WCAT Decision Number: WCAT-2011-00996
WCAT Decision Date: April 20, 2011
Panel: Warren Hoole, Vice Chair

1.0 Summary

[1] The current version of *Assessment Manual* policy AP1-37-1 and AP1-37-3 permits the Workers' Compensation Board, operating as WorkSafeBC (Board), to assign and reassign employers to a classification unit (CU) for assessment purposes on an annual basis. I will refer collectively to the policy provisions that set out the Board's annual classification and reclassification authority as the "impugned policies".

[2] The impugned policies depend on the notion that each employer's classification decision expires at the end of the year in which it is made. This permits classifications and reclassifications that are said to not offend the 75-day reconsideration limit set out in subsection 96(5) of the *Workers' Compensation Act* (Act).

[3] The employer submits, and I agree, that the impugned policies are patently unreasonable because the Act provides no foundation for the expiry of classification decisions each year. I therefore refer the validity of the impugned policies to the Chair of the Workers' Compensation Appeal Tribunal (WCAT) in accordance with subsection 251(2) of the Act.

2.0 Issue(s)

[4] Are the impugned policies of the *Assessment Manual* so patently unreasonable that they are not capable of being supported by the Act?

3.0 Background

[5] The three appellants are related companies involved in the operation of building supply retail outlets under the same trade name in British Columbia. For convenience, I will simply refer to the appellants collectively as the "employer".

[6] The Board accepted the employer's registration and assigned it for assessment purposes in part to CU 741013 "General Retail – Not Elsewhere Specified" and in part to CU 741014 "Home Improvement Centre". The latter CU has a higher assessment rate than the former.

[7] Several years later, in 2005, the Board decided to change the employer's classification by deleting CU 741013, with the result that the employer's assessment costs increased because its entire assessable payroll was assigned to the higher assessment rate associated with CU 741014.[1]

[8] The employer disagreed with the Board and, following an unsuccessful request for review, appealed to the WCAT. The employer said that subsection 96(5) of the Act prevented the Board from reconsidering the employer's classification as more than 75 days had passed between its initial classification in 2002 and the Board's reclassification decision in 2005.

[9] The WCAT panel noted that the version of policy AP1-37-3 in effect at the time permitted the Board to change the employer's classification where the misclassification was the result of "Board error".

[10] The panel concluded that the version of AP1-37-3 in effect at the time was patently unreasonable because nothing in the Act permits reclassification on the basis of Board error. On the contrary, subsection 96(5) of the Act precluded the Board from reconsidering one of its decisions after 75 days, except where there was fraud or misrepresentation.

[11] The WCAT panel issued an April 2, 2007 memo referring the validity of that version of AP1-37-3 to the WCAT Chair. The WCAT Chair was not required to resolve the April 2, 2007 memo and the referral became moot when the Board amended AP1-37-3 and removed the statement that a reclassification was permitted if the original misclassification was due to "Board error".

[12] The WCAT panel then issued *WCAT-2008-01030* and *WCAT-2008-01034*, both dated April 3, 2008, allowing the employer's appeals. In the result, the employer succeeded in maintaining its assignment to both CU 741013 and CU 741014.

[13] Since then, AP1-37-3 has continued to be the subject of appellate comment because, although the "Board error" element had been removed, the policy continued to permit reclassification where an employer had failed to provide timely and complete evidence, but where the employer's omission fell short of fraud or misrepresentation.

[14] Most notably, in *WCAT-2008-02064*, dated July 10, 2008, another WCAT panel analysed this remaining aspect of AP1-37-3 that purported to permit the Board to reclassify employers after more than 75 days.

[1] In fact, one of the employers registered and was reclassified later than the other two; however, all three were reclassified more than 75 days after their original classification. Nothing turns on the third employer's different date of registration and classification for the purposes of this memo.

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[15] The panel concluded that the amended version of AP1-37-3 was likely patently unreasonable to the extent that it permitted a reclassification after 75 days for circumstances of employer non-compliance that fell short of "fraud or misrepresentation."

[16] In the circumstances of the appeal before him, the panel resolved the appeal on other grounds and was therefore not required to initiate a section 251 referral. In an effort to assist the Board in navigating the difficult interplay between assessment matters and the 75-day reconsideration rule, the panel suggested that the Act might be interpreted as providing the Board with a general power to classify an employer on an annual, prospective basis. This would effectively permit annual reclassification decisions, regardless of the reason underlying the need for such a reclassification.

[17] In particular, the panel indicated that sections 38, 39, 47, and 49 of the Act supported the concept of an "annual classification cycle". As part of its duty to administer the annual classification cycle, the panel noted that the Board was required to promulgate the annual *Classification and Rate List* – a policy document issued in the latter part of each year listing every CU and the rate applicable to that CU for the coming year.

[18] The annual nature of the *Classification and Rate List*, as well as the references to annual assessment matters in the noted sections of the Act, led the panel to suggest that a classification decision was only intended to be valid for one year and that an employer's classification could therefore be revisited for each coming annual classification cycle in the period following the issuance of the *Classification and Rate List*.

[19] The panel pointed out that his interpretation promoted flexibility in the assessment system while still respecting finality by ensuring that, although classification changes were possible, they would only be applied on a "go-forward" basis, rather than impacting an employer's assessment obligations in years past.

[20] The panel concluded that this interpretation was necessary in order to avoid the absurd consequences of employers remaining permanently in the wrong CU, which could result either in unfairly penalizing an employer or unfairly providing an unmerited windfall to an employer at the expense of other employers.

[21] The Board appears to have substantially agreed with *WCAT-2008-02064* and, in any event, created the impugned policies by amending AP1-37-1 and AP 1-37-3 pursuant to *Resolution 2009/07/14-08*, effective October 1, 2009.

[22] The impugned policies now permit the Board to classify and reclassify an employer annually, on a prospective basis. I note that policy item AP1-37-3 also permits further classification decisions where the factual, statutory, or policy circumstances of an employer change or in the presence of fraud or misrepresentation. I see no policy error in this regard and I expressly exclude the latter two situations from the current referral.

[23] Following the promulgation of the impugned policies, the Board decided by way of letters dated November 13, 2009, and January 8, 2010, to reclassify the employer by withdrawing it from CU 741013.

[24] As a result, for the 2010 assessment year, the employer's entire payroll was assessed at the rate associated with CU 741014. Consequently, the Board achieved in 2010 what it had first attempted to do in 2005: reclassify the employer by removing CU 741013 from its account.

[25] The employer disagreed with the Board's decisions and requested a review. In *Review Decisions #R0112872*, *#R0112873*, and *R0116337*, all dated June 24, 2010, a review officer denied the employer's requests for review.

[26] The employer now appeals to the WCAT. The employer raises two issues. First, the employer says the impugned policies are patently unreasonable because the Act does not permit annual reclassification of employers.

[27] Second, the employer says that *WCAT-2008-01030* and *WCAT-2008-01034* were final and conclusive and that the Board was not permitted to reach a decision contrary to the WCAT's earlier finding that the employer could not be withdrawn from CU 741013. It is only the first issue that is the subject of the current referral.

4.0 The Impugned Policies

[28] The portions of AP1-37-1 and AP1-37-3 authorizing the Board to annually classify and reclassify an employer are underlined below[2]:

[29] AP1-37-1 "The Classification System" states in relevant part:

> **2. CLASSIFICATION UNITS**
>
> Employers and independent operators are assigned to classification units annually and at other times as the Board requires, on the basis of the industry in which the firm is operating.

[30] AP1-37-3 "Classification – Changes" states in relevant part:

> **2. CHANGE IN CLASSIFICATION**
>
> The Board may change a firm's classification.

[2] I note that the "Background" to AP1-37-1 also references an annual classification cycle; however, pursuant to Board of Directors *Resolution 2003/02/11-04*, the "Background" to AP1-37-1 is not policy and accordingly cannot be included in the current referral.

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> The effective date of a change in a firm's classification and the impact on the firm's experience rating depends on the reason for the change. Set out below are four reasons why the Board may make a new decision concerning a firm's classification, and the effective date and impact on experience rating associated with each reason for change. Decisions in these cases do not constitute reconsiderations of existing classification decisions.
>
> **2.1 The Annual Classification Cycle**
>
> A firm is assigned one or more classifications every year as a consequence of the yearly establishment of the *Classification and Rate List*. This assignment may result in a firm's classification changing. The effective date of a change to a firm's classification resulting from the annual classification cycle is January 1st of the year for which the *Classification and Rate List* is established.
>
> Where a firm's classification changes as a result of the annual classification cycle, the general rule is that a firm's experience will transfer.
>
> [my emphasis]

[31] It is the portions of the policy excerpts underlined above that constitute the "impugned policies."

5.0 Analysis

[32] This is a narrow referral. It is directed only at the notion that the Board enjoys an annual classification and reclassification authority. This referral is not concerned with whether the Board may reclassify employers generally under some other theory; however, I will also briefly address this latter issue at the conclusion of my referral.

[33] I turn then to discuss why, in my view, the notion of an annual classification and reclassification authority is patently unreasonable.

5.1 Section 251 – Meaning of Patently Unreasonable

[34] The WCAT Chair addressed the meaning of this phrase in *WCAT-2011-00833*, dated March 30, 2011, at paragraphs 24 to 27. I will not repeat it, other than to say that, in essence, the patently unreasonable standard permits a variety of policy interpretations as long as the policy interpretation finds some rational basis in the Act.

[35] The patently unreasonable standard tolerates strained interpretations of the Act and is not concerned with the best or most reasonable interpretation of the Act; it is engaged where there is no statutory basis at all to support the policy item in question.

[36] Of particular relevance to the current referral, I consider apt the following from *Cowburn v. British Columbia (Workers Compensation Board)*, 2006 BCSC 1020 at para 24:

> …The question is whether the BOD [Board of directors of the Board] had the power to implement such a policy in the face of the *Act*. In other words, was the interpretation of s. 35.1(8) patently unreasonable. I have concluded that it is. I can find nothing [*sic*] the *Act* or the history of the section which is capable of sustaining the interpretation given to it by the BOD. Their decision is focused more on policy and the finances of the WCB than what the legislature intended with s. 35.1(8).
>
> [my emphasis]

5.2 Are the impugned policies patently unreasonable?

[37] As noted in *WCAT-2011-00833*, statutory interpretation is the basis for evaluating the viability of the policies at issue. The modern rule of interpretation is well-known and turns on the ordinary and grammatical sense of the statutory provisions in question, read in their context, and with regard to the purposes of the provisions in question as well as the Act more generally. I will address each in turn.

A. Ordinary and Grammatical Sense

[38] The policy itself does not identify any particular statutory authority for the notion that the Board is authorized to classify and reclassify employers on an annual basis. I infer however that the Board agreed with the panel's analysis in *WCAT-2008-02064* in which the concept of an annual classification cycle was first proposed. That decision referenced sections 38, 39, 47, and 49 of the Act as all describing annually recurring assessment activities and thus an annual power of the Board to classify and reclassify employers.

[39] I agree that the referenced sections describe annually recurring activities relevant to assessment matters; however, I disagree that the referenced sections have any bearing on the Board's classification authority. This means that the annual nature of the former is irrelevant to the characterization of the latter.

[40] It may be useful at this point to note that an assessment is, in essence, simply a bill or invoice to an employer setting out the payment that employer must make to fund its portion of the compensation system. It is true that, in order to calculate the amount of this bill, a number of factors come into play. These include: the employer's CU, as well as the rate applicable to each CU, whether a firm is an "employer", who its "workers" are, the employer's assessable payroll, and its experience rating.

[41] Consequently, although an assessment reflects the sum of all these factors, the assessment should not be conflated with also being these factors. It follows that the annual nature of the first (that is, the bill or invoice conveyed by an assessment) need not colour the nature of the second (that is, the factors that combine to ultimately provide the amount of the assessment).

[42] With more particular reference to the sections cited by the panel in *WCAT-2008-02064*, I see nothing in the referenced statutory provisions that relate to an annual authority to reclassify an employer.

[43] First, the Board's annual power to advise employers of the upcoming assessment rate associated with a CU is quite different from the power to classify or reclassify an employer into a CU. The purpose of the annual *Classification and Rate List* is not to advise an employer of the CU to which it is assigned; rather, it is simply to advise an employer of the rate payable per $100 of assessable payroll for the upcoming year.

[44] Second, an employer's annual obligation to report payroll similarly has nothing to do with its classification. This annual (or, in some cases, more frequent) obligation permits the payment of assessments in an orderly manner, it does not create new decisions as to the underlying elements that make up the amount of an assessment itself, other than in relation to the amount of the assessable payroll.

[45] For example, the periodic reporting of payroll depends on the notion that an entity is an "employer" in the first place because, unless an entity is an employer, it cannot be subject to the Act. But it would be absurd to suggest that the monthly, quarterly, or annual reporting by an employer of its payroll carries along with it an opportunity for the employer to revisit its status (in the absence of any material change) following each report.

[46] Third, the requirement that the Board notify an employer of any assessments owing to the Board in each year again makes no mention of classification issues. This requirement involves the administrative task of advising employers of the amount of their assessment costs for a given period, not of reopening for further adjudication each of the already decided factors (status, CU, experience rating, and so on), that combine to result in the assessment amount for any given year.

[47] Consequently, I am unable to conclude that the ordinary and grammatical sense of the referenced sections of the Act provides a rational basis to conclude that the Board enjoys an annual reclassification authority. On the contrary, the only reasonable conclusion is that the referenced provisions are absolutely silent as to the Board's classification and reclassification authority, and instead deal only with different and unrelated aspects of its assessment authority more generally. The fact that some of these assessment-related powers are annual in nature therefore can have no bearing on the nature, annual or otherwise, of classification or reclassification decisions.

B. Contextual Analysis

[48] A contextual interpretation similarly offers no rational support for the impugned policies. Indeed, it is difficult to see why sections 38, 39, 47, and 49 of the Act would have anything to do with the Board's classification or reclassification authority given that section 37 already specifically sets out in detail the Board's authority on this issue.

[49] If the authority for an annual classification or reclassification authority could be found in sections 38, 39, 47, or 49, much of section 37 would be redundant, contrary to the presumption against tautology. It is contrary to the rules of statutory interpretation to infer a classification authority from general sections of the Act that are silent as to classification matters when this authority is already specifically provided in section 37.

[50] In this regard, section 37 makes no mention of an annual classification or reclassification authority. If the Legislature had intended such an authority, surely it would have included this notion within the only section of the Act specifically addressing the Board's classification and reclassification authority.

[51] In addition, I see little in the remainder of Part 1 of the Act generally that envisages ongoing decision-making of the kind suggested by an annual classification and reclassification authority.

[52] The only scope for this kind of annual decision-making in Part 1 of the Act relates to the Board's obligation to increase temporary and permanent disability payments on an annual basis in order to defray inflation.

[53] If the annual aspects of some portions of sections 38, 39, 47, and 49 of the Act were sufficient to permit new classification decisions on an annual basis, then the same logic would suggest that each annual decision regarding compensation indexing would permit new decisions in relation to compensation issues. Such a result cannot be intended given the importance of finality in the workers' compensation system.

[54] It is this finality found in section 96 of the Act that is the final significant contextual factor. It need hardly be said that finality of decision making was a key issue identified in the March 11, 2002 *Core Services Review* and codified on March 3, 2003, by the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). The key value of finality is openly contradicted by the notion of annually adjudicating an employer's classification.

[55] Consequently, a contextual approach to the interpretation of sections 38, 39, 47, and 49 of the Act does not offer a rational basis for the impugned portions of AP1-37-3.

[56] This means that neither the ordinary and grammatical meaning nor the context of sections 38, 39, 47, and 49 support an interpretation of the Act clothing the Board with an annual classification or reclassification authority.

C. Purposive Approach

[57] I also conclude that neither section 8 of the *Interpretation Act*, nor the purposes of the Act in relation to assessment matters support an interpretation of the Act capable of saving the impugned policies. In any event, as pointed out in *Sullivan on the Construction of Statutes*, 5th ed. (LexisNexis, 2008) at page 259:

> Purpose is not inherently more important than other contextual factors, and purpose cannot be relied on to justify adopting an implausible interpretation.

[58] Even if the purpose of ensuring accurate classification decisions were the predominant force in interpreting the Act, I am not persuaded that such an approach would supports the notion of an annual classification cycle because I give little significance to the "mischief" that the impugned policies seek to remedy. This mischief is twofold.[3]

[59] First, there is no doubt that some employers are wrongly classified in a CU with a higher assessment rate than the "correct" CU. This kind of wrongly classified employer suffers a competitive disadvantage in the marketplace because it has a higher cost of doing business than similarly situated employers.

[60] However, I do not find this first form of "mischief" to be compelling. An employer assigned to an incorrect, and thus too-expensive, CU has a right of review and a further right of appeal. If special circumstances precluded the exercise of those rights within the statutory timeframes, the Act provides that those timeframes may be extended.

[61] Consequently, if a wrongly classified employer fails to take advantage of the review and appeal system, it cannot reasonably complain about its classification for assessment purposes any more than a worker can complain if he or she fails to appeal a compensation decision. I therefore see little in the first kind of mischief to suggest that a purposive interpretation of the Act is required in order to provide the Board with an annual classification and reclassification power.

[62] The second type of mischief relates to employers that are wrongly classified in a CU and the wrong CU has a lower rate than the correct CU. This results in a windfall for the employer and consequently an economic advantage over its competitors, who are also disadvantaged because they collectively fund the wrongly classified employer's windfall. Such a situation is obviously unfair, particularly as the Board has no standing to request a review or appeal and the employer will likely not do so.

[3] The Board's March 27, 2009 discussion paper regarding an annual classification and reclassification authority identifies the problems that would arise if initial Board classification decisions were final (subject to changed circumstances and fraud or misrepresentation).

[63] Although this second mischief is more troubling than the first, a closer analysis suggests that it still does not support a purely purposive interpretive approach to the relevant provisions of the Act for several reasons.

[64] First, as already discussed earlier, the notion of revisiting classification decisions on an annual basis undermines finality, a concept that is fundamental to the workers' compensation system.

[65] Second, it is the Board that is in control of the process by which classification decisions are made. The Board controls the nature of information that employers must provide to it before assigning an employer to a CU. The Board also controls the degree of scrutiny that it brings to the investigation and adjudication of an employer's classification. Indeed, the Board is under no obligation to issue a formal classification decision until it considers it appropriate to do so. Finally, in the event of an error, the Board still has 75 days to identify and correct that error.

[66] Simply put, the Board need not issue an incorrect classification decision based on inadequate evidence in the first place. The proper approach is to ensure appropriate investigation and decision-making at the outset rather than relying on a wholly purpose-driven interpretation of the Act to save incorrect initial decisions.

[67] Third, in my experience, classification decisions are not always clear-cut. There are several hundred thousand employers in BC and hundreds of CUs to select from. Employers often do not fit squarely within any one particular CU and reasonable people may disagree about a CU assignment. This means that there is considerable scope for ongoing disagreement even in the presence of thorough investigation and adjudication – a circumstance where finality assumes considerable importance. The need to correct occasionally erroneous decisions therefore appears to me to be less compelling when contrasted with the need to bring finality to what is often a contentious area of adjudication.

[68] Fourth, it appears to me that the Board likely has in any event a residual, albeit limited, authority under the Act to correct classification errors if they are sufficiently serious to interfere with the efficiency of the CU in question.

[69] The Board may cancel a CU by removing it from the *Classification and Rate List* if that CU is no longer an effective tool for achieving the underlying purpose of grouping and reasonably distributing risk to similarly-situated employers. A CU may also be cancelled if it no longer captures changing technology and business models, or for various other reasons.

[70] Because CU's are part of the *Classification and Rate List*, they constitute binding policy. Thus, if a CU is eliminated, the resulting policy change would require the Board to reassign the members of the cancelled CU to another CU. The reassignment would not

amount to an impermissible reconsideration; rather, it would be a new decision, on a new matter, flowing prospectively from the change in policy.

[71] Finally, a purely purposive interpretation might even be said to weigh more heavily against an annual classification authority than for it. As already mentioned, there are several hundred thousand registered employers and hundreds of CUs, with the result that classification decisions are sometimes contentious.

[72] With this context in mind, an annual classification and reclassification authority would permit not only the Board but also every employer in BC to request a classification review every year. Finality would effectively disappear and, because of the potential for increased decision-making, the annual classification cycle therefore risks creating more mischief than it solves.

[73] Consequently, I do not consider that even a purely purposive interpretive approach to the Act supports the impugned policies. It is true that, on occasion, employers will continue to be misclassified; however, such misclassifications can be lessened by careful initial adjudication and any remaining errors mitigated, if sufficiently serious, through ongoing management of the CU structure itself.

[74] As a result, I conclude that the impugned policies that authorize the Board to make annual classification and reclassification decisions find no rational support in sections 38, 39, 47, and 49 of the Act and are patently unreasonable. In the final analysis, the impugned policies are, as warned against in *Cowburn*, "focused more on policy and the finances of the WCB than [on] what the legislature intended."

5.3 Section 37 and the ability to revisit classification decisions generally

[75] As already noted, my referral turns on whether the Act provides any rational support for the Board having an annual classification and reclassification authority.

[76] I have reviewed that issue from the perspective of the sections of the Act identified in *WCAT-2008-02064* and I have concluded that these statutory provisions do not support the impugned policies.

[77] However, I recognize that the impugned policies are silent as to the source of their authority and I have therefore merely assumed that sections 38, 39, 47, and 49 of the Act were considered to provide statutory support for the impugned policies.

[78] Although not referenced in *WCAT-2008-02064* as support for the notion of an annual classification authority, I consider in the interests of completeness that it is necessary to address section 37 of the Act as a potentially relevant source of statutory support for the impugned policies.

[79] In this regard, I note that the shortcomings of section 37 as authority for a reclassification power have already been illustrated in the April 2, 2007 memo as well as in *WCAT-2008-02064*. I will therefore only briefly discuss why I do not consider that section 37 provides any rational support for an annual classification and reclassification authority.

[80] This question involves, again, statutory interpretation. The difficulty with interpreting section 37 of the Act as providing an annual classification and reclassification power turns on subsection 96(5) of the Act. Other than the subsection 96(7) exception for cases of fraud or misrepresentation, subsection 96(5) mandates a 75-day limit on the Board's reconsideration authority.

[81] The purpose of the 75-day reconsideration rule is to encourage finality within the workers' compensation system. As noted earlier, the importance of finality was discussed at length in the *Core Services Report* and then codified in Bill 63. The benefits of finality are obvious; however, the cost of finality is, occasionally, incorrect decision-making.

[82] With the importance of finality in mind, section 1 of the Act is also relevant and defines "reconsider" as making "…a new decision in a matter previously decided where the new decision confirms, varies or cancels the previous decision or order."

[83] It therefore appears to me that, in the absence of a material change in an employer's circumstances, or a material change in the statutory and policy framework, any further effort by the Board to change an employer's classification after 75 days would amount to a reconsideration by the Board.

[84] Such a reconsideration would be impermissible because subsection 96(5) is said to apply to "Part 1" of the Act. It need hardly be said that section 37 is found within Part 1 of the Act and must consequently be subject to the 75-day reconsideration rule. There is nothing in the wording of section 37 to suggest that it should somehow not be included in Part 1 and therefore subject to the 75-day reconsideration rule.

[85] An ordinary and grammatical reading of the provisions in question, therefore, suggests that the Board is unable to revisit an employer's classification after more than 75 days, subject to subsection 96(7), unless the employer's circumstances materially change or the statutory and policy framework materially changes.

[86] The significance of a material change in an employer's circumstances is that the new circumstances create a new "matter" to be decided and therefore fall outside the definition of "reconsider" and, by extension, the 75-day reconsideration rule.

[87] As a result, the ordinary and grammatical sense of the Act indicates that the Board simply has no authority to change a classification after 75 days in the absence of a material change in circumstances or fraud or misrepresentation.

[88] The context of the Act directs me to a similar conclusion. The Legislature has indicated in other areas of the Act that the 75-day reconsideration rule is not applicable. For example, section 24 of the Act specifically states that the Board's authority to revisit certain pension decisions after 10 years is not subject to the 75-day reconsideration rule. Significantly, this aspect of section 24 was brought into effect pursuant to the same Bill 63 amendments that first implemented the 75-day reconsideration rule on March 3, 2003.

[89] Clearly then, the Legislature was aware of the effect of the reconsideration limits imposed by Bill 63 and deliberately immunized section 24 from their effect. At the same time, despite being aware of the 75-day reconsideration rule and the need to limit its impact in some circumstances, the Legislature remained silent in relation to section 37. In my view, this suggests that section 37 was intended to be subject to the 75-day reconsideration rule.

[90] Indeed, this conclusion is all the stronger given that Bill 63 amended section 37 by extending the Board's existing powers in relation to subclasses (CUs). The fact that the Legislature addressed both section 37 and subsection 96(5) in Bill 63 buttresses the conclusion that, had the Legislature intended to exclude section 37 from the operation of section 96, it would have done so explicitly. The Legislature clearly turned its mind to both provisions. The absence of any such exclusionary language reinforces the conclusion that section 37 is subject to subsection 96(5).

[91] It follows that a contextual analysis of section 37 indicates this provision is not capable of supporting a conclusion that the Board enjoys an annual classification and reclassification authority.

[92] Even a purely purposive interpretation does not persuade me that an annual reclassification is rationally supported by the Act. I have already discussed above as to why the "mischief" flowing from incorrect classifications is of little real consequence and why it does not require the irrational interpretation found in the impugned policies.

[93] In summary, the ordinary and grammatical sense of section 37, in combination with the reconsideration provisions, the context of these provisions, and the purpose of section 37, as well as finality, do not support the notion of an annual classification or reclassification authority and therefore cannot provide a rational basis for the impugned policies.

5.4 Other comments

[94] I address as a final point the notion of what I will refer to as the "independent powers" analysis. I understand that the Board considers that section 37 provides it with classification powers independent from and in addition to its assignment authority.

[95] In my view, the "independent powers" analysis is likely flawed and in any event does not support an annual classification and reclassification power. I reference it only in the interests of completeness and because I am aware that the Board has raised this argument in other appeals before the WCAT.

[96] The "independent powers" analysis turns on the idea that the Board is provided not only with the power to "assign" an employer to a CU pursuant to paragraph 37(2)(d) of the Act, but also with the power to "withdraw… and transfer" an employer from a CU pursuant to paragraph 37(2)(f) of the Act.

[97] Paragraph 37(2)(f) states:

> (2) The Board may do one or more of the following:
>
> …
>
> (f) withdraw from a subclass
>
> (i) an employer, independent operator or industry,
>
> (ii) a part of the subclass, or
>
> (iii) another subclass or part of another subclass,
>
> and transfer it to another class or subclass or form it into a separate class or subclass.…

[98] Paragraph 37(2)(f) therefore appears to provide the Board with the tools to, in effect, reclassify an employer by first withdrawing it from a subclass (CU) and transferring it to another subclass (CU).

[99] In these circumstances, the presumption against tautology might be said to require that the independent powers set out in paragraph 37(2)(f) add something to the statute not already included in the Board's authority to make an initial classification assignment by way of paragraph 37(2)(d). However, even if this view offers a viable interpretation of the Act, which I doubt, the exercise of the independent powers would still be subject to the 75-day reconsideration rule, the same as the remainder of section 37, and indeed all matters under Part 1.

[100] This means that even the most generous reading of paragraph 37(2)(f) would likely only permit the independent powers to be exercised once before they were in turn exhausted by the 75-day reconsideration rule. If the independent powers are only exercisable once, at most, they obviously cannot support the notion of an ongoing annual classification and reclassification power. It follows that the "independent powers" analysis offers no rational basis for the impugned policies.

[101] In the result, it appears to me that a legislative amendment is the only effective response to the difficult position in which the Board finds itself since Bill 63 when dealing with classification matters. Rather than relying on strained interpretations of section 37 or other sections of the Act it would make more sense to simply amend the Act to expressly insulate section 37, in whole or in part, from the finality provisions now embodied in section 96. However, that is a matter for the Board and Legislature to address and I will not consider it further.

6.0 Conclusion

[102] In conclusion, I find that the impugned policies are patently unreasonable to the extent that they purport to provide the Board with the authority to classify and reclassify an employer on an ongoing, annual basis. I therefore consider that the impugned policies should not be applied to the current appeal and I refer them to the Chair of the WCAT pursuant to subsection 251(2) of the Act.

[103] For convenience, I again set out the impugned policies, with underlining, below:

> AP1-37-1 "The Classification System":
>
> **2. CLASSIFICATION UNITS**
>
> Employers and independent operators are assigned to classification units annually and at other times as the Board requires, on the basis of the industry in which the firm is operating.
>
> AP1-37-3 "Classification – Changes":
>
> **2. CHANGE IN CLASSIFICATION**
>
> The Board may change a firm's classification.
>
> The effective date of a change in a firm's classification and the impact on the firm's experience rating depends on the reason for the change. Set out below are four reasons why the Board may make a new decision concerning a firm's classification, and the effective date and impact on experience rating associated with each reason for change. Decisions in these cases do not constitute reconsiderations of existing classification decisions.
>
> **2.1 The Annual Classification Cycle**
>
> A firm is assigned one or more classifications every year as a consequence of the yearly establishment of the *Classification and Rate List*. This assignment may result in a firm's classification changing. The

effective date of a change to a firm's classification resulting from the annual classification cycle is January 1st of the year for which the *Classification and Rate List* is established.

Where a firm's classification changes as a result of the annual classification cycle, the general rule is that a firm's experience will transfer.

Warren Hoole
Vice Chair

WH/pm/gw

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