

Noteworthy Decision Summary

Decision: WCAT-2009-01313 **Panel:** Warren Hoole **Decision Date:** May 13, 2009

***Sections 37 and 42 of the Workers Compensation Act – Policy item #AP1-37-3
“Classification – Changes” Assessment Manual - Transfer of experience rating –
Assessments - Practice Directive 1-37-3(A) “Change of Classification”***

This decision determined that “distinct change” for the purpose of policy item AP1-37-3(4) of the *Assessment Manual*, which relates to the transfer of an employer’s experience rating upon a change in the employer’s industry classification, should be interpreted as allowing for the potential transfer of experience rating unless an employer’s new operations represent a clear and marked difference from their former operations.

In this case the employer was engaged in the construction industry. For the purposes of levying assessments on the employer, the Workers’ Compensation Board, operating as WorkSafeBC (Board), initially assigned the worker to “House or Other Wood Frame General Contracting, Construction or Renovation Work” classification unit. The employer later advised the Board it was commencing a seven-storey concrete building project.

The Board determined that the employer’s operations had changed and therefore assigned the employer to “Industrial, Commercial, Institutional or Highrise Residential General Contracting or Construction.” In the same decision letter, the Board declined to transfer the employer’s positive experience rating from its former classification unit to its new classification unit. The Review Division confirmed the Board’s decision. The WCAT panel denied the employer’s appeal, finding that the employer’s experience rating should not be transferred. The panel concluded that a comparison between a seven-storey concrete building and a wood-frame building demonstrates a clear and marked difference between the methods of construction and the attendant safety concerns. The panel thus found that the employer’s transition from wood-frame housing construction to the construction of a seven-storey concrete building does not reflect a mere evolution over time and instead demonstrates a distinct change in the employer’s operations.

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Introduction

- [1] The appellant is an employer engaged in the construction industry. For the purposes of levying assessments on the employer, the Workers' Compensation Board, operating as WorkSafeBC (Board), initially assigned the employer to classification unit (CU) 721027 "House or Other Wood Frame General Contracting, Construction or Renovation Work."
- [2] The employer contacted the Board on October 3, 2007, and reported that it was commencing a seven-storey concrete building project. In a decision letter dated November 22, 2007, the Board concluded that the employer's operations had changed and therefore assigned the employer to CU 721028 "Industrial, Commercial, Institutional or Highrise Residential General Contracting or Construction." In the same decision letter, the Board declined to transfer the employer's positive experience rating from its former CU to its new CU.
- [3] The employer disagreed with the Board's decision and requested a review. In *Review Decision #R0089574*, dated June 3, 2008, a review officer denied the appellant's appeal.
- [4] The employer now appeals *Review Decision #R0089574* to the Workers' Compensation Appeal Tribunal (WCAT). The employer initially requested that its appeal proceed by way of an oral hearing. However, in a letter dated December 9, 2008, the employer advised that an oral hearing was not necessary.
- [5] I have reviewed item #8.90 of the WCAT's *Manual of Rules of Practice and Procedure* (MRPP) and I am satisfied that the employer's appeal does not raise issues of credibility, factual complexities, or other circumstances that require an oral hearing. I therefore accept the employer's request that the appeal proceed by way of written submissions.

Issue(s)

- [6] Should the employer's experience rating from CU 721027 be transferred to CU 721028?

Jurisdiction

- [7] This appeal is brought under subsection 239(1) of the *Workers Compensation Act (Act)* which permits appeals of Review Division findings to the WCAT.
- [8] The employer agrees with the Board's decision to reassign it to CU 721028 and restricts its appeal to the issue of transfer of experience rating. In light of item #14.30 of the MRPP I therefore limit the scope of this appeal to the transfer of experience rating issue.

Background and Evidence

- [9] The facts are not in dispute and the review officer has already provided a convenient summary of the background to the employer's appeal. The review officer's decision is publicly available on the Internet at www.worksafebc.com. I therefore see little purpose in repeating this information at length. To the extent necessary, I will discuss relevant evidentiary matters in the course of my reasons.

Submissions

- [10] The employer says that its seven-storey construction project is not a distinct change in its operation and is merely the result of incremental changes since the commencement of the employer's operations in the construction industry.
- [11] The employer was initially established to construct single-family wood-framed homes. The employer then moved into multi-family wood-framed homes with concrete underground parking garages. The employer then moved into the project at issue in this appeal.
- [12] The employer continues to use all the same workers in the seven-storey construction project, and continues to operate the same safety program, with the same management. The employer refers me to the Board's *Assessment Manual*, particularly item 4(a)(ii) of policy AP1-37-3 and submits that its circumstances fall squarely within that policy and justify the transfer of its prior positive experience rating into its new CU.
- [13] The employer therefore requests that I allow its appeal and find that it is entitled to a transfer of its positive experience rating from prior CU 721027 into its new CU 721028.

Reasons and Findings

- [14] Section 37 of the Act authorizes the Board to assign employers into different classes for assessment purposes. Section 42 of the Act permits the Board to adopt a system of experience rating so that it may confer or impose on an employer a special rate,

differential, or assessment to correspond with the hazard or cost of compensation of that employer relative to that of the industry class or subclass to which it is assigned.

[15] WCAT panels are bound by published policies of the Board pursuant to subsection 250(2) of the Act. The policies relating to this appeal are set out in the Board's *Assessment Manual*. I note in particular policy item AP1-37-3 "Classification – Changes" which describes the circumstances and effects of classification changes and the situations in which experience rating will be transferred following a classification.

[16] The policy item states, in relevant part:

4. Impact on Experience Rating

A change in classification may result in a transfer of experience rating. The following principles apply:

- (a) The classification has changed because of a change in the firm's operations.
 - i. If there has been a distinct change in the operations, the experience rating will not transfer.
 - ii. If the change in operations has occurred incrementally or the firm's operations have evolved over time, the experience rating may transfer.
- (b) If the classification has changed, but not as a result of a change in the firm's operations, the experience rating may transfer. This includes a change in classification because of Board error.
- (c) If the classification has changed because of firm non-compliance, the general rule is that experience rating will not transfer. However, the Board may decide to transfer experience rating if the noncompliant firm could benefit from a failure to transfer.

The firm will be advised of any change in its classification.

[...]

[reproduced as written]

- [17] I also note Practice Directive 1-37-3(A) "Change of Classification." The practice directive is not binding upon me; however, it provides guidance regarding the interpretation of policy item AP1-37-3 and merits consideration to the extent that it provides consistency and predictability in decision-making.
- [18] Turning to the employer's appeal, it relies on the position that its operations have undergone an incremental change in its operations rather than a "distinct change" in its operations. If the former circumstances apply, then experience rating may transfer; however, if the latter circumstances apply then experience rating will not transfer.
- [19] The question then, is the meaning to be given to "distinct change" for the purposes of policy item AP1-37-3. This question requires consideration of the principles of statutory interpretation.
- [20] The correct approach to statutory interpretation in Canada is referred to as the "modern principle" and was described, for example, in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27.
- [21] In essence, the modern principle states that interpreting legislation requires reading the words of the provision in context and according to their grammatical and ordinary sense, harmoniously with the scheme and the object of the statute. A similar approach is appropriate where, as here, the interpretation of a binding policy is in question.
- [22] The second edition of *Webster's Dictionary*, unabridged, defines "distinct" as: "not alike," "different," "not the same," "separate," "individual," "clearly marked off," "clear," "plain," "well defined," "unmistakable" and "definite."
- [23] The ordinary and grammatical sense of this phrase therefore suggests that a "distinct change" requires a clear and marked difference between one state of affairs and another.
- [24] The purpose underlying policy item AP1-37-3(4) of the *Assessment Manual* is conveniently described in policy item AP1-42-1, which discusses the concept of experience rating generally:

Experience rating is a means of adjusting individual employers' assessment rates to reflect their actual claims cost experience. Employers whose experience is better than their rate group average receive a discount. Employers whose experience is worse than their rate group average pay a surcharge.

The experience rating program attempts to promote positive safety attitudes and to provide equity through a system of recognition and

accountability for claims costs. The goal is to encourage employers with high injury costs to reduce them, and to encourage employers with low injury costs to keep them low. The desired outcome is a reduction in the social and economic costs of work-related injuries and diseases.

- [25] Therefore, the purpose of experience rating generally and also within the context of policy item AP1-37-3 is to encourage sound safety practices by rewarding employers with good safety records and penalizing employers with poor safety records.
- [26] In my view, the purpose underlying the transfer of experience rating supports interpreting a “distinct change” as requiring a marked and clear difference between one state of affairs and another.
- [27] A positive or negative experience rating reflects an employer’s efforts to operate safely within a particular context. Where that context is no longer present, it is reasonable to infer that the employer’s former experience rating does not provide an accurate indicator of that employer’s ability to ensure future safe operations on its work site.
- [28] Indeed, where an employer is operating in unfamiliar and unusual circumstances it may no longer benefit from its prior knowledge, experience, and existing safety protocols learned during the course of its former operations. The likely safety of workers will similarly be a more difficult task to predict.
- [29] On the other hand, where an employer’s operations only change to a limited extent, it is reasonable to infer that the bulk of that employer’s knowledge, experience, and existing safety protocols will continue to be of relevance to that employer’s new operations. The employer will then likely continue to pose less risk to the workers’ compensation system generally because the safety of its workers will continue to be positively affected by its circumstances.
- [30] The purpose underlying policy item AP1-37-3(4) is therefore served by interpreting a “distinct change” as relating to a clear and marked difference between one state of affairs and another. Some minor change that does not impact the overall nature of the risks of the employer’s work site and the measures that the employer takes to control those risks should not prevent the transfer of experience rating. A more significant change that requires the development of substantially new procedures and that creates new areas of risk may require that experience rating not transfer.
- [31] For the above reasons, I therefore interpret “distinct change” for the purpose of policy item AP1-37-3(4) as allowing for the potential transfer of experience rating unless an employer’s new operations represent a clear and marked difference from their former operations.

- [32] With this interpretation in mind, I turn to consider the specific facts of the employer's appeal.
- [33] I have little difficulty in agreeing that substantial similarities exist between the operations described in CU 721027 and CU 721028. Both activities involve construction of residential units and can include multi-family condominium or townhouse-style construction.
- [34] However, it is apparent from the CU descriptions that there is a significant area of difference. That difference lies in the distinction between wood-frame construction and concrete construction. Indeed, the description for CU 721027 points out that exterior or structural renovation work will be classified "depending on the nature of the buildings" that are renovated.
- [35] According to the CU description, wood-frame exterior renovation will be assigned to CU 721027 and concrete building exterior renovation will be assigned to CU 721028. The description goes on to point out that, for interior renovation, no distinction is necessary between concrete or wood-frame buildings because the interior renovation work is essentially the same in either case. The CU description therefore demonstrates that a significant difference exists between wood-frame buildings and concrete buildings.
- [36] The distinction between the use of concrete and wood-frame buildings is not merely because of the different building techniques. In addition, concrete buildings have the capacity to reach greater heights than wood-frame buildings and bring with them greater concerns around fall restraint systems and additional more complex safety protocols than those associated with relatively smaller wood-frame buildings.
- [37] I am therefore of the opinion that a comparison between a seven-storey concrete building and a wood-frame building demonstrates a clear and marked difference between the methods of construction and the attendant safety concerns.
- [38] I agree that the employer's prior experience and knowledge, as embodied in its long-term workforce, will assist its safety efforts while engaged in the construction of concrete building; however, that assistance will be limited. The employer cannot rely solely on its prior experience to construct the seven-storey concrete building project. Because it will be conducting new activities in new circumstances, the employer's prior positive safety record cannot be relied on to reasonably forecast the likelihood of the employer continuing to operate safely in this new, albeit related, aspect of the construction industry.
- [39] Finally, I note the employer's argument that it has constructed concrete footings and concrete garages during the course of its operations in CU 721027. It is not the mere pouring of concrete at or below ground level that distinguishes CU 721027 from

CU 721028. It is also, and primarily, because the concrete work is conducted at considerable height that the latter CU is clearly distinct from the former.

[40] Consequently, although I understand that the employer has worked with concrete in the past and that its operations have evolved, I do not consider that the extent of its concrete operations or the degree of its evolution is sufficient to preclude my finding that the two operations in question represent a clear and marked difference from one another.

[41] In summary, I find that the employer's transition from wood-frame housing construction to the construction of a seven-storey concrete building does not reflect a mere evolution over time and instead demonstrates a distinct change in the employer's operations. This means that the requirements for the transfer of experience rating are not satisfied in the circumstances of this appeal. The Board was correct not to transfer the employer's experience rating when it transferred the employer from CU 721027 to CU 721028.

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

Conclusion

[43] I confirm *Review Decision #R0089574*. I find that the employer's experience rating from CU 721027 should not be transferred to CU 721028.

[44] No expenses were requested and none are apparent; therefore, I make no order for the reimbursement of appeal expenses.

Warren Hoole
Vice Chair

WH/gl