

Noteworthy Decision Summary

Decision: WCAT-2008-00639 **Panel:** Warren Hoole **Decision Date:** February 27, 2008

Employer Registration – Effective Date – Sections 38 of the Workers Compensation Act – AP1-38-1 of the Assessment Manual – Promissory or Equitable Estoppel

This decision is noteworthy for its analysis of the responsibility on an employer to register with the Workers' Compensation Board, operating as WorkSafeBC (Board). Where the employer believes that the Board promised not to levy penalties or interest on employers who voluntarily registered, it is doubtful that WCAT has the authority to provide relief in the nature of promissory estoppel or equitable estoppel.

In response to a September 21, 2006 letter from Board, advising that it may be required to register, on September 27, 2006 the employer telephoned the Board to voluntarily register. It had been in operation for approximately 15 years. The Board advised the employer that the effective date for its registration was January 1, 2005. The employer disagreed, arguing that the effective date should be September 28, 2006, relying on the wording in the Board's letter which assured them that no penalties or interest would be levied if they came forward voluntarily. Retroactive registration was indistinguishable from a penalty and the Board should be held to its promise.

The employer's appeal was denied. Section 38 of the *Workers Compensation Act* (Act) requires a business to notify the Board as soon as it becomes an "employer" within the meaning of the Act. Section 250(2) of the Act requires the panel to apply policy item AP1-38-1 of the *Assessment Manual*. Item AP1-38-1, as it read prior to January 1, 2007, stated that if the firm was employing workers so that the registration with the Board would have been required in a previous year, the effective date would only go back as far as January 1st of the preceding year. However, if there was evidence that the employer deliberately avoided registration, a prior date might be used. Although the employer conceded that it should have been registered sooner, the panel found no suggestion that the employer had deliberately avoided its obligation to register.

The employer argued that setting a retroactive effective date for its registration was essentially the same as a penalty because it had to pay assessment costs even though none of its workers had been injured during the retroactive period. The panel doubted that WCAT has the authority to provide substantive relief on the basis of the equitable principles of promissory or equitable estoppel. Even if it did, the panel would not grant such relief because the Board's contact letter had indicated that employers would be responsible for retroactive premiums to ensure fairness between the delinquent employer and other employers that were properly registered.

The employer argued that it was the Board's responsibility to notify it of its obligation to register. The Board had placed an injured worker with the employer six years ago as part of a retraining initiative. At that time, the Board did not notify the employer of this requirement, nor did the Board inquire about the employer's registration status. Again, the panel questioned his authority to grant an equitable remedy. Even if WCAT had this authority, he would not grant it because the responsibility under the Act and policy for registration rests with the employer.

The employer raised the concern that the Review Division of the Board had not issued its decision until after the statutory time frame. The Board could not reasonably expect employers to abide by statutory requirements if the Board did not do so itself. In rejecting this argument the panel found the Review Division decision had been issued on time. Even if it had not, there was no authority under the Act or in the applicable policy to change an effective date of registration on the basis of a late Review Division decision.

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Introduction

The appellant British Columbia company has operated a used car business for approximately 15 years. In a decision letter dated September 28, 2006, the Workers' Compensation Board, now operating as WorkSafeBC (Board), registered the appellant with the Board as an employer for assessment purposes. The Board set January 1, 2005, as the effective date of this registration.

The employer disagreed with the effective date of its registration and requested that the Board reconsider its September 28, 2006 decision letter. In a decision letter dated October 27, 2006, the Board confirmed January 1, 2005, as the effective date of the employer's registration.

The employer disagreed and requested a review of the Board's September 28, and October 27, 2006 decisions. In *Review Decision #R0074704* and *Review Decision #R0074705*, both dated May 10, 2007, a review officer denied the employer's requests for review.

The employer now appeals *Review Decision #R0074704* and *Review Decision #R0074705* to the Workers' Compensation Appeal Tribunal (WCAT). The employer's appeal proceeded by way of a teleconference.

Issue(s)

Is January 1, 2005, the correct effective date of the employer's registration with the Board?

Jurisdiction

This appeal is brought under subsection 239(1) of the *Workers Compensation Act (Act)* which permits appeals of Review Division findings to the WCAT.

Background and Evidence

In a letter dated September 21, 2006, the Board notified the employer that it may be required to register. The September 21, 2006 letter stated, in relevant part:

You will not face any penalties or interest fees if you haven't registered with [the Board] and come forward voluntarily. However, in fairness to all other business owners who have been paying their share of insurance premiums to support B.C.'s injured workers, you will be responsible for paying retroactive premiums if your business should have been registered.

[reproduced as written, except as noted]

The employer telephoned the Board on September 27, 2006. A summary of this conversation is set out in the Board's computerized "Notepad" system of the same date. The employer stated that it had been operating for approximately 15 years and agreed to voluntarily register with the Board. A Board officer then informed the employer that its registration would be effective January 1, 2005. The employer disagreed with the January 1, 2005 effective date and argued that the effective date should be September 27, 2006.

In a Notepad entry dated October 27, 2006, the employer informed the Board that the Board had placed an injured worker with the employer in 1999 and had not checked whether the employer was properly registered with the Board. Nor had the Board notified the employer of this obligation. For this reason, the employer considered it unfair for the Board to backdate the employer's registration.

In the course of the WCAT proceedings, the employer submitted several documents:

- A July 5, 2007 submission setting out the reasons for the employer's disagreement with the Board's decision to set January 1, 2005, as the effective date of the employer's registration.
- An August 20, 2007 submission relating to the employer's request for stay of proceedings pending the resolution of the WCAT proceedings.
- An October 11, 2007 letter notifying the employer's employees that they would be losing their jobs because the employer did not intend to carry on business in the face of its dispute with the Board.

I conducted an oral hearing of this appeal by way of a teleconference at Richmond, British Columbia, on November 28, 2007. The employer provided oral evidence at the hearing. The employer stated that the Board placed Mr. JM, an injured worker, with the employer six years ago as part of a retraining initiative. The Board did not notify the employer at that time that it was required to be registered, nor did the Board inquire as to the employer's registration status.

Submissions

The employer's submissions were somewhat disordered; however, I understood the employer to direct the bulk of its relevant arguments to three primary areas of concern.

First, the employer says that the September 21, 2006 contact letter from the Board promised not to levy penalties or interest on employers that voluntarily registered with the Board.

The employer considers that setting a retroactive effective date for its registration is essentially the same as a penalty because the employer must pay assessment costs even though none of its workers were injured during this retroactive period. The employer therefore believes that it received no benefit from its retroactive coverage and that the Board is unjustly enriched because it receives premiums for a period in which it has no exposure to the risk of one of the employer's workers filing a claim for compensation.

In these circumstances, the employer argues that the retroactive effective date of its registration is equivalent to a penalty. Because the Board's September 21, 2006 contact letter promised not to impose penalties on employers that voluntarily register, the employer says that the retroactive effective date is improper.

Second, the employer argues that it was the Board's responsibility to notify the employer of its registration obligations. This is particularly so given that the Board placed an injured worker with the employer in 1999 and did not inquire as to the employer's registration status or notify the employer of its obligations in this regard.

The employer submits that the Board's omissions deprived the employer of the opportunity to comply with its registration requirements. For this reason, the employer says that it should not be subject to retroactive assessment payments between January 1, 2005 and September 28, 2006.

Third, the employer complained of a number of procedural shortcomings that it experienced when dealing with the Board. In particular, the employer says that it did not receive the Review Division decisions under appeal until after the expiry of the statutory time frame for the completion of those decisions. The employer says that the Board cannot reasonably expect employers to abide by statutory requirements if the Board does not do so itself.

For the above reasons, the employer submits that the effective date of its registration should not be made retroactive to January 1, 2005. The employer requests that I allow its appeal and set September 28, 2006, as the effective date of its registration with the Board.

Reasons and Findings

The employer's appeal cannot succeed. The Board correctly set January 1, 2005, as the effective date of the employer's registration. I set out my reasons for this conclusion below.

Section 37 of the Act authorizes the Board to assign employers to classification units for assessment purposes. Section 38 of the Act requires a business to notify the Board as soon as it becomes an "employer" within the meaning of the Act.

WCAT panels are bound by published policies of the Board pursuant to subsection 250(2) of the Act. The policies relating to this issue are set out in the Board's *Assessment Manual*. I note in particular policy item AP1-38-1, "Registration of Employers."

Policy item AP1-38-1 was amended effective January 1, 2007. However, because the Board issued its registration decision prior to January 1, 2007, it is the pre-January 1, 2007 version of AP1-38-1 (former AP1-38-1) that applies to this appeal.

Former AP1-38-1 states, in relevant part:

The effective date of registration is the date from which the employer will be assessed by the Board. Except where stated otherwise in this manual, this is the date the employer first employed workers. If the firm was employing workers, so that the registration with the Board would have been required in a previous year, the effective date will only go back as far as January 1st of the preceding year. However, if there is evidence that the employer deliberately avoided registration by such means as misrepresentation, false statements or ignoring registration requests, a prior date may be used.

I also note Practice Directive 1-38-1(A), "Section 38 Registration of an Employer on the Initiative of the Board," which, although not binding upon me, provides guidance to Board officers when registering an employer.

The relevant law and policy therefore oblige every "employer" to register with the Board. To the extent that an employer fails to register in a timely manner, the Board will set the effective date of registration as January 1 of the year prior to the year of actual registration. In the event that an employer deliberately evades its registration obligations, the Board may apply a lengthier period of retroactivity to that employer's registration.

The employer concedes that it should have been registered with the Board well before the date of its actual registration. There is no suggestion in the evidence that the

employer deliberately avoided its registration obligations. The only dispute is whether the Board was correct to set the effective date as January 1 of the year prior to the employer's actual registration on September 27, 2006.

In my view, the policy set out in former AP1-38-1 clearly directs the Board to backdate the employer's registration to January 1, 2005. As already noted above, I am required to apply policies such as those set out in former AP1-38-1. I see little room to dispute the plain meaning of the policy item and the clear consequences of an employer's failure to register in a timely manner. It therefore seems obvious that the Board was correct to set January 1, 2005 as the employer's effective date of registration.

However, for its part, the employer argues that the September 21, 2006 contact letter promised not to levy penalties or interest on an employer that voluntarily registers with the Board. The employer then says that the retroactive effective date is indistinguishable from a penalty. The employer says that the Board should be held to its promise not to penalize the employer.

The employer's argument cannot succeed for two reasons. First, I doubt that an administrative tribunal has the necessary jurisdiction to provide the employer with the type of equitable remedy that it seeks.

In essence, the employer's argument relies on the legal principles of promissory estoppel or equitable estoppel. Both of these principles are generally considered to be equitable remedies more typically associated with superior courts of inherent jurisdiction than with administrative tribunals such as the WCAT.

Indeed, the Supreme Court of Canada has suggested that even superior courts may be unable to grant substantive equitable remedies in the context of public law.¹

Blake offers a similar conclusion at page 100 of her *Administrative Law in Canada, 4th Edition*:

The doctrine of legitimate expectations, which may give rise to procedural rights, is not a source of substantive rights. Similarly, a representation made by or on behalf of the tribunal does not create an estoppel requiring that a discretionary power be exercised in accordance with the representation. The tribunal retains its discretion on whether and how to exercise that power right up until the power is exercised and the final decision is made.

¹ *Mount Sinai Hospital Center v. Quebec (Minister of Health & Social Services)*, [2001] S.C.J. No. 43 at paragraphs 80 *et seq.*

I therefore doubt that the WCAT has the necessary jurisdiction to provide substantive relief on the basis of the equitable principles of promissory estoppel or equitable estoppel. For this reason alone, the employer's argument cannot succeed.

In any event, even if I had the necessary jurisdiction to provide the employer with the substantive equitable remedy it seeks, I would not do so on the basis of the factual circumstances of this case.

The key difficulty with the employer's argument is its allegation that the Board "promised" not to penalize the employer by registering it retroactively if the employer registered voluntarily. This allegation is not supported by the facts of the appeal.

Indeed, even a cursory review of the September 21, 2006 contact letter reveals the following statement from the Board, immediately following the "promise" not to levy penalties or interest:

However, in fairness to all other business owners who have been paying their share of insurance premiums to support B.C.'s injured workers, you will be responsible for paying retroactive premiums if your business should have been registered.

[emphasis added]

This statement clearly notifies an employer that it will be subject to retroactive registration in order to ensure a degree of fairness between the delinquent employer and other employers that were properly registered.

In these circumstances, I am unable to conclude that the Board's September 21, 2006 letter, in its full context, could reasonably be interpreted as a promise by the Board not to make an employer's registration retroactive.

I therefore do not accept the employer's allegation that the Board promised not to set a retroactive registration date. At most, the Board promised not to levy penalties, for which the Board has specific authority under subsection 40(2) of the Act. This promise was kept. In fact, the amount owing from the employer to the Board in relation to its non-registration would have been many times greater had the Board exercised its authority to levy penalties and interest.

This means that I disagree with the employer that the Board promised not to set a retroactive effective date for the employer's registration. I also doubt that I would have the necessary jurisdiction to provide a substantive remedy even if I agreed with the employer's assertion that the Board promised not to register it retroactively. For these reasons, the employer's first argument must fail.

The employer's second argument turns on the fact that the Board placed an injured worker with the employer for vocational rehabilitation purposes. The employer says the Board should have notified the employer of its registration obligations at that time.

This argument cannot succeed. The argument again imports considerations of equity that I doubt are within my jurisdiction. In any event, both the Act and the applicable policy place the registration and reporting obligation squarely on an employer. Given the number of employers in British Columbia, it would be a tremendously expensive and inefficient system if the Board were required to monitor every business and ensure its registration and compliance with the Act.

In these circumstances, a self-reporting system is a far more efficient solution, a solution that entitles the Board to rely on each business to report its status in an accurate and timely fashion. The effectiveness and legitimacy of a self-reporting system is supported by the same legal rationales applicable in the context of an individual's obligation to report his or her income tax.²

Although I appreciate that the employer is frustrated that the Board missed an opportunity to alert the employer to its failure to register, the fact remains that the responsibility for registration rests with the employer. I am therefore not persuaded that the Board's lack of initiative in relation to the employer's registration status is an appropriate basis for changing the decision under appeal, even if I had the necessary authority to grant the sort of substantive equitable remedy the employer requests.

The employer's third argument must also fail. Again, I appreciate that the employer is frustrated with the Board and with the Review Division's failure to issue its decision within the necessary time frame. I note for the employer's information that the decision may have arrived in the mail outside the time frame; however, the decision was in fact issued within the proper period.

Even if the employer were correct in its assertion, this does not mean that the effective date of the employer's registration should be changed. Indeed, I see no authority under the Act or in the applicable policy to change an effective date of registration on the basis of a late Review Division decision. The employer's argument on this point is therefore of no assistance to it.

In light of the above, I am satisfied that the Board correctly set January 1, 2005, as the effective date of the employer's registration.

As a result, I must deny the employer's appeal.

² See, for example, *Johnson v. Minister of National Revenue*, [1948] 3 D.T.C. 1182 (S.C.C.)

Conclusion

I confirm *Review Decision #R0074704* and *Review Decision #R0074705*. I find that the Board correctly set January 1, 2005, as the effective date of the employer's registration.

The employer has not requested reimbursement for appeal expenses and none are apparent; consequently, I make no order regarding expenses of this appeal.

Warren Hoole
Vice Chair

WH/gl