Date: June 06, 2007
Panel Members: Herb Morton, Vice Chair
Warren Hoole, Vice Chair
Teresa White, Vice Chair

Introduction

The worker (W), at age 30, was seriously injured in an accident on January 16, 2005 while working as a faller. He was making a back cut in a four-foot cedar on a sidehill when he started to lose his footing. He put his left hand against the tree to stop himself from falling and at the same time his chainsaw kicked out of the cut, striking his left wrist. W's left hand, which was almost completely severed, was surgically reattached the same day. He also underwent a left fifth finger extensor tenolysis and tendon transfer on September 2, 2005.

W has appealed the October 5, 2005 Review Division decision (*Review Decision #31200*), concerning the initial wage rate on his claim. The review officer confirmed the February 15, 2005 decision by a case manager of the Workers' Compensation Board, operating as WorkSafeBC (Board). Pursuant to section 33.6 of the *Workers Compensation Act* (Act), W's initial wage rate was based on the amount of Personal Optional Protection (POP) purchased by him ($2,500.00 per month).

The central issue raised in W's request for review, and in this appeal, concerns whether he should be considered as a worker of the logging firm for which he was providing falling services. If W were to be considered a worker on this basis, his rate of POP coverage would not apply. The review officer found that W was a faller or falling contractor, that his chainsaw was a piece of major revenue-producing equipment, and that he was properly categorized as an independent operator (as a labour contractor who had purchased POP coverage).

W was initially represented by a lawyer, who provided letters and submissions dated January 11, 2006 and August 1, 2006. He previously furnished an affidavit from W, sworn on June 22, 2005, and a written submission to the Review Division dated August 24, 2005. On October 12, 2006, the lawyer advised he was no longer representing W. W is now being assisted by a workers' adviser.

The Board's Assessment Department, and the logging firm for which W was providing falling services, were invited to participate in this appeal as interested persons. The logging firm is represented by an employers' adviser.

This appeal was initially assigned to a one-member panel. W's appeal was reassigned by the WCAT chair to this three-member panel under section 238(3) and (5) of the Act. The WCAT chair did not accede to the request by W's former lawyer to have this appeal assigned to a "precedent panel" under section 238(6) of the Act.

W has appealed other Review Division decisions to WCAT. Those appeals concern the termination of his wage loss benefits, the granting of a pension award of 17.16% of total disability, and the denial of a loss of earnings pension award. Those appeals (coded as D, E and F) have not been assigned to this panel.

Coded initials are used in this decision. The appellant is referred to as W, and his business name is referred to as W Logging. The firm for which he was providing falling services at the time of his injury (i.e. the putative employer) is referred to as X Contracting. The prime contractor, a large forestry company, is referred to as Z.

Issue(s)

In his notice of appeal, W requested an increased wage rate, increased section 21 (health care) benefits, and reimbursement of legal fees. The central issue in this appeal concerns W's status at the time of his injury, as this affects the basis on which his initial wage rate was determined.

Jurisdiction

The Review Division decision has been appealed to WCAT under section 239(1) of the Act. WCAT may consider all questions of fact, law and discretion arising in an appeal, but is not bound by legal precedent (sections 250(1) and 254 of the Act). WCAT must make its decision based on the merits and justice of the case, but in so doing must apply a published policy of the board of directors that is applicable (section 250(2) and 251 of the Act).

In our decision, we have applied the versions of the Act, the *Assessment Manual*, and *Volume II* of the *Rehabilitation Services and Claims Manual* (RSCM II), which were in effect at the time of W's January 16, 2005 injury and the February 15, 2005 decision by the case manager. Archived copies of the policy manuals are accessible on the Board's website (http://www.worksafebc.com/).

Preliminary

Several preliminary questions arose in this appeal. Due to the complexity of the proceedings in the appeal, additional time for the making of the WCAT decision was granted under section 253(5)(a) of the Act.

Memoranda were provided by this panel concerning various procedural matters dated August 31, 2006, October 18, 2006 and February 9, 2007. In the course of making our

decision, we have further reviewed and confirmed those determinations. These included determinations that:

- As W's appeal involves questions of law and policy, and does not involve any significant issue of credibility, it can be properly heard on the basis of written submissions without an oral hearing (Rule #8.90 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP)).

- It was not necessary to grant the July 28, 2006 and April 5, 2007 requests by the employers' adviser for orders compelling the production of W's personal and business income tax returns for 2004 and 2005, and for copies of various business records of W's falling business (W Logging). There was sufficient other evidence before the panel on which to base a decision. However, the panel did obtain information from the Canada Revenue Agency on February 1, 2007, regarding W's 2004 income tax return.

- It was appropriate to invite participation by X Contracting, the putative employer, and by the Board's Assessment Department, as interested persons.

- It was not necessary to invite other worker representative organizations to participate in this appeal (although it remained open to W's representative(s) to incorporate input from such other groups).

Disclosure was provided of both W's claim file, and of the assessment file established in connection with his POP registration (W Logging). The following additional materials were also provided to the parties:

- *Assessment Manual Policy AP1-2-3*, "Personal Optional Protection";

- *Practice Directive Number 1-2-3(A)*, "Personal Optional Protection", effective January 1, 2005;

- British Columbia Court of Appeal decision in *IPX v. BC (WCB)* (1988), 25 B.C.L.R. (2d) 273, 49 D.L.R. (4th) 86;

- Policy Consultation Paper, "Determining Workplace Status", February 2006, pages 1-35. (The complete document is accessible on the Board's website, see policy consultation, archived policy discussion papers, "Proposed Amendments to Assessment and Prevention Policies to address Serious Injuries, Fatalities and the Changing Nature of Working Relationships").

Our August 31, 2006 memorandum flagged a question regarding our jurisdiction to address W's appeal regarding the validity of his POP registration, in the context of an appeal concerning his initial wage rate on his claim. That memorandum reasoned:

Policy in the *Assessment Manual* at *AP1-2-3*, "Personal Optional Protection", includes information regarding the circumstances under which a retroactive cancellation of POP coverage may be requested. It appears that the appellant has not requested a determination from the Assessment Department under that policy (see, for example, *WCAT Decision #2004-05158* dated September 30, 2004, and *WCAT Decision #2005-01581* dated March 30, 2005, which stemmed from Assessment Department decisions concerning POP coverage).

There appear to be three bases for challenging the validity or applicability of POP coverage. The first concerns the validity of the initial assessment decision to accept an application for POP coverage. The second concerns whether there was some subsequent change of status which affected the validity of the POP coverage. The third possibility is that the appellant was engaged in various types of work activities, and the work accident occurred in a work situation to which his POP coverage was not intended to apply. Possible related issues concern whether:

- a request for reconsideration of the acceptance of an application for POP coverage is subject to the 75 day time limit on the Board's reconsideration authority under section 96(5)(a) of the Act;

- the appellant's application for POP coverage involved fraud or misrepresentation as contemplated by section 96(7) of the Act;

- there was a subsequent change in the appellant's legal status which would support the retroactive cancellation of his POP coverage.

In a claim log entry dated January 28, 2005, the case manager noted:

> [The worker's lawyer] contends that [the worker], although he had personal optional protection, should be covered under the prime contractor, [X Contracting]. This is because as a sub-contractor, he was making $500 per day vs the $2500 per month POP.

> [The worker's lawyer] did acknowledge that the saw was owned by [the worker] and was purchased 2nd hand by [the worker], but [the worker's lawyer] did [not] know the name of the prior owner.

Accordingly, the appellant's position was expressed to the Board from the outset. His objections regarding the validity of his POP coverage were not referred to the Assessment Department for consideration. The February 15, 2005 decision by the case manager may be viewed as implicitly confirming the validity/applicability of the appellant's POP coverage, given the prior objections expressed by [the worker's lawyer] on this issue.

The Review Division confirmed the case manager's decision of February 15, 2003 regarding the calculation of the appellant's initial wage rate. On page 2 of the October 5, 2005 Review Division decision, the review officer also found that the appellant was properly classified as a labour contractor and "was not a worker pursuant to the Board's Assessment policies." The review officer concluded the appellant was an independent operator with POP coverage. Accordingly, this issue has been expressly addressed by the Review Division.

Both the appellant and the respondent appear, by their submissions, to be requesting that WCAT proceed to hear the merits regarding the appellant's status at the time of his accident on January 16, 2005, notwithstanding the absence of a decision from the Board's Assessment Department.

In these circumstances, we are inclined to consider that there is sufficient basis to view the question of the appellant's status as being before WCAT in the context of this appeal. The lack of prior input from the Assessment Department may be addressed by allowing the Assessment Department to provide comments as an interested person. We remain open, however, to considering submissions regarding WCAT's jurisdiction in hearing this appeal.

[all quotes reproduced as written,
save for changes noted]

By submission of December 6, 2006, the manager, Assessment Policy, advised that as the review officer – rightly or wrongly - turned his mind to the issue of the appellant's status, the Board would not be making submissions regarding WCAT's jurisdiction to hear W's appeal. By submission of April 5, 2007, the employers' adviser states (on behalf of X Contracting), that the question of status was addressed by the review officer and that "we will not be opposing the Panel's jurisdiction to review this issue."

We have proceeded to hear W's appeal on the merits, on the basis that it is properly before us on appeal from the Review Division decision.

Background

On January 4, 2001, W submitted a "Personal Optional Protection Insurance Application" to the Assessment Department of the Board.

By letter dated December 18, 2001, the Assessment Department advised W that his POP coverage was cancelled as requested. That letter noted: "If you require coverage in the future, please complete the enclosed applications…"

An "Application for Personal Optional Protection Insurance," signed by W as the "owner/operator" of W Logging, dated July 12, 2004, was submitted to the Board. W requested POP coverage of $2,500.00 per month. The form was marked "Urgent." By letter dated July 13, 2004, an employer service representative, Assessment Department, advised:

> As requested, I have activated POP for [W], in the amount of $2500.00 per month, effective Monday, July 12, 2004. Your coverage provides no-fault insurance in case you are injured on the job.
>
> Your business has been assigned to classification unit 703013, Manual Falling, at a rate of 10.69%.
>
> While your POP has been activated as per your request, you submitted an outdated application form. This doesn't affect your coverage but it does affect how you pay your POP premiums.
>
> Under the current terms and conditions, you must pay for POP at the start of the coverage period, like you do for your car or home insurance. As such, you will soon receive an invoice for that coverage….
>
> I have enclosed a copy of the new terms and conditions. If you no longer wish to maintain POP under these terms and conditions, please cancel your registration within 30 days of the date of this letter…
>
> As noted in the terms and conditions, you will be charged for a minimum coverage period of 30 days, even if you apply for a period of less than 30 days.

An Assessment Department memo dated August 3, 2004 noted:

> [name], spouse, called to advise that payment for POP premium would be made at the bank on Aug 10, 2004, the date that they would be paid.
>
> Since POP invoice was dated on July 13, 2004, I advised client that they should be okay for this time if payment being made on Aug 10, 2004.

An Assessment Department memo dated August 16, 2004 noted:

> Rec'd call from [W], owner ... advising he has given authorization to [name] bkkpr for access to his WCB account. [W] stated he will fax in an authorization letter later today & wanted this noted. Provided Pop o/s bal & explained warning letter procedure.

In a letter to the Board dated August 16, 2004, W confirmed that he had given his bookkeeper permission to respond to any Board queries.

Subsequent to W's injury, the bookkeeper contacted the Board on February 11, 2005 to request cancellation of W's POP coverage. A refund of $423.64 was processed, effective February 11, 2005.

W's injury occurred on January 16, 2005. By letter dated February 15, 2005, the case manager advised W that his claim was accepted. She explained the basis on which she set his initial wage rate as follows:

> In accordance with section 33.6 of the *Act*, your wage rate has been based on the amount of Personal Optional Protection purchased, less probable deductions for federal and provincial income taxes, Employment Insurance premiums and Canada Pension Plan contributions. A standard formula for deductions has been used. This is the same for all workers regardless of their actual tax status. As an injured worker, you are entitled to 90% of your net earnings, that is, earnings after deductions. At the time of your injury, your coverage totaled $2,500.00 per month.

A subsequent decision by the case manager dated March 24, 2005 concerning W's long-term wage rate is not before us. That long-term wage rate was also used in calculating W's permanent disability award, as set out in a decision dated February 20, 2006 by the disability awards officer.

W provided a sworn affidavit on June 22, 2005. He advised:

> 2. My injury happened on Sunday, 16 January 2005 at about 3:30 p.m. on Gilford Island, about 1.5 hours, by water, from Campbell River. About 12 men were working as fallers, in two

> crews, on sub-contracts from [Z]. We were cutting Western Red Cedar, balsam, hemlock and some spruce and fir. The majority was Cedar, mature, old growth. It was my last tree of the day…
>
> ...
>
> 19. I had no private disability insurance. I did not pay into EI [Employment Insurance] but I did pay CPP [Canada Pension Plan] premiums.
>
> …
>
> 21. [name] of [X Contracting] paid me through [W Logging], my unincorporated business. My bookkeeper is [name and contact information]. [name] is a close friend who helped through this….

The Review Division Decision

The October 5, 2005 Review Division decision (*Review Decision #31200*) reasoned in part:

> Assessment policy item #AP1-1-7, *Coverage under Act – Labour Contractors*, provides that labour contractors may voluntarily choose to register as an employer (proprietorship or partnership) if they have workers or obtain POP as an independent operator if they do not have workers. A labour contractor who takes one of these actions is an "independent firm" for the purposes of item AP1-1-3. If a labour contractor is registered, the proprietor is not covered unless Personal Optional Protection is in effect. The policy further provides that labour contractors include proprietors who may or may not have workers but contract a service including one piece of major revenue-producing equipment to a firm or individual.
>
> Practice Directive 1-1-7(A), *Labour Contractor Criteria*, provides an industry-specific list of established pieces of major revenue-producing equipment, and provides that ownership of major revenue-producing equipment is often the sole basis by which a Board Officer determines whether a subcontractor is a labour contractor or a worker. It states that chainsaws are not usually considered revenue-producing equipment. However, chainsaws will be deemed to be major revenue-producing equipment for contractors classed in Classification Units ("CU"s) 703013 (manual tree falling and bucking) and 703002 (brushing and weeding or tree thinning or spacing).
> The applicant's occupation is as a faller or falling contractor and is confirmed by the applicant in his application and first aid report. He has

registered as a sole proprietor with the Board and his registered CU is 703013 (manual tree falling and bucking). Therefore, I find that the applicant's chainsaw is a piece of major revenue-producing equipment as described under Practice Directive 1-1-7(A) and as a result he is properly classified as a labour contractor and not a worker pursuant to the Board's Assessment policies. The applicant was in the business of providing equipment to fulfill a contract making the subcontractor a labour contractor.

The applicant is therefore an independent operator who has purchased POP coverage as described in section 33.6, and the Board must determine his average earnings from the date of injury based on the gross earnings for which coverage was purchased. As the applicant purchased coverage in the amount of $2,500 per month, this is the appropriate figure to be used to determine his initial wage rate. I therefore find no error in the Board Officer's application of law and policy and the use of this figure in determining the applicant's wage rate and I deny the applicant's request.

Submissions

W's former lawyer requested that W's "wage rate be set in accordance with **his 'average earnings'**, as per s. 33 **not** in accordance with the **'POP'** rate" [emphasis in original]. In a written submission to the Review Division dated August 24, 2005, W's former lawyer cited item "(a)" of the definition of the term "worker" in section 1 of the Act and argued:

> 5. The WCB Assessment Manual AP1-1-1 defines worker as **"an individual who performs work under a contract with an employer and has no business existence under the contract independent of the employer"**. These words apply to [W].
>
> 6. The WCB incorrectly classified [W] as a "labour contractor". There is no provision in s. 2(2) of the Act that gives authority to deem [W] to be a labour contractor who only qualifies for "Personal Optional Protection" (POP).
>
> 7. **AP1-1-7** states, in part:
>
> > Labour contractors may voluntarily choose to register as an employer (proprietorship or partnership) if they have workers or obtain Personal Optional Protection as an independent operator if they do not have workers.

8. [W] didn't register as an employer. He does not have workers. He states that he obtained POP only because he was required to do so by the Ministry of Forests whom he worked for under a contract of service in or about 1997 or 1998. And he states he maintained POP in case of any future contracts with the Ministry of Forests. [W] had no knowledge of applicable workers compensation law or policy.

9. **"Independent operator"** is not defined in the Act. According to **AP1-1-1**, "the term is referred to in section 2(2) of the Act as being an individual who is neither an employer nor a worker and to whom the Board may direct that Part 1 applies as though the independent operator was a worker".

10. WCB premiums of 10% were deducted by [X Contracting] and paid directly to their WCB accounts if not in good standing. That indicates that good standing with the WCB was a condition of employment with [X Contracting]. [X Contracting] paid for chainsaw gas and oil. Transportation was provided by [X Contracting], either by helicopter or by "crummy". [W] did not solicit customers or work simultaneous contracts while employed by [X Contracting]. [W] had no discretion regarding his wages and accommodation. Customers paid [X Contracting] and in return [X Contracting] paid [W]. [X Contracting] determined [W's] wages. [X Contracting] paid for [W's] meal and accommodation expenses. [W] states that [X Contracting] determined their accommodations. Clearly, [W] entered into a contract of service with [X Contracting] as a worker thereby satisfying the definition of "worker" under s. 1 of the Act.

11. [W's] only piece of equipment was a chainsaw, worth very little. [W's] chainsaw does not fall under the Assessment Manual's definition of a major piece of equipment. The cost of [W's] chainsaw is ± $1,500: that does not qualify as **"major"**. By industry standards, [W] describes his chainsaw as reasonably priced compared to the most expensive being ± $1,700 and the least expensive being ± $1,300. Neither of those figures satisfies the word **"major"**.

> 12. In fact, [W] advises that he uses his Stihl 660 Magnum chainsaw to chop firewood every winter. He lives in a remote area of [location] and depends on firewood to generate heat. He does not have gas. He states that he also has his own source of electricity.
>
> 13. Clearly, [W's] chainsaw is not too **large "to be appropriate for home use applications"** as demonstrated by his use of it for chopping firewood.
>
> 14. [W's] chainsaw, a Stihl 660 Magnum, is not "difficult to obtain, and not custom manufactured on a limited basis or one-of-a-kind in nature" to quote the Assessment Manual. He states that it is a commonly used chainsaw in and about homes, ranches and farms and that about 70% of fallers he was working with at [X Contracting] used the Stihl 660 Magnum. In fact, on Stihl's website (http://www.stihl.ca/products_chainSaws.asp) it is stated that Stihl chainsaws are the number one selling worldwide.
>
> [emphasis in original]

By submission of July 31, 2006, the employers' adviser argues that the Review Division decision was correct under the law, policy and the evidence of this case. She provided a copy of an undated "Contract Service Agreement" between X Contracting and W Logging, signed by W. That agreement stated that W:

> Agree[d] to provide services as an independent contractor to [X Contracting] under the following conditions:
>
> 1. In no way will [X Contracting] be responsible for personal income tax, employment insurance, or Canada pensions.
> 2. Contractors must comply with all W.C.B., I.H.S. regulations and B.C. Forest practice code laws and regulations.
> 3. WCB amounts of 10% will be deducted from pay and will be paid direct to sub-contractors account by [X Contracting] if WCB account is not in good standing.
> 4. Contractors are to provide 2 good chain saws, wedge belt, axe and all personal safety equipment.
> 5. Rate of pay will vary depending on contract locations.

Consistent with clause 3 of this agreement, X Contracting has furnished copies of several clearance letters it obtained from the Board concerning the status of the account for W Logging.

W provided information regarding his level 1 first aid certification, his faller certification, his fire suppression certification, and the WCB account number for W Logging.
The employers' adviser further argues:

> On an equitable basis, we submit that it would be completely draconian for an innocent third party, such as [X Contracting], who has shown great due diligence in conducting its WCB affairs, and who relied on the validity of the POP contract between [W] and the Board, to be found responsible for the assessments and claims of a party who so obviously meets the definition of independent operator as set out in Policy.

The manager, Assessment Policy, provides a detailed analysis of the evidence and applicable policy. He submits that the determination of status should be addressed as follows:

> 36. The Assessment Department submits that the conjoinment of the *Act* and policy creates the following hierarchical analytical framework for status determination (as the framework is hierarchical, a conclusive determination at any stage determines status):
>
> (i) Whether the underlying agreement between the individual and another is a contract of service or a contract for service. That is, whether the service provider is performing the services as an individual in business on his or her own account or is performing them in the capacity of a worker (the "general principles" of *AP1-1-3(a)*).
>
> (ii) Whether the individual falls within subparagraphs (b) to (f), inclusive, of the statutory definition of worker in the *Act*.
>
> (iii) Whether one of the specific guidelines of *AP1-1-3(b)* is applicable.
>
> (iv) If after subjecting the evidence to the above, status is uncertain or the probabilities are more or less balanced between worker and independent operator, the three labour contractor criteria described and developed in *Assessment Manual Item: AP1-1-7* are considered.

With respect to this last point, the manager does not comment regarding the possible application of subsections 99(3) and 250(4) of the Act requiring the resolution of disputed possibilities in a manner that favours a worker. The manager concludes:

> 79. On applying the evidence before the Assessment Department to the "major test", the factors in *AP1-1-3(a)*, and the "specific guidelines" in *AP1-1-3(b)*, the department submits that it cannot be determined whether the appellant provided his services under a contract of service or a contract for service.

> 80. On applying the evidence before the Assessment Department to the "labour contractor" criteria in *AP1-1-7*, the department submits that the evidence establishes that the appellant met the labour contractor criteria and was registered with the Board as "an independent operator admitted by the Board under section 2(2)" of the *Act*.

On March 14, 2007, the workers' adviser stated he would defer to the arguments provided by the W's former lawyer "to support [W's] short term rate be based on actual earnings as opposed to POP coverage."

By submission of April 5, 2007, the employers' adviser objects to the "hierarchical" or sequential framework of analysis proposed by the manager, Assessment Policy. She submits:

> While we do not dispute Assessment Department's theoretical analysis of the relevant law and policies, in reality, the decision made by the Board to extend coverage to sole proprietors is not determined by such an approach. Rather, the Assessment Department reviews a sole proprietor's application on the basis of whether he or she meets the criteria of Policy AP1-1-7, the last step in the hierarchy analysis outlined by Assessment Department. If the individual meets the eligibility requirements set forth in this Policy, no further investigation is made. The Board will extend coverage.

The employers' adviser cites the policy concerning labour contractors (which is contained at AP1-38-1 of the *Assessment Manual*, rather than AP1-1-3 as cited) and submits that this policy:

> …reflects the conclusions found by the Board in the Commissioners' Decision No. 255, dated July 26, 1977 (3 *Workers' Compensation Reporter* 155). In that decision, the Commissioners recognized that the practice in certain industries is to hire contractors or subcontractors to fulfill certain work functions. In keeping with this practice, the Commissioners decided that, when determining whether to allow an individual's application for registration,
>
> > some regard must be had to the structure and customs of the particular industry involved… The Board will be more ready to accept applications from contractors working in such industries from those working in other industries where contracting out is not the usual practice.

The employers' adviser submits that the acceptance of chainsaws as "major revenue-producing equipment" which meets the Policy AP1-1-7 requirement is the result of the direction in *Decision No. 255* to have regard to the nature of the industry involved. She submits that it further lends itself to the acceptance of applications for coverage on this basis without further analysis. She argues:

> [W] does not deny the accuracy of the information he provided in his application, nor does he allege that any of the bases upon which he obtained coverage have changed since coverage was extended effective July 12, 2004, as required under the terms of the contract and Policy AP1-2-3(b). Nor is there any evidence that either [W] or the Board cancelled his POP account prior to the date of injury.

The employers' adviser further notes:

> [X Contracting] performed its due diligence by obtaining clearance letters and imposing holdbacks. While we acknowledge that these statements are not evidence of eligibility per se, it is not, in our submission, unreasonable for a company, entering into a contract with an independent operator, to rely upon the legitimacy of the contract between [W] and the Board, and their respective obligations in establishing and determining eligibility for POP coverage in accordance with law and policy.

Notwithstanding her position that it is not necessary to address the criteria in AP1-1-3 in determining whether W was properly registered as an independent firm, the employers' adviser further provides submissions concerning these criteria. She submits that such an analysis supports a conclusion that W was an independent operator, properly registered by the Board.

In a final submission dated May 2, 2007, W reiterated his central concern as follows:

> …I did not sign a contract or was I responsible for any of the following, plane-boat, helicopter, floating camp, food, lodging, fuel for saws, block layout, mapping, emergency transportation or equipment, which is all required.
>
> Being a hand faller I had a chainsaw along with personal protective safety gear.
>
> I feel at this logging operation there was some major money being made. The chainsaw had a part in making some of this major money, but the major money did not come back to the chainsaw.
>
> Each and everyday at work my boss told me where to go in the block and what trees to fall. With a boss telling me what to do everyday and having

> everything supplied for me and with no responsibilities other than falling trees for a multi million dollar operation. I have to ask how does a chainsaw make me a company? What constitutes a company in this situation?

Other Evidence

By submission of December 6, 2006, the manager, Assessment Policy, advised, in connection with W's 2004 application for personal optional protection coverage:

> 10. At all material times, a chainsaw was deemed to be major revenue-producing equipment for logging contractors classified in Classification Unit 703013 [Manual Tree Falling and Bucking].

The employers' adviser has furnished copies of the invoices prepared in relation to the work performed by W Logging for X Contracting. W was paid on the basis of various daily rates ranging from $380.00 to $440.00, plus a "living out allowance" of $20.00 to $30.00 a day. X Contracting also paid an additional amount to W, based on the goods and services tax (GST) of 7% on these earnings.

By submission of July 31, 2006, the employers' adviser advised that the provision of chainsaw gas and oil formed part of X Contracting's contract with its client, Z. It was, in fact, Z, the prime contractor, who paid for the gas and oil. X Contracting provided transportation to the remote locations where the logging took place, but it was up to the contractors to get to the plane or boat at their own expense. As with the gas and oil, it was Z who provided the camp and food (rather than X Contracting). These were provided out of necessity given the remote locations of the worksites. The employers' adviser has furnished invoices showing all of the "contractual periods" during which W provided services to X Contracting. These periods (and days worked) were as follows: July 1 to 15, 2004 (3 days), July 16 to 20, 2004 (4 days and 4 hours), July 24 to 31, 2004 (1 day), August 1 to 15, 2004 (4 days and 3 hours), August 15 to 31, 2004 (12 days), September 1 to 15, 2004 (9 days and 4 hours), September 15 to 30, 2004 (7 days), November 1 to 15, 2004 (8 days), December 15 to 31, 2004 (6 days and 0.5 hours), January 1 to 15, 2005 (11 days and 5.5 hours), and January 15 to 31, 2005 (1 day).

Given the citation by W's former lawyer of the Stihl website, we have referred to that publicly accessible source of information. The following categories of chainsaws are listed: Compact Saws, Mid-Range Saws, Special Purpose Saws, Professional Saws, Electric Saws, Arctic™ Saws, and Rescue Saw. Key features of the various grades of chainsaws involve their power and weight. The Stihl MS 660 is in the upper range of chainsaws listed in the "professional" category. It has 5.2 kilowatts or 7.1 horsepower, and a weight of 7.3 kilograms or 16.1 pounds. The most powerful professional chainsaw described on this site, the STIHL 880, has 6.4 kilowatts or 8.7 horsepower, and a weight of 9.9 kilograms or 21.8 pounds.

W's income tax records show that in 2004, he had T4 earnings of $6,143.00, gross business income of $53,519.00 and net business income of $35,847.00, and EI benefits of $11,151.00. The T4 earnings came from two different firms (neither of them X Contracting).

Law and Policy

Section 1 of the Act defined the term "worker" as including:

> (a) a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise;
>
> …
>
> (f) an independent operator admitted by the Board under section 2 (2);…

Section 2 of the Act provided:

> **2** (1) This Part applies to all employers, as employers, and all workers in British Columbia except employers or workers exempted by order of the Board.
>
> (2) The Board may direct that this Part applies on the terms specified in the Board's direction
>
> (a) to an independent operator who is neither an employer nor a worker as though the independent operator was a worker, or
>
> (b) to an employer as though the employer was a worker.

The dispute concerning W's status relates to the basis on which his status as a worker is founded (i.e. under section 2(1) or s. 2(2)(a) of the Act).
Section 33 provided, in part:

33(1) The Board must determine the amount of average earnings and the earning capacity of a worker with reference to the worker's average earnings and earning capacity at the time of the worker's injury.

(2) Subject to section 3 (5), the Board must determine the amount of average earnings of a worker in accordance with this section and sections 33.1 to 33.7.

Section 33.6 of the Act provided:

> If an independent operator or employer, to whom the Board directs that this Part applies under section 2 (2), has purchased coverage under this Act, the Board must determine the amount of average earnings under section 33.1 from the date of injury based on the gross earnings for which coverage is purchased.

Section 250 of the Act provided:

> (2) The appeal tribunal must make its decision based on the merits and justice of the case, but in so doing the appeal tribunal must apply a policy of the board of directors that is applicable in that case.
>
> ...
>
> (4) If the appeal tribunal is hearing an appeal respecting the compensation of a worker and the evidence supporting different findings on an issue is evenly weighted in that case, the appeal tribunal must resolve that issue in a manner that favours the worker.

Policy at AP1-1-5 concerning "Coverage under Act – Workers", provided:

> Workers include individuals not employing other individuals and who fall into the following categories:
>
> - individuals paid on an hourly, salaried or commission basis;
> - individuals paid on commission or piecework where the work is performed in the employer's shop, plant or premises;
> - individuals paid commission, piecework or profit sharing where they are using equipment supplied by the employer;

- individuals operating under circumstances where the "lease" or "rental" of equipment or "purchase" of material from their employer is merely a device to arrive at a wage or commission amount; and

- **labour contractors who elect not to be registered as independent operators.**

A worker cannot be an "independent firm".

[emphasis added]

Policy at AP1-1-7, "Coverage under Act – Labour Contractors", provided:

> **Labour contractors may voluntarily choose to register as an employer (proprietorship or partnership) if they have workers or obtain Personal Optional Protection as an independent operator if they do not have workers. A labour contractor who takes one of these actions is an "independent firm" for purposes of Item AP1-1-3.**
>
> **Labour contractors who choose not to register as an employer (if they have workers) or obtain Personal Optional Protection as an independent operator (if they do not have workers) are considered workers of the firm for whom they are contracting, and that firm is responsible for assessments**. Any persons employed by the labour contractor to assist them are also considered workers of the firm with whom the labour contractor is contracting. **A worker cannot be an "independent firm".**
>
> If the labour contractor is registered, the proprietor or partner is not covered unless Personal Optional Protection is in effect.
>
> Labour contractors include proprietors or partners who:
>
> - have workers and supply labour only to one firm at a time;
>
> - are not defined as workers, do not have workers, or do not supply major materials or major revenue-producing equipment but who contract a service to two or more firms on an ongoing simultaneous basis; or
>
> - **may or may not have workers but contract a service including one piece of major revenue-producing equipment to a firm or individual**.

> Persons who are normally labour contractors and who employ a worker are considered independent firms for any period of time that they are not contracting with another person or entity.
>
> [emphasis added]

Policy at AP1-38-1, Registration of Employers, provided:

> **(b) Labour contractors**
>
> The Board does not conduct a full investigation of each application for registration from a labour contractor. The fact that a contractor applies for registration is in itself indication of sufficient status. Most applications for registration are bona fide in respect of a properly registrable business. Therefore, applications for registration which are, on the face of it, proper, are accepted without further investigation. Where there are grounds for suspecting that an attempt is being made to avoid the provisions of the *Act*, the status of the applicant will be fully investigated and determined according to the policies in this manual.
>
> Where an application for registration from a labour contractor is accepted, the contractor will be informed that he or she is not personally covered for compensation benefits unless he or she applies for Personal Optional Protection. Since registration is elective, the effective date is when registration is received, unless a subsequent date is considered appropriate. Prior to that date the prime contractor is responsible for assessments.

Practice Directives

Practice directives of the Board's Assessment and Revenue Services are accessible on the Board's website. Practice directives by the Board's administration do not constitute part of the policies of the board of directors under section 82 of the Act. Accordingly, they are not binding on WCAT under section 250(2) of the Act.

Practice Directive 1-1-7 (A), "Labour Contractor Criteria", effective May 1, 2005, provides:

MAJOR REVENUE-PRODUCING EQUIPMENT

Ownership of major revenue-producing equipment is often the sole basis by which a Board officer determines whether a subcontractor is a labour contractor or a worker. Historically, Board officers have used different interpretations of the meaning of this phrase when applying policy. Over time, the general principles of this policy have expanded in ways that it may not have originally contemplated. Industries change; the constant pace of change necessitates the Board consider things as 'equipment' that fall outside the usual meaning of the word. For example, horses and special pieces of software may now be deemed major revenue-producing equipment for some contracts.

What follows is a brief discussion of some criteria Board officers may consider when determining "major revenue-producing equipment" that would allow a subcontractor to register as a labour contractor. To determine if a subcontractor's equipment is major and revenue-producing, review the terms of the contract under which the subcontractor is working.

Board officers may use several criteria to determine if equipment is major and revenue-producing:

1) Whether the potential labour contractor is in the business of providing equipment to fulfill a contract (making the subcontractor a labour contractor), or providing talent and expertise in utilizing equipment to fulfill a contract (making the subcontractor a worker).

2) If a specialized license is required to operate the equipment the subcontractor provides, and the contract stipulates the subcontractor must supply the equipment, the Board may deem it as major revenue-producing equipment.

3) Policy states that equipment that allows subcontractors to register as labour contractors must be "major." Thus, "minor" equipment does not qualify to give a subcontractor labour contractor status. **The Board may make the distinction between major and minor equipment based on whether the equipment is of professional- or industrial-grade or of light- or home-use-grade. However, the fact that a piece of equipment is of professional-grade is not enough on its own for the Board to deem it as major**. For example, professional-grade drills or other similar hand-tools are not major revenue-producing equipment. Below are three criteria to use to determine the difference between major (generally, professional-grade) and minor (home-use-grade) equipment. Any of

the three could serve to indicate major revenue-producing equipment.

a) Cost: is the equipment priced out of the reach of those who would only occasionally use it, so that only those who truly need the equipment to fulfill contracts can afford to purchase and maintain it?

b) Size: is the equipment too large to be appropriate for home-use applications, or for easy home-storage or portability?

c) Scarcity: is the equipment difficult to obtain, custom-manufactured on a limited basis or of a one-of-a-kind nature?

In light of the above criteria, consider these two examples:

i. A truck-mounted pressure washer is obviously expensive, designed for professional use, and not easily obtainable, whereas anyone can purchase a small, portable pressure-washer quickly and easily for home use.

ii. A custom-programmed, dedicated piece of software held out by a subcontractor for use in a particular industry is generally expensive to produce, designed for professional use, and not easily obtainable. In contrast, common programs (such as Word, WordPerfect, Excel, PowerPoint, or PowerBuilder) are relatively inexpensive and easy to obtain for home use.

The above considerations are for Board officers to use when determining whether a particular piece of equipment is major and revenue-producing. Board officers may use any or all of these criteria to make a decision based on the situation of the subcontractor.

For ease of reference, an industry-specific list of established pieces of major revenue-producing equipment follows. This list is not exhaustive or complete; Board officers should use their judgement to determine whether equipment not on this list satisfies the requirements to be considered major revenue-producing equipment.

…

- **Chainsaws are not usually considered revenue-producing equipment. However, chainsaws will be deemed major revenue-producing equipment for contractors classed in CUs 703013 (Manual Tree Falling and Bucking) and 703002 (Brushing and Weeding or Tree Thinning or Spacing (not elsewhere specified)), and may be considered such in exceptional circumstances in other CUs. The rationale for this is that the chainsaws used to fulfill such contracts are generally required by the contracts to be of the highest professional grade (thus very expensive) and of a large size**.

- Bicycles, if the owner of a bicycle is licensed to operate a courier bicycle by a municipal or other governmental authority.

Please note that equipment used for crew transportation (such as a pickup or a crummy) is not deemed to be major revenue-producing equipment where used in any industry but the transportation industry.

[emphasis added]

Court Decisions

Section 99(1) of the Act provides, in relation to the Board's decision-making authority:

> The Board may consider all questions of fact and law arising in a case, but the Board is not bound by legal precedent.

Section 250(1) of the Act similarly provides, in relation to WCAT's decision-making authority:

> The appeal tribunal may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent.

As the Board and WCAT are not bound by legal precedent, we are not bound by the decisions of the courts regarding the tests to be applied as to whether a person is a worker or an independent operator. For the purposes of decision-making under the Act, such determinations are within the exclusive jurisdiction of the Board and WCAT pursuant to sections 96(1)(j) and section 254 and 255 of the Act. In *B.C. Rail v. Workers' Compensation Board* (1987), 39 D.L.R. (4th) 126, 15 B.C.L.R. (2d) 387, leave to appeal to S.C.C. refused 41 D.L.R. (4th) vii, the British Columbia Court of Appeal reasoned:

> Section 96(1)(*j*) gives the board exclusive jurisdiction, not subject to review, to determine if a person is an employer within the meaning of Pt. [Part] I of the Act which includes s. 10(8)(*b*). Although the board took a much narrower view of the meaning of "employer" in s. 10(8)(*b*) than a court might have done, I think that it has an unreviewable jurisdiction to define who is "an employer".

Nevertheless, both the development of policy and practice, and decision-making under the Act, are guided by common law principles. We thus consider it appropriate to take into account various court decisions, while recognizing that they are not binding.

Bicycles are included in the list of major revenue-producing equipment set out in the practice directive. We note, in this regard, some historical background provided in a 1988 Court of Appeal decision, regarding the Board's approach to the ownership of revenue-producing equipment and the role this may play in determining whether a person is eligible to register with the Board. A decision dated March 24, 1986 by the former commissioners of the Board found that certain courier drivers and courier cyclists were workers of IPX International Ltd. (IPX). IPX challenged the Board's decision in a petition for judicial review. That petition was dismissed by the British Columbia Supreme Court on October 30, 1986. IPX appealed that decision. By judgment dated February 18, 1988, the British Columbia Court of Appeal denied the appeal (*IPX International Ltd. v. BC (WCB)*, [1988] B.C.J. No. 300; (1988), 49 D.L.R. (4th) 86, 25 B.C.L.R. (2d) 273, 9 A.C.W.S. (3d) 171). The Court of Appeal reviewed the Board's decision concerning the status of certain courier (car) drivers as follows:

> The reasons of the Board for deciding that the courier drivers ought to be regarded as <u>workers</u> for the purposes of the Act are found in a letter dated March 24, 1986, signed by N.C. Attewell, Director, Appeals Administration, the relevant part of which reads:
>
> > Having carefully considered all the available evidence, the Commissioners have concluded that their previous decision should be confirmed. They agree with the conclusions reached in Mr. Van Buekenhout's letter of June 5, 1985, and feel that this letter and his later memo has properly responded to the various points you have raised. They have considered all the various factors put forward by you which suggest that the messengers are independent contractors, but in general feel that the messengers must be considered as workers of your company. They consider it significant that the messengers operate under your motor carrier licence and, notwithstanding your argument that they are free to work for other companies, find that, in reality they have no independent existence as a business without your company. There is little chance of the messengers making a loss.

> Though their vehicles are provided by themselves, your logo is on the vehicle and all billing for the services they perform is through your company.
>
> In your letter of July 5, 1985, you state that the Board has neglected the desire of your messengers to be independent operators. This is not correct. The Board recognizes in its policies that there is a certain group of working people whose position is borderline regarding the question whether they are workers or independent contractors. These persons are allowed by the Board to make their own choice by registering with the Board as independent. Many of your messengers have now exercised this option. However, until this option is exercised, these persons are considered as workers and their earnings are assessable. The Assessment Department does deduct from your payroll payments to registered messengers, but only does so from the time when they are registered.

The appellant submits that the Board has recognized that drivers are independent operators, but has proceeded as though it has a discretion to treat them as workers unless and until they elect to be treated otherwise. The appellant submits that it is the duty of the Board to decide whether drivers are workers, or independent operators, and that it cannot treat drivers as independent operators for some purposes, and as workers for others.

"Employer" and "worker" are defined in s. 1 of the Act. The words "independent operator" appear in ss. 1 and 3(3), but are not defined. The relevant provisions read as follows:

> **Interpretation**
>
> 1. In this Act
>
> * * *
>
> "employer" includes every person having in his service under a contract of hiring or apprenticeship, written or oral, express or implied, a person engaged in work in or about an industry;
>
> * * *
>
> "worker" includes

> (a) a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise;
>
> * * *
>
> (f) an independent operator admitted by the board under s. 3(3);
>
> * * *
>
> **Extending Application**
>
> **3.** (3)an employer within the scope of this Part, a member of his family excluded by section 2(2)(d) or an independent operator, not being an employer or worker, may be admitted by the board as being entitled for himself and his dependants to the same compensation as if he were a worker within the scope of this Part, but an employer shall not then cease to be an employer within the scope of this Part. Admission of an employer under this subsection shall not affect his status as an employer for the purpose of section 10.

The Board has developed "operating policies" which bear upon the question whether, in a given case, it will treat firms or individuals as independent operators. It is not necessary to examine those policies in detail, but merely to observe that whether a person is designated as a worker or an independent operator may involve policy considerations. This may be illustrated by reference to this passage from the reasons of the Board:

> The Board recognizes in its policies that there is a certain group of working people whose position is borderline regarding the question whether they are workers or independent contractors.
>
> (emphasis added)

I understand that the Board considers that an independent operator may be an employer engaged in an independent business, or may be someone who is not an employer, but who is engaged in an independent business. Presumably the former could not be admitted under s. 3(3), but the latter could.

> In my opinion, this is a case where the question in issue seems to lie logically at the heart of the specialized jurisdiction confided to the Board. The Act does not define independent operator, and leaves it to the Board to decide, in its discretion, who should fall into that category. It was open to the Board to decide whether the couriers in question were workers or not. It decided that they were workers, and not independent operators as asserted by the appellant, because "they have no independent existence as a business". That is a decision which fell within its jurisdiction, and, in my opinion, did not involve a patently unreasonable interpretation of the Act.
>
> [underlining in original]

The Court of Appeal further provided the following analysis in relation to the Board's approach to bicycle couriers:

> The second submission of the appellant is that the finding that the courier cyclists were workers involved a patently unreasonable finding of fact. The appellant asserts that these extracts from the letter of March 24, 1986, and a memorandum dated August 9, 1985, reveal the Board's reasons for concluding that the courier cyclists were "workers" and not "independent operators":
>
> > March 24,1986
> >
> > Certain types of working persons are not allowed the option of registering with the Board as independent. These individuals are persons who clearly fall within the "worker" category and there is no doubt on the question whether they are independent contractors. The Commissioners agree with the Assessment Department that your messengers who use bicycles fall within this category.
> >
> > August 9, 1985
> >
> > Leased operators not employing workers are not employers. They can apply for, and be granted Personal Optional Protection. If a leased operator does not want to take Personal Optional Protection, and does not employ workers, then he will not be registered as an employer simply because he is not an employer. Where an individual does not take Personal Optional Protection, then that individual is considered to be a worker of whomever employs him.

> Personal Optional Protection would not be extended to a bicycle courier. A bicycle is not considered to be a major source of revenue-producing equipment.
>
> [emphasis added]

I pause here to note that, again, there appears to be a policy component in that reasoning.

The appellant submits that "On the evidence, it was clear that the bicycles used by couriers in many cases cost more than the motor vehicles used by courier drivers. The distinction made by the Board was based upon a wholly erroneous assumption of fact."

But the Board's decision that the cyclists are workers had as much to do with lack of independence, as it did with the value of capital equipment. This extract from a memorandum from the Board to IPX, dated June 5, 1985, is an illustration:

> Another mode of transportation in the courier industry is the bicycle. This mode is not regulated in the same manner as motor vehicles. The bicycle courier is dependent on the principal's dispatching network and clientele to earn an income.
>
> Seven claims for leased drivers and bicycle couriers were filed and paid during 1983 and 1984 showing I.P.X. as the employer. Five of the Employers' Report of Injury (Form 7) are over the signature of the general-manager John Spackman. No Form 7's were submitted for the other two, however the claims were not contested. A summary is attached.
>
> Audit notes pertaining to the 1985 partial audit note that some individuals were being charged for uniforms among other things, I.P.X. couriers have been observed with I.P.X. uniforms.

Again, it is my opinion that the question fell within the specialized jurisdiction of the Board, and I am satisfied that there was a basis in the evidence, and on policy grounds, for the Board to make the finding which it did. There is no basis upon which the court should intervene.

A 2001 decision by the New Brunswick Court of Appeal, *Joey's Delivery Service v. New Brunswick (Workplace Health, Safety and Compensation Commission)*, [2001] N.B.U. No. 222, 2001 NBCA 17, leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 425, expressed the following caution:

98 Finally, it is necessary to deal with the application of the "mischief rule" or "purposive approach" to classification of working relationships. Bluntly stated, this factor applies on the understanding that most legislative schemes that distinguish between employees and independent contractors are directed at providing needed benefits to employees. Therefore, it is understandable that the law should lean towards classification as an employee, at least in those cases where conventional analysis leads to an indeterminate conclusion. Everyone is aware that it is to the benefit of employers to outsource work traditionally undertaken by employees and this is the mischief that decision-makers must consider.

99 The adoption of economic measures that promote employer efficiency are well known. In recent times, the out-sourcing of work traditionally undertaken by employees is commonplace. Employers of independent contractors are no longer obligated to contribute to the national pension scheme, as well as federal and provincial insurance schemes - employment insurance and workers' compensation, respectively. Nor are employers required to provide independent contractors with traditional employee benefits, including supplementary health and disability insurance, let alone access to a private pension scheme. At the same time, non-unionized workers classified as independent contractors are ineligible to receive the statutory protections prescribed by minimum employment standards legislation. For these reasons, courts and tribunals carefully scrutinize working relationships with a view to ensuring that employers are not exploiting workers who have one of two options - either accept the work or find alternative employment if it exists.

100 It is true that some workers willingly accept the financial risks to which independent contractors are exposed if work is no longer available. There are advantages to carrying on business for oneself. For example, there are tax write-offs not available to employees and the remuneration received as an independent contractor may enable the self-employed to make adequate provision for retirement and other insurance type benefits. In short, not all workers are opposed to classification as independent contractors and for good reason.

101 The real task is to isolate those cases in which the employer is effectively exploiting workers, that is, cases in which no discernible advantage accrues to those whom the employer has labeled "independent contractor". Perhaps it is not surprising that very few classification cases involve highly skilled workers or home-based entrepreneurs. Much of the jurisprudence has been concerned with the legal status of those possessing a driver's license and a vehicle. Presumably, persons falling within the first category are better able to look after their own economic

> interests than those who come within the second. This is why the purposive or mischief factor or approach cannot be ignored.

A 2001 decision of the Supreme Court of Canada provides a useful review and analysis of the common law principles to be applied in determining whether a person is an employee or an independent contractor. In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc*., [2001] S.C.R. 983, (2001), 204 D.L.R. (4th) 542, the Supreme Court of Canada provided a detailed review and analysis of prior court decisions regarding employee versus independent contractor status, at paragraphs 33 to 45. This analysis included reference to:

- *Stevenson Jordan and Harrison, Ltd. v. Macdonald*, [1952] 1 The Times L.R. 101
- *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553
- *Market Investigations, Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732
- *Montreal v. Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161
- *Lee Ting Sang v. Chung Chi-Keung*, [1990] 2 A.C. 374
- Atiyah, P. S., *Vicarious Liability in the Law of Torts*. London: Butterworths, 1967.

In *Sagaz*, the Supreme Court of Canada concluded:

> 46 In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Lord Denning stated in Stevenson Jordan, supra, that it may be impossible to give a precise definition of the distinction (p. 111) and, similarly, Fleming observed that "no single test seems to yield an invariably clear and acceptable answer to the many variables of ever changing employment relations ..." (p. 416). Further, I agree with MacGuigan J.A. in Wiebe Door, at p. 563, citing Atiyah, supra, at p. 38, that what must always occur is a search for the total relationship of the parties:
>
> > [It] is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose.... The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic

> formula can be propounded for determining which factors should, in any given case, be treated as the determining ones.

47 Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in Market Investigations, supra. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

48 It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

Reasons and Findings

(a) Standard of Proof

We have considered, as a preliminary question, the effect of subsections 99(3) and 250(4) of the Act. These subsections require that if the Board is making a decision respecting the compensation or rehabilitation of a worker, or WCAT is hearing an appeal respecting the compensation of a worker, and the evidence supporting different findings on an issue is evenly weighted, the issue must be resolved in a manner that favours the worker. A restrictive and literal interpretation of these subsections might suggest that this direction only applies to the determination of benefits after a person has been found to be a worker. A broad and purposive interpretation of these subsections might support applying this statutory direction in connection with the initial determination regarding the scope of workers' compensation coverage (as to whether a person is a worker).

In this case, W's appeal concerns the initial wage rate set on his claim. The question regarding his status has been raised in connection with the determination of the wage rate used to calculate his wage loss benefits. We consider, therefore, that our decision is one respecting the compensation of a worker. Accordingly, if the evidence on an issue is evenly balanced, it must be resolved in W's favour.

Section 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, provides:

> Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

We consider that this provision also supports applying a broad and purposive interpretation to subsections 99(3) and 250(4) of the Act. We find, therefore, that the statutory direction contained in subsection 250(4) of the Act, regarding the resolution of issues on which the evidence is evenly balanced in favour of the worker, is applicable to our determination as to whether W was a worker or an independent operator.

(b) Status Determination – Wage Rate

W's status as a worker, with respect to the acceptance of his claim for compensation, is not in issue in this appeal. At issue is whether W is a worker in the "usual" sense of that term, entitled to workers' compensation coverage, by virtue of his employment, on the basis of the protections provided to workers on a compulsory basis. Alternatively, did he fall into a grey area, between that of a worker or an independent operator, whose status may be determined on the basis of his being a labour contractor who elected to register with the Board for POP coverage as an independent operator?

In light of the wording of section 33.6 of the Act, it is arguable that the fact that a person is registered with POP coverage at the time of his or her injury should be treated as determinative of the basis on which the person's initial wage rate should be set. On the basis of that approach, if the validity of the person's POP coverage is to be challenged it should be in respect of a decision by the Board's Assessment Department, rather than in the context of a wage rate determination by a case manager. We do not consider it necessary to resolve that question for the purposes of our decision. We have proceeded to address W's appeal on the merits, on an assumption that the question regarding the validity of his POP coverage is properly before WCAT in this appeal.

We have cited the Court of Appeal decision in *IPX* at length above. We accept that decision as establishing that the policy regarding labour contractors is viable or lawful under the Act, including the reliance on ownership of major revenue-producing equipment as a significant criterion in determining whether a subcontractor is a labour contractor or a worker. We note, however, that what was expressed in the 1980's as a policy position of the Board in excluding bicycle couriers was recently modified by way of a practice directive to permit registration of bicycle couriers. Policy could not

normally be amended by a practice directive. However, the term "policy" did not have an express status under the Act until the June 3, 1991 amendments to the Act (when the powers of the former board of commissioners were divided between the board of governors with policy-making authority, the Board's administration under the authority of the President, and the Appeal Division with authority to hear appeals). As the definition of what constituted major revenue-producing equipment was never part of the published policies of the board of governors, panel of administrators, or board of directors, it was open to the Assessment Department to revise its practices and to record these developments in a practice directive.

Unlike the Court of Appeal in the *IPX* case, our consideration of the Board's decision is not subject to the Board's strong privative clause (except in respect of issues of lawfulness of policy, as set out in section 251 of the Act). We are empowered to make what we consider to be the correct decision in respect of the circumstances of this case, without any requirement of deference to the decisions by the case manager and the review officer which are at the root of this appeal. It is a matter for us to determine, as an exercise of judgment, whether any degree of deference should be accorded to the Board's general practices in effect during the time period in question.

A central issue in this appeal concerns the effect to be given to the Board practice directive which treats a professional grade chainsaw as a major piece of revenue-producing equipment, in the falling and bucking industry. While Practice Directive 1-1-7(A) was stated to be effective May 1, 2005, we infer that it represented, at least in its treatment of chainsaws, a written statement of what had been the Board's prior practice at the time of W's registration with the Board on July 12, 2004.

WCAT Decision #2006-02121, May 17, 2006, summarized as noteworthy on the WCAT website, reasoned:

> Practice directives are issued by the Board's administration, rather than by the Board's board of directors. They do not have the status of published policy, and are therefore not binding on WCAT. It is nevertheless appropriate for WCAT to take practice directives into account on issues of interpretation, given the desirability of using common definitions in order to promote consistency and predictability of decision-making in the workers' compensation system.

In that case, the WCAT panel declined to follow an interpretation provided in the Best Practices Information Sheet #5: Reconsiderations. The information sheet was subsequently amended to accord with the reasoning provided by the WCAT panel (i.e. that the 75-day time frame on the Board's reconsideration authority is not triggered by the making of an internal determination on the Board's file which has not been communicated).

WCAT Decision #2006-03780 similarly commented:

> I agree with the lawyer (and the WCAT panel) that practice guidelines cannot be inconsistent with the published policy of the board of directors. However, where there is a gap or ambiguity in policy, it is open to the Board to provide practice direction to its adjudicators. Such practice direction does not achieve the status of policy under section 82 of the Act. Accordingly, the statutory directions in subsections 99(2) and 250(2) regarding the application of policy do not require compliance with practice directives. While regard may be had to such practice guidance (in the interest of promoting consistency in decision-making), it is open to WCAT to conclude that an alternative interpretation or approach better meets the intent of the Act or policy.

We further note, in respect of the consideration to be given to such non-binding practice directives, that they cannot be treated as fettering a decision-maker's discretion. In the text *Administrative Law in Canada*, Fourth Ed. (Ontario: LexisNexis, 2006) Sara Blake states at pages 98-99:

> Many tribunals issue guidelines indicating the considerations by which they will be guided in the exercise of their discretion or explaining how they interpret a particular statutory provision. **The publication of policies and guidelines is a helpful practice. It gives those in the industry advance knowledge of the tribunal's opinion on various subjects so that they may govern their affairs accordingly. It assists applicants by listing the criteria that will be considered when deciding whether to grant the application**. Also, in tribunals that have many members presiding over a large number of proceedings, guidelines ensure a certain level of consistency and avoid a patchwork of arbitrary and haphazard decisions....
>
> However, care must be taken so that guidelines formulated to structure the use of the discretion do not crystallize into binding and conclusive rules. If discretion is too tightly circumscribed by guidelines, the flexibility and judgment that are an integral part of discretion may be lost. A balance must be stuck between ensuring uniformity and allowing flexibility in the exercise of discretion. The tribunal may not fetter its discretion by treating the guidelines as binding rules and refusing to consider other valid and relevant criteria....
>
> [emphasis added]

Blake cites the decision of the Federal Court of Canada – Trial Division in *Dawkins v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 505, [1992] 1 F.C. 639. In that case, the Court reasoned:

> With respect to the guidelines generally, I do not think it can be seriously disputed that general standards are necessary for the effective exercise of discretion in the circumstances, in order to ensure a certain level of consistency from one decision to another, and to avoid a patchwork of arbitrary and haphazard decisions being made across the country. Uniformity in decision-making, however, must be balanced against the need to consider individual cases on their own merits and particular circumstances. Care must be taken so that any guidelines formulated to structure the use of discretion do not crystallize into binding and conclusive rules. If the discretion of the administrator becomes too tightly circumscribed by guidelines, the flexibility and judgment that are an integral part of discretion may be lost. The balance to be struck between the two considerations depends, however, on the circumstances and considerations of a particular decisionmaking situation.

We are cognizant of the concerns which have arisen regarding the application of the labour contractor policy. It appears that there was some change in the Board's approach during the last 20 years as to what constituted a major piece of revenue-producing equipment (as illustrated by the changed treatment of couriers with bicycles). A question may be posed as to whether the development of industry-specific practices around what constitutes a major piece of revenue-producing equipment involves accommodations which may serve to promote the economic competitiveness of particular industries but which tend to undermine certain fundamental goals of the workers' compensation system (relating to the prevention of injuries and the compensation of injured workers). This concern is reinforced by the analysis expressed by the New Brunswick Court of Appeal in *Joey's Delivery Service*, regarding the application of the "mischief rule" or "purposive approach" to the classification of working relationships.

In *IPX*, the Court of Appeal upheld the Board's use of the "labour contractor" policy analysis as a means of determining the status of persons in what we have termed the grey area (as to whether they are workers or independent operators) as viable under the Act, recognizing that this involved a significant policy component. We consider that the appeal before us similarly involves a significant policy component, albeit one on which a central issue regarding whether a chainsaw constitutes a major piece of revenue-producing equipment has only been addressed by way of a practice directive which does not have the status of policy under section 82 of the Act.

While not relevant to our decision in this case, we note that related policy issues have been the subject of recent policy consultation (as described on the Board's website). At its January 27, 2006 meeting, the board of directors approved the release of a package of policy discussion papers and draft policy items for stakeholder consultation:

- Assessment Policy Regarding Workplace Status
- Prevention Policies Regarding Roles and Responsibilities of Workplace Parties
- Prevention Policies Regarding Enforcement

Comments regarding these materials were invited by May 12, 2006. The information on the Board's website notes: "Stakeholder feedback will be reported to the Board of Directors and given consideration prior to making a final decision on policy amendments."

The proposed amendments to the policy in the *Assessment Manual* regarding determinations of status under the Act include (at page 22, under "Equipment Supply"):

> Major equipment is that required to complete the actual work contracted for, and which represents a significant capital outlay to supply. **The Board does not consider hand tools (including chain saws) and vehicles used for personal transportation or to transport lesser equipment as major equipment**.
>
> [emphasis added]

At pages 5 to 6, the consultation paper also identifies a number of "Challenges under Current Policy." In particular, those involving health and safety consequences, and compensation consequences, are discussed under headings 4.3.1. and 4.3.2. The discussion paper contains a cogent and frank analysis of the systemic concerns arising from the operation of the Board's current policies and practice directives. The draft policy amendments propose the elimination of the labour contractor category. Under the proposed changes, Board officers would no longer determine status solely based on one aspect of a workplace relationship.

While we take note of this current review of the policies, we do not consider that this is a factor to be taken into account in our decision. The fact that the Board has engaged in consultation regarding the concerns related to its current policies, with a view to submitting these issues to the board of directors for consideration under their policy-making authority pursuant to section 82 of the Act, does not mean that the existing policies and practice directives are necessarily in error. In general, the process of policy development tends to support leaving room for the policy-makers to address policy issues in a comprehensive manner under section 82 of the Act. In any case, we are obliged to make a decision which takes into account the merits and justice of the particular case before us, in the context of the policy which existed in early 2005.

While we have no legal obligation to defer to a practice directive, we consider that it may sometimes be the case that on certain kinds of issues, with broad implications for the workers' compensation system, WCAT should exercise caution in considering whether some different approach is required. The interests of consistency, and the legitimate expectations of the parties, are factors which may validly be taken into account. We find that the argument by the employers' adviser to this effect has considerable merit, particularly as this concerns an issue of status rather than a question of entitlement to a particular benefit.

In his submission, W questions, in effect, the basis on which a person may be found to be an independent firm rather than a worker in the traditional sense of the term. It is evident from the court decisions cited above, and the policies contained in the *Assessment Manual*, that there is no single test which may be applied. In this context, the desirability of having policies and practices to promote a consistent approach is obvious, and long-standing practices are, in our view, deserving of some measure of deference. To conclude otherwise could lead to an unacceptable level of uncertainty regarding the status of such persons, with far-ranging consequences.

In the present case, the appellant was registered with the Board for POP at the time of the accident. He provided his own chainsaw, which was in the upper range of professional grade chainsaws. Board practice at the time was to treat such a chainsaw as a major piece of revenue producing equipment in relation to contractors classed in Classification Units 703013 (manual tree falling and bucking) and 703002 (brushing and weeding or tree thinning or spacing). The appellant's work activities, and assessment classification, were in the former category. The appellant elected to register with the Board for POP coverage, on the basis of the Board policies and practices which were in effect at the time. X Contracting similarly relied upon the Board policies and practices which were in effect at the time, in ensuring that W / W Logging stayed current with its assessment obligations in relation to the work which was being performed.

For the purposes of our decision, we do not consider it necessary to resolve the dispute identified in the submissions by the manager, Assessment Policy, and by the employers' adviser, regarding whether the analysis of the appellant's status should proceed by way of a sequential analysis beginning with the criteria at AP1-1-3. We consider that the employers' adviser is likely correct in suggesting that the Board's initial acceptance of the appellant's application for POP proceeded directly to the application of the labour contractor criteria, without such an analysis. On the other hand, once the status of a person is in issue, we accept that this may be further reviewed having regard to the criteria in AP1-1-3, with a view to determining whether, in all of the circumstances, the original acceptance of the appellant's application for POP coverage was in error.

The policy at AP1-1-3 sets out general principles to be applied in distinguishing an employment relationship from one between independent firms. Together with the set of criteria contained in AP1-1-3, the policy explains:

> In distinguishing an employment relationship from one between independent firms, there is no single test that can be consistently applied. The factors considered include: …
>
> The major test, which largely encompasses these factors, is whether the individual doing the work exists as a business enterprise independently of the person or entity for whom the work is done.
>
> No business organization is completely independent of all others. It is a question of degree whether a party to a contract has a sufficient amount of independence to warrant registration as an employer. Many small parties may only contract with one or two large firms over a period of time. Yet they are often independent of the person with whom they are contracting in significant respects. For example, they must seek out and bid for their own contracts, keep their own books and records, make income tax, unemployment insurance and Canada Pension Plan deductions. They also retain the right to hire and fire their own workers and exercise control over the work performed by their workers. These factors must be considered.
>
> Some regard must also be paid to the structure and customs of the particular industry involved. Where an industry makes much use of the contracting out of work, this should be recognized as a factor in considering applications for registration as employers by parties to contracts in those industries.

We have considered the application of the specific criteria in AP1-1-3 as follows:

(i) whether the services to be performed are essentially services of labour;

W's services may be characterized as involving the provision of both labour and equipment, as he furnished at least one professional grade chainsaw.

(ii) the degree of control exercised over the individual doing the work by the person or entity for whom the work is done;

We accept W's evidence to the effect that a substantial degree of control was exercised by X Contracting and/or Z, even though W applied his own expertise in connection with the specific falling activities undertaken.

(iii) whether the individual doing the work might make a profit or loss;

As W was paid on a daily rate rather than on a "production" basis, there was little opportunity for profit or loss so long as work was available. However, his actual

earnings level was subject to work being available, and X Contracting was not obliged to provide him with continuous work. The number of days worked varied in each pay period.

(iv) whether the individual doing the work or the person or entity for whom the work is done provides the major equipment;

Major equipment was provided by X Contracting and/or Z. W also provided at least one professional grade chainsaw, which the Board by practice had deemed to be a piece of major revenue producing equipment for the falling industry.

(v) if the business enterprise is subject to regulatory licensing, who is the licensee;

We infer that X Contracting and/or Z would have held the significant regulatory licenses.

(vi) whether the terms of the contract are normal or expected for a contract between independent contractors;

We do not find that the terms of the contract were unusual or exceptional, in terms of considering whether W's circumstances should be viewed as falling outside the practice of the Board to accept applications for registration for POP coverage from persons in similar circumstances.

(vii) who is best able to fulfill the prevention and other obligations of an employer under the Act;

We consider it evident that the larger firms (X Contracting and/or Z) would be in the best position to fulfill the prevention and other obligations of an employer under the Act.

(viii) whether the individual doing the work engages continually and indefinitely for one person or works intermittently and for different persons; and

While W was hired to work for other firms in 2004, the weight of the evidence supports a conclusion he had a substantial work connection to X Contracting even if this was not continuous.

(ix) whether the individual doing the work is able or required to hire other persons.

The evidence does not establish that W was able or required to hire other persons. On the other hand, it does not appear that the contract with X Contracting expressly precluded W Logging from hiring other persons.

In the absence of the policy permitting registration by a labour contractor, an application of the criteria at AP1-1-3 would point to the appellant having the status of a worker. That is, in fact, contemplated by the labour contractor policy, as that policy provides that W would be a worker of the firm for which he was working if he was not registered.

We accept that it is open to us to find, upon consideration of the facts and law, that W is so clearly a "worker" in the traditional sense that the Board erred in law in accepting his application for POP coverage. We are not persuaded, however, that the evidence is so clear-cut as to warrant this conclusion. We do not consider that an application of the criteria at AP1-1-3 points so strongly to W having been a worker as to show that the Board's acceptance of his application for POP coverage was in error. There are also indicia of independence involving the need for W to seek out his own contracts, payment of his CPP premiums, deduction of business expenses for income tax purposes, and provision of a professional grade chainsaw (in the context of an industry where there appears to have been much use of the contracting out of work).

Notwithstanding the problems associated with the current policies and the practice directive, the fact remains that W / W Logging, and X Contracting, and doubtless numerous other contractors and firms, organized their business operations in reliance on the framework established by the Assessment Department. This involved applications for POP coverage, payment of WCB premiums, the deduction of business expenses by W from his earnings for income tax purposes, payment of CPP by W, and the calculation of workers' compensation benefits for other workers with POP coverage. A change in this framework would impact the calculation of a firm's experience rating, if they were to be responsible for injuries which occurred during a time period during which they not previously considered to be the employer. Even though there may be significant concerns respecting the application of the practice directive in question, we are of the view that consideration as to a possible change in the Board's approach is better addressed by the workers' compensation system and its stakeholders in some broader fashion than in the context of this particular appeal.

Upon careful consideration of the evidence and the submissions by the appellant and other interested persons, we agree with the decision by the review officer. We find that the appellant's wage rate was properly determined under section 33.6 of the Act, on the basis that he was an independent operator by virtue of his being a labour contractor who had purchased POP coverage from the Board. Accordingly, his initial wage rate was properly based on the gross earnings for which POP coverage was purchased.

(b) Heath Care Benefits

The February 15, 2005 decision letter by the case manager also advised W:

> I will consider paying your prescription costs related to this claim. Please send original receipts with your claim number clearly identified.
> Please note the following guidelines:

The letter set out a number of guidelines, without specifically relating these to W's claim. *Review Decision #31200* reasoned:

> With respect to health care benefits, section 21(1) of the *Act* states in part that the Board may provide for the injured party any medical, surgical, hospital, nursing and other care or treatment that it may consider reasonably necessary at the time of the injury and thereafter during the disability to cure and relieve that party from the effects of the injury, and the Board may adopt rules and regulations with respect to furnishing health care to injured parties entitled to it and for the payment of it. The applicant's representative submits only that the section 21 benefits are "too limited" and provides no supporting evidence or argument for this contention. I can find no error in law and policy in the Board Officer's documentation of the applicant's potential entitlement to a variety of health care benefits. I therefore deny the applicant's request.

We read the February 15, 2005 decision letter as simply providing W with advance information regarding the manner in which consideration would be given to his claim for health care benefits, rather than constituting a decision as such. This left room for any accounts actually submitted to the Board to be adjudicated at a future date. Accordingly, we do not consider that the February 15, 2005 decision contained a reviewable decision regarding the provision of health care benefits.

Although again raised as an issue in W's notice of appeal, this issue was not further addressed in the submissions provided on his behalf. We find no basis on which to allow W's appeal on this issue.

(c) Legal Expenses

In his notice of appeal, W requested reimbursement of legal fees. *Review Decision #31200* reasoned:

> The Board's *Rehabilitation Services and Claims Manual* ("RSCM"), Vol. II, policy item #100.40, *Fees and Expenses of Representatives and other Advocates*, sets out that fees and expenses of representatives and other

> advocates are not payable by the Board. In addition, the Review Division Practices and Procedures, B4.5, *Costs and Expenses*, includes the provision that if a party or parties choose to retain a representative for the purpose of review, they do so at their own expense. The Review Division is bound by the Board's policy respecting fees and expenses of representatives and other advocates as stated in policy item #100.40. The applicant's legal costs are therefore not reimbursable.

Section 7 of the *Workers Compensation Act Appeal Regulation* (Appeal Regulation), B.C. Reg. 321/02, provides:

> The appeal tribunal may not order the Board to reimburse a party's expenses arising from a person representing the party or the attendance of a representative of the party at a hearing or other proceeding related to the appeal.

By submission of January 11, 2006, W's former lawyer argued that W was "entitled to legal costs to date under s. 100 or under the WCB's general authority using the ***Van Unen*** (BCCA) criteria of "**unique**", "**unusual**" or "**truly deserving**". [emphasis in original]

W's former lawyer relied upon the decision by the British Columbia Court of Appeal in *Van Unen* v. *WCB (BC)*, 2001 BCCA 262, (2001), 152 B.C.A.C. 13, 87 B.C.L.R. (3d) 277, 17 W.C.R. 305, leave to appeal to the Supreme Court of Canada denied [2001] S.C.C.A. No. 288. In *Van Unen*, the Court of Appeal considered Appeal Division decisions which denied payment of legal fees. The Appeal Division panels considered the policy which appeared to prohibit the payment of legal fees. In those cases, however, the Appeal Division panels considered whether there were circumstances justifying a departure from the policy. The Court of Appeal reasoned:

> [28] Those two sets of reasons reflect an application of the reasoning set out in the "generic" decision No. 93-1687. In my opinion, applying the standard of correctness, coupled with appropriate deference to the Appeal Division's expertise in relation to the objects and practical application of the legislation, the interpretation of s. 100 which allows it to apply to claims for legal expenses, but does not require that they be paid in any case or class of cases, (with the possible exception of unusual cases where the claiming party was subjected to abuse of process or otherwise became subject to unique considerations), is an interpretation that meets the standard which I have described. **It is an interpretation which rises above the *Rehabilitation Services and Claims Manual* by allowing for exceptions not indicated in the Manual.**

> [29] The interpretation I have described was actually applied in the passages from the two relevant decisions which I have quoted. In my opinion, **it leaves an ample discretion for truly deserving cases without violating the harmony of a system that the Board has decided should be conducted without any customary liability of the Board to pay legal fees** from the accident fund to every successful claimant who retains a lawyer.
>
> [30] In my opinion the Appeal Division did not improperly fetter its discretion in the two relevant decisions refusing the payment of legal expenses, did not act in a way that was patently unreasonable, and did not violate the principles of natural justice. I would not accede to the first ground of appeal.
>
> [emphasis added]

WCAT Decision #2004-06308, November 29, 2004, summarized as noteworthy on the WCAT website, addressed a similar argument in detail. That decision reasoned in part:

> The policy of the board of directors at #100.40 is stated as a rule, rather than as a guideline. It is unequivocal in its effect. It does not contain words such as "usually" or "generally", which would support applying the rule as a guideline. This language cannot be read as being tempered by the policy at #96.10, as that policy has been deleted.
>
> WCAT is a creature of statute, and its authority is defined by the Act. I find that the legislative intent of sections 99 and 250, regarding the application of policy, must be respected. Accordingly, I agree with the decisions by the review officer, which denied the worker's request for payment of legal fees. I do not view the policy at #100.40 as a patently unreasonable limitation on the authority contained in section 100 of the Act, so as to warrant a referral to the WCAT chair under section 251 of the Act. The worker's appeal on this issue is, therefore, denied.

Blake, *supra*, states at page 99:

> If a statute requires the application of policies or directives issued by the Minister or by another tribunal, then they must be applied because they have the status of law. However, the decision maker retains discretion to consider whether the policy applies in the circumstances of the case before it.

Having regard to the changed legislative context involving the March 3, 2003 changes to the Act, under which Board officers and WCAT must apply applicable policy pursuant to section 99(2) and 250(2) of the Act, and the deletion of the prior policy at RSCM #96.10, we consider that the analysis in *Van Unen* no longer applies.

We agree with the decision by the review officer to deny W's request for reimbursement of legal expenses. We further find, pursuant to section 7(2) of the Appeal Regulation, that we have no authority to award reimbursement of legal expenses in this appeal. No other expenses have been claimed in this appeal.

Accordingly, W's appeal is denied in relation to the three issues raised in his notice of appeal.

Conclusion

We confirm *Review Decision #31200*. We find that W was a labour operator who had purchased POP coverage from the Board. As such, he was properly characterized as an independent operator. Accordingly, his initial wage rate was properly determined under section 33.6 of the Act, based on the gross earnings for which POP coverage was purchased. His appeal for greater health care benefits is denied, for the reason that the February 15, 2005 decision by the case manager was only an information letter regarding the Board's general guidelines which did not contain a decision limiting future adjudication of such matters. W's appeal for reimbursement of legal expenses is denied.

Herb Morton
Vice Chair

Warren Hoole
Vice Chair

Teresa White
Vice Chair

HM/gw