

NOTEWORTHY DECISION SUMMARY

Decision: WCAT-2014-00203

Panel: Herb Morton

Decision Date: January 23, 2014

Policy item #AP1-37-1 of the Assessment Manual – Classification units – Effective date of policy changes

In changing an employer's classification unit (CU), the Workers' Compensation Board, operating as WorkSafeBC (Board), cannot take into account an amendment to policy effective after the date of the Board's decision.

The Board's decision to change the employer's CU to CU763036 was made on October 23, 2012. The amended version of policy item #AP1-37-2 of the *Assessment Manual* was effective on January 1, 2013, and only applied to Board decisions, not appellate decisions. Therefore, the Board's decision could only apply policy from the 2012 *Assessment Manual*, and should not have taken into account amendments to policy item #AP1-37-2 that became effective after the date of the Board's decision.

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Introduction

- [1] The employer has appealed the April 25, 2013 Review Division decision (*Review Decision #R0154136*), to the Workers' Compensation Appeal Tribunal (WCAT).
- [2] The employer, which was engaged in environmental consulting, was previously classified in classification unit (CU) 763011 Consulting (not elsewhere specified). The 2013 Classification and Rate List, which is part of the published policy of the board of directors (BOD), established a new CU. This was CU763036, Field Work Services.
- [3] By decision dated October 23, 2012, an officer of the Workers' Compensation Board, operating as WorkSafeBC (Board), advised the employer that it, and all firms engaged in consulting involving field work, had been reclassified to CU763036, Field Work Services, effective January 1, 2013. The employer requested a review of this decision. By decision dated April 25, 2013 (*Review Decision #R0154136*), a review officer confirmed the October 23, 2012 decision regarding the firm's reclassification. The employer has appealed the Review Division decision to WCAT.
- [4] The employer is represented by a lawyer. The employer's appeal was initiated by a notice of appeal and submission dated May 24, 2013. The employer requested that its appeal be heard on the basis of written submissions. The employer emphasized that less than 15% of its time and payroll hours involved field work. The employer provided further written submissions dated July 29, 2013 and December 9, 2013.
- [5] The background facts are not in dispute. I agree that the employer's appeal involves questions of law and policy which can be appropriately considered on the basis of written evidence and submissions without an oral hearing.

Issue(s)

- [6] At issue is the 2012 decision by the Board to reclassify the employer from CU763011 Consulting (not elsewhere specified) to CU763036, Field Work Services. The employer's appeal concerns the question as to which CU best matches the employer's industrial undertaking, within the framework of the policies contained in the 2012 version of the *Assessment Manual* and the 2013 Classification and Rate List.

Jurisdiction

- [7] The Review Division decision has been appealed to WCAT under section 239(1) of the *Workers Compensation Act* (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 BOD of the Board that is applicable (sections 250(2) and 251 of the Act).
- [8] WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal. The standard of proof in this appeal is the balance of probabilities.

Background and Evidence

- [9] The employer was classified in CU763011, Consulting (not elsewhere specified) for more than ten years prior to the 2012 reclassification decision (as an employer engaged in environmental consulting).
- [10] In 2002 and 2009, the firm provided detailed information to the Board concerning the nature of its activities, in response to requests from the Board. By letter of November 14, 2002, the firm advised that it had 58 workers other than its principals. The workers included professional civil engineers, professional chemical engineers, draftspersons, registered professional biologists, geologists, technical staff (applied science technologists, technicians), and administrative and clerical support staff. The employer advised that it normally provided written advice, but provided oral advice infrequently. The employer advised:

We do not implement the advice provided except for the likes of:

- construction management
- progress monitoring and reporting

[all quotations are reproduced as written, except as noted]

- [11] The firm described the nature of its services as providing professional engineering, scientific and technical services and advice to clients including conducting feasibility studies, chemical engineering, civil engineering, environmental engineering, field investigations, preparing designs and plans, drafting, providing engineering, scientific and technical advice, writing contract specifications and tenders, construction management, preparing/providing progress reports, tendering, recommending tenders, obtaining approvals and permits (municipal, provincial, federal), and technical inspections. In terms of specialized equipment, the firm advised that it used drafting and design (CADD) equipment, computers, and specialized software for data evaluation.

- [12] In a letter dated November 6, 2009, the company president provided a detailed (5 pages) description of the firm's activities. In brief, the employer's activities involved four areas which contributed various percentages of the firm's gross revenue: the investigation department (40%), the risk assessment biological services department (15%), technology department (30%), and project management services (15%). The president further stated:

Question: What percentage of revenue from your clients are strictly paper/consulting work, and what percentage goes beyond that to implementing your recommendations and hiring subcontractors to complete the work?

Answer: Approximately eighty percent of our revenue is generated from paper/consulting. Of the remaining twenty percent, about half is associated with laboratory subcontractors with the remainder primarily drillers. This revenue stream comes from our markup analytical and contracted work. Our policy is not to subcontract remediation work under [name of employer]. We make every effort to ensure the remediation works are undertaken via a direct contracted relationship with the client and remediation contractor. On rare occasions [the employer] subcontracts minor remediation works such as pump and treat waste water, however in these instances, our role is to monitor the subcontractors' activity and not to direct their work.

[emphasis removed]

- [13] In an employer account system (EAS) notepad entry dated November 10, 2009, a Board officer reviewed the November 6, 2009 letter provided by the firm's president and concluded that the firm was in the correct CU of 763011-Consulting (not elsewhere specified) as this included environmental consulting.
- [14] The employer has furnished copies of two Employer Classification Committee Resolutions dated December 12, 2011 and March 12, 2012¹. The first Resolution, dated December 12, 2011, is entitled "Expiration of classification units 704015 [Geological, Geophysical, or Geochemical Field Work], 704016 [Oil and Gas or Mineral Exploration, or Prospecting] and 763015 [Forest Management Services], and creation of a Field Work Services classification unit." In this Resolution, the Employer Classification Committee recommended to the BOD that CU763036 be created effective January 1, 2013, and that firms in the three expired CUs listed above be transferred to this new CU. The Resolution reasoned that the provision of field work services, regardless of purpose, had been identified as a single industry, and that the division of the industry into three different CUs added unnecessary complexity to classification assignment and data collection activities.

¹ The Employer Classification Committee Resolutions were obtained by the employer through requests to the Board under the *Freedom of Information and Protection of Privacy Act*, and furnished to WCAT by the employer on July 29, 2013.

- [15] On January 13, 2012, the Board wrote to the employer to request that it complete a questionnaire. The Board's classification and rate modification administrator explained:

In order to provide fair and equitable insurance rates, WorkSafeBC continually conducts research on industries to ensure that the classification and rate structure is keeping pace with the realities of industries operating in BC.

- [16] By letter dated January 17, 2012, the employer returned the completed questionnaire and provided some additional information. In the questionnaire, the employer advised that currently 85.5% of its activities were carried out in its offices, and 14.5% were carried out in the field. The employer explained:

Our field work comprises items such as:

- Utility locates: observing a utility locate company determine the location of underground utilities
- Visiting sites to make professional observations (engineering or biology)
- Observing contractors drilling boreholes and construction monitoring and soil vapour wells. Our personnel observe the activities of the driller and make field notes/records. Samples collected by the contractor are placed in containers by our staff for laboratory testing (by others)
- We collect water, soil, sediment and soil vapour samples for analysis by others
- We provide engineering services during construction of works. That is, we attend to sites to observe the work performed by a contractor to confirm that it meets the requirements of the design drawings and specifications.

Office work includes the performance of professional engineering, geoscience and biology, preparing opinions, designs, drawings and specifications. Office support services to the technical teams (engineers, geoscientists and biologists) are engaged in accounting, word processing and general office administration activities.

We have indicated that we work with rocks, soil, and water. This is in relation to our assessment and development of remediation plans for contamination. We also work with water, preparing sediment and erosion control plans for contamination. We also work with water, preparing sediment and erosion control plans, storm water management plans and wastewater treatment plant design. These are the practice of professional engineering and geoscience. Our biologists conduct environmental

assessments of vegetation, tree surveys (arborist opinions), bird surveys, and biological environmental assessments.

We employ engineers and geologists/geoscientists whose practice is regulated by the Association of Professional Engineers and Geoscientists of British Columbia and biologist who practice is regulated by the College of Applied Biologists. Our clients include forestry firms, transportation companies including road, rail and sea, mining firms, federal, provincial and local government organizations and Crown corporations, real estate firms, developers, financial institutions, other professionals (legal and accounting), and miscellaneous commercial and industrial clients.

- [17] The second Resolution by the Employer Classification Committee, dated March 12, 2012, is entitled "Re-classification of environmental consulting activities involving field work to CU 763036 [Field Work Services]." The Employer Classification Committee Resolution stated:

AND WHEREAS the provision of field work services, regardless of purpose, has been identified as a single industry in British Columbia;

AND WHEREAS in terms of inputs, processes, and equipment; the business undertaking of providing environmental consulting involving field work is not unlike the business undertaking of providing field work services;

AND WHEREAS the business undertaking of providing environmental consulting involving field work is similar to the business undertaking within Classification Unit 763036 [Field Work Services];

AND WHEREAS the division of that industry into two separate classification units adds unnecessary complexity to both classification assignment and data collection activities.

The following resolutions were passed by the Employer Classification Committee on 12 March 2012.

RESOLVED THAT:

1. **The Assessment Department make recommendations to the Board of Directors that,**
Effective 1 January 2013:
 - The business undertaking of providing environmental consulting involving field work be added to Classification Unit 763036 [Field Work Services];
 - All firms engaged in environmental consulting involving field work be reclassified to Classification Unit 763036 [Field Work Services] and experience rating be transferred.

2. The Employer Classification Committee's Secretary is authorised to execute this Resolution and to thereafter insert this Resolution into the Committee's record book.

[emphasis added]

- [18] An EAS notepad entry dated August 2, 2012 concerning the employer stated:

A Bulk class change from CU (763011) Consulting nes [not elsewhere specified] to (763036) Field Work Services has occurred as a result of a Bulk Special Instruction being applied by JC15581. This change is effective 2013-01-01.

...

Bulk CU SI Comments

Classification Committee Resolution 2012/03/12, approved by the BOD, states that effective January 1, 2013, firms engaged in consulting services involving field work are to be reclassified to CU 763036 [Field Work Services] and ER [experience rating] will transfer.

- [19] In a letter dated August 14, 2012, the Assessments Department, Classification and Rates, wrote to the employer stating:

Thank you for responding to the classification questionnaire that was sent to your firm on January 13, 2012. Based on your response, we understand that you are dependent on engaging in field work in order to provide consulting services (either you contract to have field data/samples collected or collect them yourself).

Recent analysis of the consulting industry has identified that providing consulting services involving field work and providing field work services are not discrete industries, as they share similar business processes.

In accordance with our overarching commitment to continuously monitor the manner in which we classify and offer insurance rates to industries, **we have made the decision to represent the business undertaking of providing consulting involving field work elsewhere. Effective January 1, 2013, firms engaged in consulting involving field work will be reclassified to CU 763036 [Field Work Services] and have their experience rating transferred.**

If you find that only a small proportion of your contracts require you to engage in field work (either through direct hires or subcontractors), then please respond and you will be classified appropriately. Otherwise, we will proceed in reclassifying your firm to CU 763036 [Field Work Services].
[emphasis added]

- [20] This letter appears to have been based on the March 12, 2012 Resolution by the Employer Classification Committee that the Assessment Department make certain recommendations to the BOD.
- [21] The employer contacted the Board on August 22, 2012 in response to this letter. In an EAS notepad entry of that date, a Board officer noted:

[R] states that 14% of the firms operations is collecting field samples, and 86% of the firms operations are analysing the samples collected.

I explained that WorkSafeBC classifies based on industrial undertaking [rather than] occupation or hazard, as such, although 86% of the firms operations is analysing data in an office and writing reports on the data collected, the firm is required to collect the data before being able to analyse and compose recommendations.

As such the firm is dependent on engaging in field work.

[R] inquired into what the letter meant by stating "if you find that only a small proportion of your contracts require you to engage in field work then please respond and you will be classified appropriately."

I explained that if the firm does not collect samples themselves, or contract to have the samples collected by other, that the firm merely analyses samples collected by unaffiliated firms, and is hired solely for the purpose of data analysing and consulting on the data collected by the unaffiliated firm, than the firm may be misclassified

[R] could not confirm at this time what % of operations are field work performed by the firm and analysis of that data collection and what % of operations are merely analysis and consulting of data collected by unaffiliated firms.

- [22] As set out below under the "Law and Policy" heading, relevant policy decisions were made by the BOD in October 2012. By decision dated October 23, 2012 (issued within 75 days of the August 14, 2012 letter), a Board officer advised the employer as follow:

You were previously advised in a letter dated August 14, 2012 of a change to your firm's classification for 2013.

The Board of Directors has now approved the 2013 Classification & Rate List, which incorporates the decision to represent the business undertaking of providing consulting involving field work elsewhere. As a result all firms engaged in consulting involving field work have been reclassified to CU 763036 [Field Work Services] and have their experience rating transferred to effective January 1, 2013.

[23] The employer requested a review by the Review Division of the October 23, 2012 decision.

[24] By decision dated April 25, 2013 (*Review Decision #R0154136*), a review officer confirmed the October 23, 2012 decision. The review officer noted the following background information:

The employer is a limited company which has been registered with the Board for a number of years. Prior to the decision letter under review, it was classified under CU, 763011 Consulting (not elsewhere specified).

In January 2012, the Board sent the employer a questionnaire to fill out regarding its business operations. In the questionnaire, the employer advised that 85.5% of the time it provides services in an office and 14.5% of the time it provides services in the field....

[25] The review officer found that section 37 of the Act and policy item #AP1-37-3 allow the Board to change a firm's classification in limited circumstances. The creation of the new Field Work Services CU was a change in policy, which provided the Board with the jurisdiction to assign the employer to a new CU. The review officer noted on page 2:

On March 12, 2012, the Board of Directors approved a Classification Committee Resolution which stated that firms engaged in consulting services involving field work were to be reclassified to CU 763036, Field Work Services (a new CU).

[26] (As set out above, the March 12, 2012 Employer Classification Committee resolved that the Assessment Department should make certain recommendations to the BOD).

[27] The review officer reasoned, in part:

I acknowledge that the employer's workers spend less than the 15% of their time on field work and that 85% of their time is spent on office work. Counsel provided references to Review Division and Workers' Compensation Tribunal decisions (which are not binding on me) that support that business activity should be at least 25% of a firm's business to be considered significant. Nevertheless, in the circumstances of this case, I am still satisfied that the Field Work Services CU is the best fit for the employer.

First, I note that although it is called Field Work Services, from the CU description, it is clear that this CU also includes activities other than field work. The CU description includes analyzing data collected from surveys and field investigations and conducting environmental assessments as examples of services provided by employers in this CU.

I am satisfied that these services would likely involve office as well as field work.

Second, I am satisfied that the field work performed by the employer is integral to the employer's business. The employer's website indicates that the services provided by the employer include investigation for contamination and contamination management and remediation. In the January 2012 letter, the principal advised that the firm's work with rock, soil, and water was in relation to assessment and development of remediation plans for contamination. Therefore, field work appears to be a necessary part of that service.

[28] The employer has appealed the Review Division decision to WCAT.

[29] The base rates (per \$100 of assessable payroll) for relevant CUs in 2012 and 2013 were as follows:

		2012	2013
763011	Consulting not elsewhere specified	0.40	0.42
763036	Field Work Services	n/a	1.89
763010	Consulting Engineering	0.22	0.18

[30] A new CU was created for 2014, which is not germane to this appeal with respect to the 2012 reclassification of the employer effective January 1, 2013. The new CU is CU63037, Consulting Engineering, Geological, Geophysical, or Geochemical Consulting, or Construction Management Consulting, with a base rate of 0.14 per \$100 of assessable payroll for 2014. CU763010, Consulting Engineering, was removed in the 2014 Classification and Rate List.

Law and Policy

[31] Unless otherwise specified, all references to policy in this decision mean the policy of the BOD which was contained in the *Assessment Manual* which was in effect at the time of the October 23, 2012 decision by the Board officer to reclassify the firm. Policy at item #AP1-37-1, "Re: The Classification System," of the *Assessment Manual* provided, in part:

1. GENERAL

The classification system is based on the principle that the cost of producing a product or providing a service includes the cost of injuries or diseases incurred by the workers doing the work. The system is based on industrial undertaking rather than on occupation or hazard. If a specific product is being manufactured, the classification is

the same, regardless of whether the manufacturing is done by the employer's workers or subcontracted out to another firm. A classification includes all occupations within the industry, including office or clerical staff.

...

2. CLASSIFICATION UNITS

Employers and independent operators are assigned to classification units on the basis of the industry in which the firm is operating. In assigning the classification, some of the factors considered are the type of product or service being provided, the processes and equipment that are used, and the type of industry with which the firm is in competition. Occupations of individual workers may be reviewed when assigning the classification, but only as an indicator of the type of industry being carried on. The fact that an employer contracts out parts of an industry to other employers does not mean that the employer cannot be classified in that industry. The classification system should not unfairly differentiate between firms competing for the same business.

[emphasis added]

- [32] Policy at item #AP1-37-2, "RE: Classification – Multiple Industrial Activities," of the *Assessment Manual* provided:

A firm is assigned to a single classification unit unless the firm qualifies for multiple classification in accordance with this policy.

- [33] Policy at item #AP1-37-4, "RE: Classification – Consulting," provided:

For the purpose of classifying employers, a consultant is an employer or independent operator who performs impartial services for clients on a lump-sum fee basis. Services include investigations and analysis, pre-planning, design or compilation of a report without commercial or manufacturing affiliations that might bias judgment.

If the "consultant" undertakes directly or indirectly to fabricate, manufacture or construct a product by any means, or implement the recommendations of a report, the activity is not considered consulting. Rather, the activity is classified according to the nature of the fabricating, manufacturing, constructing or implementing activity.

Some of the factors considered when determining whether a person is a consultant include:

- basis of payment for services;
- nature of services provided;

- whether recommendations are implemented in any way;
- affiliations with manufacturing, sales or construction firms;
- which party pays for materials; and
- degree of supervision or control over workers or subcontractors.

A consulting firm may be classified in construction management consulting when:

- the firm acts as agent for the owner, where the owner is not the general contractor;
 - the firm has no financial interest in the building;
 - the firm's role is limited to one or more of the following: quantity surveying,
 - specification writing, contract writing, tendering, recommending tenders, and
 - ensuring that the contract between the owner and general contractor/subcontractors is being adhered to; and
 - the firm has no affiliation with construction firms.
- [emphasis added]

[34] By Resolution dated October 11, 2012 (2012/10/11-05, "Re: Classification Policy Review"), the BOD approved amendments to the *Assessment Manual*. The Resolution stated:

THE BOARD OF DIRECTORS RESOLVES THAT:

1. Amendments to Items AP1-37-1, *The Classification System*, AP1-37-2, *Classification – Multiple Industrial Activities*, AP1-37-3, *Classification – Changes*, AP1-37-4 *Classification – Consulting*, and AP1-37-5, *Deposit Accounts*, of the *Assessment Manual*, as set out in Appendix A of this resolution, are approved.
2. Consequential changes to the *Assessment Manual*, attached as Appendix B to this resolution, are approved.
3. **This resolution is effective January 1, 2013 and applies to all decisions made on or after January 1, 2013.**
4. This resolution constitutes a policy decision of the Board of Directors.

[emphasis added]

[35] The policy amendments were not stated to apply to all appellate decisions. As the October 23, 2012 reclassification decision by the Board officer was made prior to January 1, 2013, the policy amendments do not apply to this appeal.

[36] The new policy at #AP1-37-2, "RE: Classification – Assignment," provided:

3.3 Classifying Consulting Firms

A consulting firm provides services such as investigations, analysis, preplanning, design, or compilation of a report, with no financial interest in the client's business operations.

If a consulting firm undertakes directly or indirectly to fabricate, manufacture or construct a product by any means, implement the recommendations of a report, or provide management or supervisory services, as part of its consulting services, the firm's main business undertaking is determined by the fabricating, manufacturing, constructing or implementing activities.

In determining whether a firm's main business undertaking is consulting, the Board considers factors such as:

- basis of payment for services;
- nature of services provided;
- whether recommendations are implemented in any way by the firm;
- affiliations with manufacturing, sales or construction firms;
- which party pays for materials; and
- degree of supervision or control over workers or subcontractors.

A consulting firm's main business undertaking may be considered construction management consulting when:

- the firm acts as agent for the owner, where the owner is not the general contractor;
- the firm's role is limited to one or more of the following: quantity surveying, specification writing, contract writing, tendering, recommending tenders, and ensuring that the contract between the owner and general contractor/subcontractors is being adhered to; and
- the firm has no affiliation with construction firms.

[37] As noted above, this new policy is not applicable in this appeal.

Reasons and Findings

[38] Section 82 of the Act provides, in part:

82 (1) The board of directors must

- (a) set and revise as necessary the policies of the board of directors, including policies respecting compensation, assessment, rehabilitation and occupational health and safety, and
- (b) set and supervise the direction of the Board.

...

(3) The board of directors may

- (a) establish committees and give directions to those committees, ...

[39] A May 17, 2005 Resolution by the BOD, 2005/04/19-01, "Amendments to the Board of Directors' Manual," 21 W.C.R. 1, included reference to the roles of the BOD and its committees. Relevant excerpts include the following:

IV. BOARD OF DIRECTORS' ORGANIZATION

...

- B. Certain of the BOD's responsibilities may be delegated to committees. The responsibilities of those committees will be as set forth in their terms of reference, as amended from time to time.

VI. DUTIES IN RELATION TO POLICY AND REGULATION MAKING AND IN RELATION TO RESEARCH

...

B. Assessments

The BOD has the responsibility to determine all policy concerning assessment matters including:

- i) approval of all amendments to the Assessment Policy Manual;
- ii) setting of assessment rates
- iii) creation and rearrangement of the classification structure;
- iv) approval of changes to the Classification and Rate List;

...

- [40] The March 12, 2012 Employer Classification Committee Resolution provided approval to the Assessment Department to make certain recommendations to the BOD. It did not purport to be a policy decision of the BOD. The recommendations of the Assessment Department need not have been accepted by the BOD. Accordingly, the effect of any resulting policy changes can only be ascertained based on the actual policy resolutions approved by the BOD. The authority to make policy rests with the BOD pursuant to section 82 of the Act, and is not exercised by any committee.
- [41] The BOD established CU763036, Field Work Services, as a new CU for 2013. (The minutes of an October 11, 2012 BOD meeting show that the 2013 Classification and Rate List was approved in that meeting.) The BOD also amended the policies concerning the classification of firms engaged in consulting effective January 1, 2013. However, the effective date wording in the October 12, 2012 policy Resolution limited the application of the revisions to the *Assessment Manual* to initial decisions by Board officers made on or after January 1, 2013. Accordingly, the revised policy contained in item #AP1-37-2(3.3) of the *Assessment Manual* could not be taken into account by the Board officer, or on review or appeal, in connection with the October 23, 2012 decision regarding the reclassification of the employer for 2013. The 2012 version of the *Assessment Manual* applied to the classification of the employer for 2013, albeit within the policy framework established by the 2013 Classification and Rate List.
- [42] I have considered whether the October 23, 2012 letter could be characterized as a January 1, 2013 decision on the basis that it merely provided notice of a decision which did not take effect until January 1, 2013. If that were the case, the decision could apply the January 1, 2013 amendments to the *Assessment Manual*. The difficulty with this analysis, however, is that it is inconsistent with the manner in which the term decision is used in the Act. For example, section 96.2(3) of the Act provides:

A request for a review must be filed within 90 days after **the Board's decision or order was made.**

[emphasis added]

- [43] Section 96(5) of the Act provides:

- (5) Despite subsection (4), the Board may not reconsider a decision or order if
- (a) more than 75 days have elapsed **since that decision or order was made,**
 - (b) a review has been requested in respect of that decision or order under section 96.2, or
 - (c) an appeal has been filed in respect of that decision or order under section 240.

[emphasis added]

[44] The Act refers to the date on which the decision was made, rather than the date on which the decision became effective. Similarly, the BOD's October 11, 2012 Resolution stated that it applied to all decisions made on or after January 1, 2013. Accordingly, I consider that the October 23, 2012 letter must be characterized as involving a decision made on October 23, 2012, and cannot be characterized as a January 1, 2013 decision based on the effective date of the employer's reclassification. As the Board officer's decision was made on October 23, 2012, it could not take into account the January 1, 2013 amendments to the *Assessment Manual*. While it was open to the Board during the period from October 11, 2012 to December 31, 2012 to reclassify employers effective January 1, 2013, using the 2013 Classification and Rate List, this required the application of the policies set out in the 2012 version of the *Assessment Manual* with respect to the determination of the employer's industrial undertaking (pursuant to the effective date wording of the BOD's October 11, 2012 policy Resolution). The 2012 version of the policy at #AP1-37-4 concerning the classification of consulting firms continued to apply, rather than the 2013 new policy at item AP1-37-2 (including item 3.3, "Classifying Consulting Firms").

[45] It is useful to directly compare the 2012 and 2013 versions of the policies concerning consulting firms. The 2012 policy at item #AP1-37-4 provided:

If the "consultant" undertakes directly or indirectly to fabricate, manufacture or construct a product by any means, or implement the recommendations of a report, the activity is not considered consulting. Rather, the activity is classified according to the nature of the fabricating, manufacturing, constructing or implementing activity.

[46] The 2013 policy at item #AP1-37-2(3.3) provided:

If a **consulting firm** undertakes directly or indirectly to fabricate, manufacture or construct a product by any means, implement the recommendations of a report, **or provide management or supervisory services, as part of its consulting services, the firm's main business undertaking is determined by the** fabricating, manufacturing, constructing or implementing activities.

[emphasis added]

[47] Under the 2012 policy, the firm's activity in implementing a report would be classified according to the nature of the activity. That policy did not stipulate that the main business activity of the firm would be determined by any minor amount of such activity, without regard to the normal guidelines for determining the firm's main business activity or industrial undertaking. The 2013 policy expressly provided that a consulting firm's main business undertaking would be determined by the fabricating, manufacturing, constructing, or implementing activities.

- [48] The BOD had the option of giving immediate effect to the policy changes approved on October 11, 2012. To the extent these changes might have resulted in employers being reclassified with an increased assessment rate, the effect of those changes would have been deferred to January 1, 2013 pursuant to the policy at item #AP1-37-3. However, by making the policy changes applicable to decisions made on or after January 1, 2013, the BOD precluded the Board from taking the new policy at item #AP1-37-2(3.3) into account in any reclassification decision made prior to January 1, 2013.
- [49] It seems to me that the CU descriptions developed by the Board for 2013 (which represent Board practice) took into account the policy changes which were made effective January 1, 2013. For this reason, I consider that it would be inappropriate to refer to these CU descriptions, in connection with a 2012 reclassification decision. Practice guidance based on 2013 policy changes was not applicable to a decision made in 2012 under the former policies.
- [50] The BOD created a new CU763036, Field Work Services, as a new CU effective January 1, 2013. However, the amended policies which came into effect January 1, 2013 regarding consulting firms were not applicable to any classification decisions in late 2012 regarding the classification of employers for 2013. The determination as to whether an employer should be reclassified in CU763036, Field Work Services, was one to be made in the context of the 2012 *Assessment Manual* policies.
- [51] The issue to be addressed is whether the employer's industrial undertaking is best described as Consulting (not otherwise specified), Field Work Services, or Consulting Engineering (within the framework of the 2013 Classification and Rate List and the policies in the *Assessment Manual* which preceded the January 1, 2013 amendments). Consideration as to whether the new CU for Field Work Services was appropriate for the employer turned, therefore, on whether this was the employer's main business/industrial undertaking.
- [52] An applicable practice directive (which is not policy) is Practice Directive #1-37-1(A), "Classification Criteria," effective April 1, 2007. This was replaced by Practice Directive #1-37-1(A), effective January 1, 2013. However, the 2013 practice directive concerns the application of the new policies which were effective January 1, 2013, and thus does not concern the application of the former policies. The 2007 version of Practice Directive #1-37-1(A) explained that:

Policy 1-37-2 creates a rebuttable presumption that a firm will be classified in a single classification unit based upon its industry:

"An employer is assigned to a single classification unit based on the industry in which the employer is operating..."

- [53] This presumption may be rebutted if the firm meets the criteria for one of the exceptions, such as multiple classification, special hazard operations, the "inescapable inclusion exception," the "ancillary operations exception," the "extraprovincial operations

exception,” or the “residential employers exception.”

- [54] Practice Directive #1-37-1(A) stated that in determining a classification, a Board officer must start with the presumption that the firm will be classified in a single CU based upon its industry unless there is evidence to the contrary. The Board officer must obtain and record any information that may support one of the above exceptions, and if so, determine whether there is sufficient evidence to rebut the single classification presumption. The practice directive further stated:

Policy AP1-37-1 states, in part, that:

“Employers and independent operators are assigned to classification units on the basis of the industry in which the firm is operating.”

As most firms in British Columbia operate within a single industry, it follows that most firms will be assigned to only one classification unit. **That one classification unit will be the classification unit which, in the Board officer’s reasoned judgement, best reflects the firm’s industrial undertaking.**

[emphasis added]

- [55] Practice Directive #1-37-1(A) summarized the evidence relevant to determining a firm’s classification (as to its industrial undertaking) as follows:

The firm must provide to the Board all pertinent information applicable to a classification determination. The determining Board officer may and should assist the firm in discharging its statutory duty by ensuring that the following minimum information is obtained and recorded:

- The industry or industries in which a firm is active
- The products a firm manufactures or provides
- The services a firm provides
- The processes a firm uses to provide its product or service
- The equipment a firm uses to provide its product or service
- Whether a firm has common ownership with its client(s)
- Whether a firm is active in any industry designated as a special hazard

In addition, the determining Board officer may require and obligate that the firm provide the following information, as applicable:

- The firm's revenue figures, showing revenue generated by various activities
- The firm's payroll figures, showing where the firm has worker activity in a classification
- The firm's individual workers' occupations
- The firm's operating locations
- The firm's competitors (from which their classifications may be determined)
- Any other information deemed necessary by the Board officer to make a classification adjudication

[56] In the absence of the new policy at item #AP1-37-2(3.3), (Classifying Consulting Firms), I consider that the effect of creating a new CU for field work services simply meant that this CU was available for firms whose main business / industrial undertaking was providing field services. The determination as to whether the provision of field work services represented a firm's industrial undertaking was to be determined in the normal way, based on the factors set out above in Practice Directive #1-37-1(A). However, in classification decisions made on or after January 1, 2013, the revised policy provides the specific direction that a consulting firm's main business undertaking is determined by any fabricating, manufacturing, constructing, or implementing activities.

[57] The review officer relied upon the CU descriptions for consulting and field services. The CU descriptions are Board practice, rather than policy. As noted above, the CU descriptions for 2013 appear to have been based on the intended effect of the March 12, 2012 Employer Classification Committee recommendations, and the version of the policy at #AP1-37-2 which came into effect on January 1, 2013. However, the March 12, 2012 Employer Classification Committee recommendations resulted in policy changes by the BOD in order to give effect to those recommendations, which were limited in their application to decisions made on or after January 1, 2013. I consider that to apply CU descriptions, which appear to have been based on the January 1, 2013 policy changes, in relation to a reclassification decision in 2012, would be inconsistent with the BOD's decision to limit the application of the new policy at #AP1-37-2(3.3) to decisions made on or after January 1, 2013. For this reason, I do not give weight to the fact that environmental consulting was removed from the CU description for Consulting NES in 2013.

[58] I find that the October 23, 2012 decision to reclassify the employer, as part of a bulk change, did not have regard to the employer's particular circumstances as to whether field services was in fact the firm's industrial undertaking. It appears that the decision took into account the intent of the Employer Classification Committee's

recommendations to create a new CU for field services, and the associated policy change at #AP1-37-2. While evidently intended to implement these policy changes, I find that the October 23, 2012 decision contravened policy, by failing to take into account that the revised policy at #AP1-37-2(3.3) in the *Assessment Manual* could not be applied in the October 23, 2012 decision.

[59] The employer cites *WCAT-2012-01165*. That decision concerned an employer which provided “full service” environmental remediation, which included both consulting services as well as active remediation of contaminated sites. The employer advised that a small portion of its gross income was generated through its active site remediation work. The WCAT panel reasoned:

[20] Here, there is no question that the bulk of the employer’s activities are best captured by the consulting CU. The employer performs a paper review, collects soil samples, analyzes the soil samples, and prepares site remediation reports and recommendations that site owners are generally responsible for implementing. These elements of the employer’s operations all fall within the consulting CU in question.

[21] However, it is the employer’s role in active remediation that has caused some difficulty in permitting the employer to transfer to the consulting CU. Both the Board and the Review Division correctly identified the employer’s activities in this regard as being inconsistent with a consulting CU. **The question then is whether even the very small percentage of the employer’s income derived from actively conducting physical site remediation operations is sufficient to remove the employer from the consulting CU.**

[22] **In my view, it is not.** The most recent evidence from the employer indicates that only about 1.1% of its activities involve active site remediation work on behalf of a client. That means that 98.9% of the employer’s business falls within the normal role of engineering consultants in the environmental management industry. Although the consulting CU is intended to exclude any employer that implements directly or indirectly its report, I am unable to conclude that this direction in the policy is intended to apply to such a small percentage. Simply put, I consider that 1.1% is so small a percentage as to amount to “*de minimis*,” or trivial, for the purposes of assigning the employer to a CU.

[23] **In this regard, other policies in the *Assessment Manual* indicate that a business activity becomes sufficiently significant for classification purposes where the activity accounts for at least 25% of an employer’s activity. I do not say that a similar percentage must be present before an**

employer can no longer qualify as a consultant; however, the 25% figure provides some context to the question of what the policies consider significant for assessment purposes.

[emphasis added]

- [60] The WCAT panel found that the employer's industrial undertaking was best characterized as engineering consulting, rather than Land or Marine Pollution Control. I agree with the reasoning in *WCAT-2012-01165*.
- [61] In this case, the employer's field services work represented 15.5% of its activities, rather than 1.1% as addressed in *WCAT-2012-01165*. However, I find persuasive the submissions by the employer, that its main business activity, and its industrial undertaking, was environmental consulting. The employer had been classified in the CU for Consulting (not elsewhere specified) for many years, and this classification correctly reflected the firm's main business activities and industrial undertaking. Given that field services work only involved a small percentage of its operations, the creation of a CU for field services work in 2013 did not, by itself, provide a basis for changing the characterization of the firm's industrial undertaking. While specific policy direction was provided in #AP1-37-2, effective January 1, 2013, that new policy did not apply at the time of the October 23, 2012 decision. Accordingly, it would involve a contravention of policy to take that new policy into effect.
- [62] The provision of field services, which represented about 15% of the firm's activities, was incidental to its industrial undertaking of consulting, not elsewhere specified. The creation of a new CU for field services did not automatically mean that this was the firm's industrial undertaking, even if that was the intent of the Employer Classification Committee's recommendations to the BOD. Those recommendations required policy changes in order to give them broad effect, and those policy changes did not apply to decision-making in 2012.
- [63] I have considered the effect to be given to the expressed intention of the Employer Classification Committee that all firms engaged in environmental consulting involving field work be reclassified to CU763036, Field Work Services. While the recommendations by the Employer Classification Committee provide relevant background, I consider that the effect of the policy changes approved by the BOD must be determined by the actual wording of the published policy of the BOD. I am not persuaded that the creation of a new CU for 2013 of field work services, by itself, provided a basis for reclassifying the employer in a 2012 decision (in view of the BOD's policy limiting the effect of the *Assessment Manual* amendments to decisions made on or after January 1, 2013).
- [64] Upon consideration of all of the foregoing, I allow the employer's appeal. I find that the time of the October 23, 2012 decision, the correct classification for the employer remained CU763011 Consulting (not elsewhere specified).

- [65] No expenses were requested, and it does not appear from a review of the file that any reimbursable expenses were incurred related to this appeal. I therefore make no order regarding expenses of this appeal.

Conclusion

- [66] I allow the employer's appeal and vary the Review Division decision. At the time of the October 23, 2012 classification decision, the correct classification for the employer remained CU763011 Consulting (not elsewhere specified).

Herb Morton
Vice Chair

HM/gw