

Review Decision

Subject: Review Reference #1504
Board Decision Under Review: March 12, 2003
Date: July 21, 2003
Review Officer: Nick Attewell

The employer requests a review of the decision of the Workers' Compensation Board (the "Board") dated March 12, 2003. In support of this request for review, the employer's accountant ("AL") has made submissions dated March 27 and May 5, 2003. Comments were made by the Assessment Department in a June 4, 2003, submission, which was disclosed to AL. This resulted in a telephone call on June 23, 2003, from AL.

Sections 96.2 and 96.4 of the *Workers Compensation Act* (the "Act") give a review officer authority to conduct this review.

Issue

The issue on this review is whether the Board correctly determined that the effective date of a change of classification from Classification Unit ("CU") 720149 (Siding, Awning, or Gutter installation) to CU715020 (Glass shop) was January 1, 2002.

Background

During an audit on March 12, 2003, the assessment officer found that the firm was incorrectly classified. A change in classification was made effective January 1, 2002. The employer contends that the change should be retroactive to 1996 since the business has not changed and the Board should have noted the error during an audit in 1999.

Facts and Evidence

The following are the relevant facts and evidence I have considered in conducting this review:

- From 1994 to December 31, 1999, the employer was classified in subclass 070600 (Building construction). The description of the business in the Board's records is "Installing shower doors or windows."
- In 1996, the employer incorporated the business. At that time, a "classification change" form was completed on which it was stated "Oct. 24, 1996-Per call from Mr. L....., accountant, he advised that Mr. M..... has a retail glass shop (used glass) but this is a very small % of his total revenue right now. Most of the work he does is labour only installing shower doors and windows. I advised class 070600 is correct. No adjustment necessary."

- The Assessment Department has no record of an audit done in 1999.
- From January 1, 2000, to December 31, 2001, the employer was classified in CU720149. (This change resulted from a change to the Board's classification system.)
- The employer was audited by an assessment officer on March 12, 2003, during which the officer found that the employer was incorrectly classified. The description of the business at that time in the Board's records is "glass shop, window installation, window glass repair or replacement."
- In the phone conversation on June 23, 2003, with AL, she advised that there was no disagreement with the statement in the classification change form completed in 1996. She advised that the employer has continued to operate its business in the same way since then. The employer obtains most of its glass from buildings about to be demolished. It then uses this glass on construction projects, such as installing shower doors, windows, etc. This is most of the employer's work. AL distinguished this work from that of a "retail glass shop," which would cover sales to the general public over the counter. She said this was a very small part of the employer's business. She advised in this call that she would seek documentary evidence of the 1999 audit and the employer's business activities, but none was received.
- In 2003, the assessment rate for CU721049 is \$7.79 and for CU715020 is \$3.38.

Law and Policy

The Act

Section 37 of the Act sets up the classification system used for the purpose of paying assessments and gives the Board authority to change the classifications to which employers are assigned.

Applicable Policy

The policy relating to this review is found in AP1-37-3 (Classification – Changes) of the *Assessment Manual*. The policy lists the following five main reasons why a classification will change:

1. Board error
2. Change in firm's operations – Distinct
3. Change in firm's operations – Evolution
4. Change in Board classification practice
5. Misrepresentation

For each of these reasons, the policy sets out the criteria for determining effective dates where the change results in an increase or decrease in assessment rates, and whether experience rating will transfer.

Reasons and Decision

In applying Policy AP1-37-3, the assessment officer considered that reason 3 applied – “Change in firm’s operations – Evolution.” With respect to that reason, the policy states that a decrease in the assessment rate takes effect on the date when the change in the business has reasonably been verified to have taken place or on January 1 of the year prior to the year in which the Board became aware of the change, whichever is later. The policy notes that “the firm should have advised the Board of the change when it occurred.” I find that this reason does not apply as the employer’s business has not substantially changed for the period in question.

The employer is presumably arguing that reason 1 in the policy applies – Board error. “Board error” is defined in the policy as follows:

This occurs if the information is available and complete to allow the proper classification to be applied but a clear error is made in classifying a firm; it includes an improper classification continuing after a Board officer has audited a firm. It does not include borderline classification questions requiring a judgment decision. Nor does it include situations where the information supplied by the firm is incomplete or inaccurate, regardless of whether this was deliberate or inadvertent.

When a “Board error” has occurred, the policy states that, for a rate decrease, the Board may use the date when the error was made.

In considering whether a Board error was made, it is necessary to distinguish the period prior to 2000 from the subsequent period. On January 1, 2000, the Board introduced a new classification system. This involved the creation of a large number of new classifications and a process for transferring employers from the old to the new.

Prior to 2000, the employer was classified in subclass 070600. This was a residual classification for employers in the construction industry not covered in other more specific classifications. There were a number of classifications relating to activities relating to glass, but none specifically covering the installation of windows and shower doors on construction projects. For example, subclass 060236 covered “glass shops which grind or polish,” including “installation of replacement window glass.” However, this subclass specifically excluded the “construction of glass walls, facades, etc which is part of the general building construction industry.” The Classification Unit (“CU”) to which the employer is now assigned, 715020, did not come into existence until January 1, 2000. I conclude that the Board did not commit an “error” in assigning the employer to subclass 070600 prior to 2000.

Under the new system, effective January 1, 2000, the employer was placed in CU721049 (Siding, Awning or Gutter Installation, Service, or Repair). This assignment was in error since the description for that CU bears no relationship to what the employer does. Furthermore, the description specifically states “Excluded from this classification unit are employers PRIMARILY engaged in installing windows or window units.” The employer on January 1, 2000, should have been placed in CU715020.

Because the Assessment Department had to transfer a large number of employers to new classifications for the new classification system, it was concerned about the possibility of error. Sometimes the transfers were based on limited information and it was not practicable to

contact every employer individually. To reduce the risk of error, a standard letter was sent out to employers in 1999 advising them of what their classification would be in the new system and giving them a chance to object. The employer was sent a letter advising that it would be classified in CU715020 but made no objection. It also filed later payroll reports based on this classification without objection. No objection was made until the audit in 2003.

The question arises whether the employer's failure to object brings the situation into the "misrepresentation" category of Policy AP1-37-3. The policy defines "misrepresentation" as

"(5) A firm may misrepresent its operations deliberately or inadvertently. Misrepresentation can be by omission of information, submission of false information, or by words which, though reasonably interpreted, do not accurately reflect the firm's operations."

A "misrepresentation" does not necessarily imply fault on the part of the employer. In the case of misrepresentation, the policy states that a rate decrease takes effect on January 1st of the year the Board became aware of the situation.

This case may also fall within the "change in Board classification practice" category of the policy since the need for change originated from the implementation of the new classification system on January 1, 2000. Under this category, a rate decrease takes effect from "January 1st of the year the definitions/parameters were changed." Application of this category would produce the same result as the Board error category in this case.

The Policy is silent on what happens when more than one of the five reasons for a classification change could apply. However, the policy lists these reasons as the "five main reasons why a firm's classification would change." It appears from this that in a case where more than one reason may apply a reasonable approach is to determine the main one. In this case, I have concluded that the main reason was the change of classification system and the Board error that lead to the misapplication of the new system on January 1, 2000, leading to the result that the classification change should be retroactive to that date.

To the extent that there was any "misrepresentation" by the employer it was by omission and innocent. As the employer was in the construction subclass prior to 2000, it may not have seemed unusual to it that it would be assigned to the siding, awning and gutter CU in 2000. The employer would not be familiar with the subtleties of the classification system. The assessment rates were similar, \$5.74 in 1999 and \$6.11 in 2000. It might have been different if a radically different classification in another industry had been assigned to the employer with a significantly different rate, for example, operation of a parking lot. Greater weight might then be given to the employer's failure to object.

I find that the employer's assignment to CU715020 should be backdated to January 1, 2000. As a result, I allow the employer's request in part.

Conclusion

As a result of this review, I vary the Board's decision of March 12, 2003.