

WORKERS COMPENSATION APPEAL TRIBUNAL

BETWEEN:

EMPLOYER
FIRM #[personal information]

APPELLANT

AND:

WORKERS COMPENSATION BOARD OF
PRINCE EDWARD ISLAND

RESPONDENT

DECISION #107

Appellant	Employer, as represented by Keith Mullins, Employer Advisor
Respondent	Brian Waddell, Solicitor representing the Workers Compensation Board
Place and Date of Hearing	January 22, 2009 Loyalist Lakeview Resort 195 Harbour Drive Summerside, Prince Edward Island
Date of Decision	April 30, 2009

FACTS AND BACKGROUND

1. This is an Employer appeal of an Internal Reconsideration Decision dated September 9, 2008, upholding the Board's Decision dated March 13, 2008, denying the Employer's request to change the rate group for the Employer from [personal information].

2. By letter dated September 15, 2007, the President of the Employer company requested a rate group change for his company to the same one as [personal information].

3. His letter read in part:

I would like to request a rate group change for my company to the same one as [personal information] rental agencies. Having been in the [personal information] business here ... since [personal information], I have great difficulty understanding why I am paying the same rate as the big [personal information] dealers on P.E.I. who also have a [personal information] component to their businesses. At this point in time, the only equipment operated on my premises are a [personal information] which cannot compare to the equipment operated by the big dealers.

Essentially I am like a [personal information] rental agency who do short and long term rentals, some sales and clean [personal information]. When I look at all the other [personal information] related businesses in rate group # [personal information] , I have nothing in common with them.

4. On November 6, 2007, Greg Rivard, Assessment Auditor for the Board, by email asked the Employer what percentage of the Employer's revenue was generated by [personal information] sales and what by [personal information] rentals, how many [personal information] it had on site for the purpose of sales versus rentals, and whether the Employer was recognized as a [personal information] company or a [personal information] dealership.

5. By letter dated November 7, 2007, the President of the Employer company replied as follows:

In regard to your letter (email) we have 100% [personal information] sales and 0% [personal information] rentals.

The point I'm trying to get across is the only difference between our operation and [personal information] rentals is that we make up a bill of sale to sell a [personal information], and they make up a rental agreement to rent a [personal information]. No mechanical work involved in either place. We are being charged as though we do mechanical work for the public or warranty for manufacturers.

We have 60 - 70 [personal information], our company is recognized as a [personal information] dealership.

6. By letter dated March 13, 2008, Greg Rivard, denied the Employer's request for a change in the Employer's rate group from [personal information].

7. In his Decision, Mr. Rivard stated:

I am writing to you with regards to your classification with the Board with respect to the operations of (naming the Employer).

Your organization is currently classified as follows:

Class: [personal information]

Rate Group: [personal information]

Standard Industry Classification (SIC): [personal information]

I have reviewed the information you have provided on the letters dated September 15, 2007, and November 7, 2007, with respect to the business activities of (naming the Employer). You indicated in your letter(s) that you feel your place of business is more comparable with that of a [personal information] rather than the current industry description of a [personal information] dealership based on the services provided. You also note that you currently have 60 - 70 [personal information] for resale.

The Workers Compensation Board policy POL02-08 "Employer Classification by Industry", Section 4 states "The Workers Compensation Board classifies each employer based on industry using Standard Industrial Classification (SIC) codes. Employers are assigned to an industry (SIC code) based on the primary line of business. All lines of business incidental to the primary operation are classified under the industry of the primary operation."

According to the above mentioned letters as well as our telephone conversation today, it is my understanding that the operations of (naming the Employer) is that of a [personal information] dealership and therefore I am unable to grant your request to change your classification as the current rate group and assessment rate are correct.

8. In fact, the Employer's request was to change its rate group and not its classification from [personal information].
9. It is unfortunate that Mr. Rivard did not ask the President of the Employer company to clarify his request before making his decision and/or advise and attempt to educate the Employer of the Board's Policy as it relates to grouping together industry types (SIC codes) into rate groups and the considerations involved in setting assessment rates for each rate group.
10. On June 9, 2008, the Employer filed a Request for Internal Reconsideration of the Decision made by Greg Rivard in his letter to the Employer dated March 13, 2008.
11. The Notice of Request for Internal Reconsideration stated in part:
The issue can be resolved by requiring the original decision maker to render the proper decision on the original request which was to change the rate group from [personal information].
12. In fact, the Employer's original request for a rate group change (the letter dated September 17, 2007) was for a rate group change for the Employer company and not for [personal information] as an industry, although this may have been what was intended by the Employer.

13. By IRO Decision dated September 9, 2008, the Board Internal Reconsideration Officer, Bonnie Blakney, denied the Employer's reconsideration request stating that the rate group applied to the Employer was appropriate.
14. By Appeal dated October 8, 2008, the Employer appealed the Decision of the IRO dated September 9, 2008, to WCAT requesting relief as follows:
 - A. *The employer's Standard Classification Code of [personal information] should be changed to the proper Standard Industrial Classification Code of [personal information].*
 - B. *The employer's Rate Group should be changed from [personal information] in recognition of the distinct differences between it and [personal information] and the similarities between it and [personal information] and would represent an appropriate 40% reduction in the assessment rate for employers in this rate group.*

ISSUE

15. The issue before WCAT is whether the Board assigned the Employer to the proper rate group. This was the Reconsideration Issue identified by Ms. Blakney in the IRO Decision dated September 9, 2008.
16. It is not necessary for WCAT to address the appeal request for Relief A as the SIC code now assigned to [personal information].

LEGISLATION AND WCB POLICIES

17. WCAT is bound by the *Workers Compensation Act* (the *Act*) and Board Policy (pursuant to Section 56.(17) of the *Act*).

CLASSIFICATION

18. Section 61.(1), 61.(2) and 61.(3) of the *Act* read as follows:
 61. (1) *For the purpose of creating and maintaining the Accident Fund, all employers within the scope of this*

Part shall be divided, in the discretion of the Board, into classes.

- (2) *The Board may by its policy or bylaw rearrange such classes and transfer any Employer or Industry to any other class.*
- (3) *The Board shall assign every employer within the scope of this Part to the proper class, and where any employer engages in more than one industry, the Board may assign the employer to more than one class.*

19. Board Policy Number: POL02-08 (Employer Classification By Industry) reads in part:

*DEFINITION:
In this policy*

1. *“Industry” includes an establishment, undertaking, work, operation, trade or business.*
2. *“Standard Industrial Classification (SIC)” means a Statistics Canada framework for collecting, compiling, and disseminating economic statistics for groups of businesses that are engaged in similar activities.*

POLICY

3. *The intent of the system is not to balance each insured employer’s assessment payment exactly to the insured employer’s costs but rather to group and assess employers by similar industry.*
4. *The Workers Compensation Board classifies each employer based on industry using Standard Industrial Classification (SIC) codes. Employers are assigned an industry (SIC code) based on the primary line of business. (my emphasis) All lines of business incidental to the primary operation are classified under the industry of the primary operation.*
6. *For purposes of setting assessment rates, industry types (SIC codes) are grouped together into rate groups. (my emphasis)*

Industry characteristics not individual employer characteristics, are key to the assignment of industry types (SIC codes) to a rate group. (my emphasis)

7. The assignment of an industry type (SIC code) to a rate group is determined by taking many factors into account. (my emphasis)

The most important considerations are the size of the industry, line of business of the industry, workplace risk of the industry, and claims cost experience of the industry. All factors must be weighed and compared according to an industry's unique characteristics. (my emphasis)

An industry with a small payroll base may have a high claims cost experience as a result of only one large claim or a very small number of claims. Hence, the size of the industry does not always lend itself to reliable statistical analysis and therefore, significant weight may be given to factors such as the line of business and workplace risk in the assignment of a rate group for this industry.

8. Due to the size of the industry base on Prince Edward Island and the requirement for rate groups to be statistically significant in size for assessment purposes, the assignment of an employer to an industry (SIC code) and the assignment of an industry (SIC code) to a rate group may require some judgment. (my emphasis)

The application of such judgment will be based on the underlying philosophy of the assignment of an employer to an industry (SIC code) and the assignment of an industry (SIC code) to a rate group.

9. The underlying philosophy of the assignment of an employer to an industry (SIC code) and the assignment of an industry (SIC code) to a rate group requires consideration of and includes concern for:

- fair treatment of competitors; employers in the same industry who compete against each other will be assigned to the same rate group;

- fair treatment of all industries and employers within a rate group;
- fair treatment of one rate group versus others. (my emphasis)

Adherence to the underlying philosophy of assignment of an employer to an industry (SIC code) and the assignment of an industry (SIC code) to a rate group will result in individual employers inheriting the characteristics (i.e. size of the industry, line of business of the industry, workplace risk of the industry, and claims cost experience of the industry) of the broad industry base.

The experience rating system, as outlined in the Workers Compensation Board policy, POL02-20, Setting Assessment Rates, not industry classification, is designed to reward and penalize individual employers within a competing industry and allow for variations in service delivery among employers who belong to the same industry.

Determining An Employer's Classification

10. *An employer account will be established with the Workers Compensation Board upon registration of the employer as outlined in Workers Compensation Board policy, POL02-10, "Employer Registration".*
11. *As part of the registration process, employers are required to provide a detailed description of their operations. The Workers Compensation Board uses this information to determine the employer's industry classification (SIC code) as follows:*
 - a) *The Workers Compensation Board reviews the information provided by the employer to determine the nature of the business activities.*
 - b) *The Workers Compensation Board, based on a schedule of industry classifications used in Prince Edward Island together with the Statistics Canada SIC manual, determines whether the nature of*

business activities as described by the employer is similar to an existing description. If a similar description exists, the business activity is assigned the respective industry (SIC code).

SIC codes are used to identify the distinct industries operating in Prince Edward Island. The Workers Compensation Board uses the SIC code and its description of activities as the primary tool to assign employers to an industry.

- c) *Where the SIC code does not provide clear direction to which industry the business operation should be assigned, the Workers Compensation Board will determine the industry that best represents the primary business activity.*
- d) *Where the Worker Compensation Board determines that a SIC code not previously used best represents the primary business activity, the Workers Compensation Board will modify the existing schedule to include the SIC code.*
- e) *Where the Workers Compensation Board has assigned a new SIC code to an employer, the Workers Compensation Board will assign the SIC code to an existing rate group based on the "General Concepts of Classification".*

20. Board Policy Number: POL02-20 (Setting Assessment Rates) reads in part:

Definition:

In this policy

- 1. *"Assessment rates" means the schedule of rates established, by the Workers Compensation Board, each year levied upon employer payrolls.*

Policy:

General

- 1. *The objective of the Workers Compensation Board assessment rate setting system is to establish overall assessment rates based on objectives, including:*
 - *a system which balances responsiveness and stability;*
 - *a system which is understandable;*
 - *a system which is manageable.*

2. *The assessment rate setting system must generate sufficient revenue, through assessment rates charged to employers, to cover the estimated total revenue requirements for the respective assessment year.*

Average Rate

3. *An average rate will be calculated based on the projected total annual revenue required and the projected total payroll to be reported for the respective assessment year.*

Group Rates

6. *A group rate will be calculated for each industry group.*
7. *The projected total revenue requirement will be distributed across industry groups based on historical accident cost experience. A group rate will be calculated for each industry group. The average rate will be adjusted up or down, for the industry group, depending on whether the respective group's experience is better or worse than that of the consolidated experience of all groups.*
8. *Factors to be considered when adjusting the average rate for respective industry groups include:*
 - *projected total revenue required from the industry group based on historical accident cost experience;*
 - *maximum annual increase and maximum annual decrease limits.*

ANALYSIS AND DECISION

21. The issue to be considered on this appeal is whether the Employer's rate group should be changed from Rate Group [personal information] to Rate Group [personal information].
22. WCAT does not have jurisdiction on this appeal to consider the Employer's request (in the Employer's request to the IRO for reconsideration) that all [personal information] be transferred from Rate Group [personal information] to [personal information]

23. WCAT lacks jurisdiction over that request.
24. The Employer's original request (letter dated September 15, 2007) was to change its own rate group to the same one as [personal information] and the Board's original decision (Mr. Rivard's letter dated March 13, 2008) only dealt with that request. The reconsideration decision by Ms. Blakney, the IRO, similarly only dealt with the Employer's original request and Mr. Rivard's decision. This was appropriate because the IRO's role under the *Act* is to only reconsider the decision made by the Board. It is that reconsidered decision that is appealable to WCAT.
25. The *Act* recognizes the industry based nature of rate groups in Section 1.(y.1) which defines "rate group" as follows:

(y.1) "rate group" means a group to which an industry is assigned for assessment purposes.
26. Further, Board Policy Number POL02-08 states that the assignment of a SIC code to a rate group is an industry-based process. In assigning SIC Code [personal information] , to a rate group, the Board had to consider many industry-related factors under its Policy, the most important of which were as follows:
 - The size of the [personal information] industry;
 - The line of business of the [personal information] industry;
 - The workplace risk of the [personal information] industry;
 - Claim costs of the [personal information] industry.
27. Thus, it is the unique characteristics of the [personal information] industry - not the unique characteristics of a particular [personal information] business (i.e. the Employer's business) - that is relevant for the purposes of

determining the rate group for the industry and thereby the rate group for the employer in that industry.

28. Rate Group [personal information] consists of the following industry types (SIC Codes):
[personal information]
29. Rate Group [personal information] consists of the following industry types (SIC Codes):
30. If an employer makes a request to the Board for a rate change, it is incumbent on the employer to submit evidence to the Board that the employer's industry has been assigned to the wrong rate group taking into account the industry's unique characteristics and such considerations as the size of the industry, line of business of the industry, workplace risk of the industry, and claims cost experience of the industry.
31. These are the factors that the Board is to take into account under Board Policy POL02-8 in making such determinations.
32. In this appeal, it is clear that the Employer did not understand the foregoing, and consequently did not present any facts or evidence with respect to the Employer's industry [personal information] to support the Employer's request for the rate group change requested.
33. The cooperation, assistance or joining of other employers in the same industry in making such a request would probably be advisable.

34. Given the absence of any evidentiary basis for the Employer's appeal, this Tribunal must therefore dismiss the appeal.

35. The Panel would like to thank both Mr. Mullins and Mr. Waddell for their excellent written and oral presentations in this proceeding.

Dated this 30th day of April 2009.

John L. Ramsay, Q.C., Vice-Chair
Workers Compensation Appeal Tribunal

Concurred:

Donald Turner, Employer Representative

Gordon Huestis, Worker Representative