Date: 1998 12 02
Docket: CV 06742

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BRADEN-BURRY EXPEDITING SERVICES LTD.

Applicant

- and -

THE WORKERS' COMPENSATION BOARD OF THE NORTHWEST TERRITORIES

Respondent

Application for judicial review of decision of the Appeals Tribunal established pursuant to the *Workers' Compensation Act*, R.S.N.W.T. 1988, c. W-6

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

Heard at Yellowknife, Northwest Territories
on November 4, 1998

Reasons filed: December 2, 1998

Counsel for the Applicant:	James R. Posynick
Counsel for the Respondent Board:	Adrian C. Wright
Counsel for the Appeals Tribunal:	Ian W. Blackstock

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REASONS FOR JUDGMENT

[1] The applicant seeks judicial review of a decision of the Appeals Tribunal established pursuant to the *Workers' Compensation Act*, R.S.N.W.T. 1988, c. W-6 (as amended). The issue before the Tribunal was whether the applicant company is properly classified for assessment purposes. The issue before me is whether the Tribunal fettered its decision-making by the application of an external policy.

Summary of Facts:

[2] The applicant company has traditionally been classified by the Workers' Compensation Board as a Class 5 ("Transportation, Communication & Utilities"), Subclass 53 ("Ground Transportation"), employer. In 1993 and 1994 it sought to change its classification to one under Class 2 ("Mining"), Subclass 27 ("Hardrock Prospecting & Exploration"). The change would result in a significant saving for the applicant in the amount it is required to pay as its annual assessment.

[3] An assessor for the Board initially approved the request. This was subsequently overruled by the assessor's manager. The refusal to change the classification was confirmed by the Board's assessment division. The applicant then appealed to the Review Committee established pursuant to the Act.

[4] The applicant argued before the Review Committee that it was not a transportation company but a company that provided support services to hard rock mineral exploration companies. An analysis of the applicant's payroll by the Board's assessors concluded that only 26.29% of its payroll was allocated to expediting work (one of the categories in the "transportation" sub-class). The rest was allocated to "mining" related activities. The Review Committee, on the basis of this analysis, rejected the request to reclassify the applicant notwithstanding the fact that almost three-quarters of the applicant's work was in the mining sector. This was due to the application of what the Review Committee termed a policy that states, in effect, that if an employer operates in two industries then it is to be classified in the higher risk industry if the higher risk operation exceeds 25% of its total operations. Transportation, being labelled a higher risk industry, was thus held to be the appropriate classification.

[5] The applicant then appealed to the Appeals Tribunal. The Tribunal denied the appeal again on the basis of the previously noted policy. The "rationale" for the Tribunal's decision read as follows:

> The Appeals Tribunal acknowledges that the appellant's claim history is minor and that records indicate that the appellant has been a low risk company for industrial accidents.
>
> Upon reviewing the Classification of Industries & Provisional Assessment Rates for 1993 and 1994, the Appeals Tribunal is unable to suitably reclassify the appellant to another category. Policies and Procedures established by the Board, and applicable in 1993 and 1994, are the policies the Appeals Tribunal is obliged to base it's decision on.
>
> The Appeals Tribunal understands the appellant is a two industry company: expediting and staking and prospecting. The appellant's request to be reclassified under Class 2 Mining, Sub-class 27 Prospecting and Exploration, is consistent with the staking and prospecting portion of the company. However, the 1993 payroll information submitted by the appellant indicated the expediting portion of the business exceeds 25% of the companies *(sic)* activity. In compliance with Operational Procedure Reference No. 30-02-01, page 2, item C, the appellant is classified according to the activity which is the higher risk and exceeds 25% of the companies *(sic)* total operations.

> The Appeals Tribunal reviewed the appellant's concern (letter dated June 7, 1994, to the Review Committee) that their classification places them on an "*uneven playing field*". The Appeals Tribunal investigated the classification and rates of four companies that offer similar services to the mining industry and were identified as competitors. The Appeals Tribunal found that the four companies were assessed at the same rate or in some instances at a higher rate.
>
> Since the Appeals Tribunal is bound by the WCB Act and Guidelines, it is difficult to find another subclass to which the appellant would be better suited. The Oil & Gas Class (3) does not suit the appellants industry objective, nor does the Mining Class (2) describe more than 75% of the appellants activities for 1993.

[6] The applicant then sought relief from the Board itself in the form of a direction to the Tribunal for a rehearing. That was denied. The applicant also sought a rehearing directly from the Tribunal but that too was denied. It then commenced these judicial review proceedings seeking an order quashing the Tribunal's decision.

[7] When these proceedings were commenced, the applicant raised some jurisdictional issues. As a result, an order was made whereby the Appeals Tribunal itself was added as a party. The issues at the hearing before me, however, were not strictly jurisdictional ones so counsel for the Tribunal did not participate in the hearing.

Legislation & Policies:

[8] The *Workers' Compensation Act* of the Northwest Territories sets up an all-encompassing system of no-fault compensation for work-place injuries. It is in sum and substance no different than the system described by the Supreme Court of Canada in *Pasiechnyk v. Saskatchewan (Workers' Compensation Board*), [1997] 2 S.C.R. 896. The Board occupies the central position in this system with exclusive jurisdiction to deal with almost any question coming within the purview of the Act. This is exemplified by s.7(1) of the Act:

> 7. (1) Subject to section 7.3, the Board has exclusive jurisdiction to examine, inquire into, hear and determine all matters and questions arising under this Act, and the action or decision of the Board on them is final and conclusive and is not open to question or review in any court and, except where there has been a denial of natural justice or an excess of jurisdiction exercised by the Board, no proceedings by or before the Board shall be

> restrained by injunction, prohibition or other process or proceedings in any court or be removable by *certiorari* or otherwise into any court nor shall any action be maintained or brought against the Board in respect of any act or decision done or made by the Board in the honest belief that it was within the Board's jurisdiction.

[9] Among the Board's powers is the assessment of levies on employers so as to fund its compensation fund. To accomplish this the Board may, among other things, divide any industry into classes and subclasses (s.62(1)); establish differentials in the rates as between classes or subclasses and impose a special rate on any particular employer or industry (s.62(3)); and make assessments in any manner and form and by any procedure that the Board considers adequate and expedient (s.63(1)).

[10] The Board, on May 1, 1989, enacted what is labelled an "Operational Policy", No. 30-02-01, on the subject of "Classification of Employer Accounts". It states:

> Employers are assigned a classification based on the industry they are involved in. Classification changes may arise from time to time as a result of Assessor reviews, audits of employers, return of Employers Payroll Statements, or at the request of an Employer for a change in classification.

[11] The Board also adopted what is labelled an "Operational Procedure" on the same subject. It sets out procedures for the Board's assessors to follow in determining an employer's classification. Among the procedures is the following:

> As the employer is permitted to have only one operating account with the Board he is usually classified according to the most hazardous industry in which he is involved within the following guidelines:
>
> ...
>
> c) If the employer has operations encompassing only two industries classify him according to the higher risk operation as long as the higher risk operation exceeds twenty-five percent (25%) of his operations.

[12] It is clear from this "Procedure" document that it is directed specifically to the Board's assessors to guide them on how to classify an employer. Whether it can be truly called a "policy" is an arguable point but the parties before me assumed it was and treated it accordingly. For sake of this case I will assume that as well (but without deciding the point). It seems to me, however, that a distinction could be drawn between a statement of "policy" and a set of "operational" guidelines for internal staff.

[13] The question of "policy" becomes important when one turns to the role of the Appeals Tribunal. The jurisdiction of the Tribunal is set forth in s.7.3 of the Act:

> 7.3 Subject to section 7.7, the appeals tribunal has *exclusive jurisdiction* to examine, inquire into, hear and determine *all matters arising in respect of an appeal* from a decision of a review committee under section 24 or 64, and it may confirm, reverse or vary a decision of the review committee. (emphasis added)

[14] The Tribunal is established as an independent adjudicative body. Its members are appointed by the cabinet minister who is responsible for the administration of the Act. The Tribunal is composed of one member from among the members of the Board, two members appointed on the recommendation of workers' representatives, and two members appointed on the recommendation of employers' representatives (s.7.1(1)). It is therefore composed of people who bring a special interest and knowledge to their tasks. It has powers to set its own procedures and to exercise the powers of a board of inquiry under the *Public Inquiries Act* (s.7.5). It is bound to follow the rules of natural justice (s.7.6). It is also protected by a very strong privative clause:

> 7.9. (1) Subject to sections 7.7 and 7.8, a decision of the appeals tribunal on an appeal is final and conclusive.
>
> (2) A decision of the appeals tribunal on an appeal may not be questioned or reviewed in any court.

[15] There is an inter-relationship between the Board and the Tribunal in that the Tribunal must apply the policies of the Board. The Board has power to direct a rehearing and the Tribunal itself may vary any decision or rehear a matter. These provisions are contained in sections 7.7 and 7.8 of the Act. The "policy" provisions are specifically found in s.7.7:

> 7.7. (1) The appeals tribunal shall, in determining an appeal, apply the policy established by the Board.
>
> (2) Where the Board considers that the appeals tribunal has failed to properly apply the policy established by the Board, or has failed to comply with the provisions of this Act or the regulations, the Board may, in writing, direct the appeals tribunal to rehear the appeal and give fair and reasonable consideration to that policy and those provisions.

[16] In the case of *Northern Transportation Company Limited v. Workers' Compensation Board et al.* (S.C.N.W.T. No. CV06887; January 19, 1998), I had occasion to comment on the relationship between the Tribunal and the Board as follows (at para. 29):

> These provisions make clear that while the Tribunal must apply the Board's policies, it is not an instrument of the Board. It is not under the "direction" of the Board (save and except the limited authority of the Board to direct a rehearing). The Tribunal must make its own decisions on the matters before it. It must make those decisions having regard to the legislation, the Board's policies, and the principles of natural justice. The policies of the Board, however, do not replace the decision-making by the Tribunal. It is the Tribunal that must decide whether a policy applies and, if so, how it applies. It cannot abdicate that responsibility to the Board itself or to some automatic application of any policy.

[17] The interplay of policy setting and adjudication by tribunals is frequently the source of controversy in the administrative law field. In many cases it is a question of a tribunal applying its own policies to an issue before it. In others, as in this case, it is a question of a tribunal applying a policy set by an external body. The benefits of establishing policies to guide administrative bodies in specialized and busy areas, such as workers' compensation, are undoubted. Consistency is much to be preferred over *ad hoc* measures. The critical point, however, is that, notwithstanding the existence of a policy, the tribunal must still maintain its focus on a consideration of each case on its merits.

Standard of Review:

[18] Much of the written argument presented for this application addressed the question of the appropriate standard of review. At the hearing, however, I think counsel more or less agreed that the standard was one of patent unreasonableness. This accords with other cases, such as *Pasiechnyk* (above), that applied such a standard to other workers' compensation legislation. The test of patent unreasonableness was applied by Schuler J. of this court to a review of an Appeals Tribunal decision in *Clark v. Workers' Compensation Board* (S.C.N.W.T. No. CV 07443; August 24, 1998). The same

approach was taken by the Alberta Court of Appeal in *Re Penny and Appeals Commission* (1993), 106 D.L.R. (4th) 707. There the Court found that, based on a functional and pragmatic approach, the purpose, language and structure of the legislation indicated an intention to insulate the Commission (similar to the Appeals Tribunal in this case) from all but patently unreasonable decisions on matters within its jurisdiction. In *Penny*, Kerans J.A. reviewed the legislative scheme and wrote (at page 719):

> Under the scheme of this *Act*, the function of the Appeals Commission is to review adjudications by board officials about benefit claims. It is not a governing body or policy-making body. (That function is performed for the board by its directors) ... The office of the privative clause is to indicate that the commission's review of the facts and judgment about them in terms of the valuing of a claim is final. The legislature sees more harm than good in further review, even accepting that further review can sometimes identify unreasonable verdicts.

[19] This approach follows from the decision of the Supreme Court of Canada in *C.U.P.E. Local 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227. That case held that the decision of a specialized tribunal, acting within its jurisdiction and with the benefit of a privative clause, will be subject to judicial review only if it acted in a patently unreasonable manner. The tribunal will not be required to be correct in its findings of fact or interpretation of the law provided that its decision has a rational basis.

[20] The applicant's position on this point is that the Tribunal's decision, in applying the 25% "policy" set by the Board, was patently unreasonable because it is a purely arbitrary figure. Its counsel submitted that classifying an employer in the more hazardous activity, when that activity is the minor part of the employer's business, is irreconcilable with the statute which, it is said, requires classification in the appropriate industry. What is appropriate will depend on the risk hazard, the employer's claims history, and fairness to the employer.

[21] The Board's argument is that the Act gives a wide latitude to the Board to develop a classification system to encompass any number of possibilities. In doing so it can adopt any procedures that will be effective and consistent in their application. The Board's counsel pointed out that the question before the court is whether the Tribunal's decision is patently unreasonable, not whether the Board's policy is patently unreasonable. So long as the policy is one that can be made pursuant to the statute, then, it was submitted, the Tribunal must apply it and it cannot be said to be acting irrationally.

[22] Counsel is correct that the issue before me is not the soundness of the Board's policy. It may or may not be a reasonable one. That is impossible to say because neither in the Board policy document or in the Tribunal's decision is there any articulated justification for the policy (that being the 25% threshold rule). There may be good actuarial reasons for it or it may simply be a convenient way for assessors to classify multi-industry businesses. If a court is not to second-guess such a policy — and I agree it should not be expected to — then at least there should be some rational basis articulated in support of it either from the Board or in the Tribunal's decision.

[23] Having said all this, however, I recognize, as counsel did at the hearing before me, that the critical issue in this case is not the standard of review but that of the Tribunal applying the policy and whether, in doing so, it fettered its discretion in its decision-making.

Fettering of Discretion:

[24] The general principle of law is that a tribunal which exercises a statutory discretion may not fetter the exercise of that discretion by the adoption of an inflexible policy. That is not to equate the adoption of a general policy with an inflexible one. What is essential is that each case be considered individually on its own merits. This was explained in *Sebastian v. Workers' Compensation Board*, [1994] S.J. No. 523 (C.A.), by Tallis J.A. (at para. 57):

> The role of policy in administrative decisions is generally recognized. A board or tribunal is entitled to develop guidelines for application of statutory provisions which facilitate consistency and enable those governed by the legislation to know what factors may affect a claim. A policy may not remove the decision from the Board; if it predetermines a matter without an opportunity to address the merits, the Board disables itself from exercising the power to decide entrusted to it by statute ...

[25] In this case, the Tribunal recognized in its decision that (a) the applicant had a minor claim history; (b) it has been a "low risk" company for industrial accidents; and (c) the request for reclassification is consistent with the majority of the company's activities. Yet, despite these factors, the Tribunal maintained the applicant's current classification because (as it wrote in its decision): "Policies and Procedures established by the Board ... are the policies the Appeals Tribunal is obliged to base its decision on" (my emphasis) and "the Appeals Tribunal is bound by the *WCB Act* and Guidelines" (my emphasis again). These statements are consistent with an interpretation that, but for the Board's

policy, the Tribunal may have considered reclassifying the applicant. I am not saying that it would have reclassified the Applicant or that it should have. I am merely saying that these statements reveal that the Tribunal felt that it was bound by an inflexible policy. That is a fettering of discretion and thus subject to intervention on judicial review.

[26] The Board's counsel argued that the Tribunal had no choice but to apply the policy since that is what the Act commands it to do. I think the response to this submission is that if the Act intends the Tribunal to automatically apply a policy in every case then there is no point in having a Tribunal. The appeal process and the adjudicative powers of the Tribunal, also created by statute, must have meaning. The Tribunal is given the exclusive jurisdiction to hear and determine all matters arising in respect of an appeal (s.7.3). Its decisions, subject to direction for a rehearing, are "final and conclusive" and may not be questioned in any court (s.7.9). This is a stronger privative clause than even that enjoyed by the Board. Even on direction for a rehearing, the Board can only tell the Tribunal to rehear the matter, not how to decide it. The legislation clearly intends that the Tribunal make independent decisions. Its only obligation is to apply, where applicable, Board policies. But, it must surely also enjoy the power to decide when a policy should not apply. That is what is meant by deciding a case on its merits.

[27] I am reinforced in this view by the policy document itself. I note that the "Operational Procedure" that everyone in this case has been calling the "policy" is really nothing more than guidelines. It states that an employer is "<u>usually</u> classified according to the most hazardous industry in which he is involved within the following <u>guidelines</u>" (my emphasis). There then follows four factors, one of which being the 25% threshold test. The use of the word "usually" suggests to me something other than "always". Therefore even the Board's document does not anticipate universal application. In addition, the very fact that the factors are described as "guidelines" suggest something less than strict rules. As noted by Saunders J. in *Shelburne Marine Ltd. v. Workers' Compensation Board*, [1995] N.S.J. No. 493 (S.C.): "If such a policy were applied in all cases, without exception, they could no longer be characterized as 'guidelines'. Such an application or interpretation would offend the discretion granted the Board ..." (para. 42).

[28] In *Saunders Farms Ltd. v. British Columbia (Liquor Control and Licensing Branch, General Manager*) (1995), 122 D.L.R. (4th) 260, the British Columbia Court of Appeal considered a similar situation. There the Liquor Appeal Board relied on a guideline, issued by the Licensing Branch, which stated that on a license application the criterion of the "need" of the community for the proposed establishment would be based

on the community's population. On this basis the application was denied. The Court of Appeal set aside the decision, and remitted the matter for rehearing, on the basis that the Board fettered its discretion by rigid adherence to the policy guideline. In doing so Southin J.A. said (at para. 53):

> "Need" is an objective factor to be interpreted within the meaning of the Act and regulations only. The board may consider whether, and to what extent, population is a factor in "need", but it may not start from the proposition that the guidelines constitute a legally binding definition of the factor.

[29] In every case the Tribunal must consider the merits of the particular application. It must have regard to any policies of the Board. But a policy (such as the 25% threshold) is only a factor for the Tribunal's consideration. The Tribunal may, in the end, consider it to be the most important factor but it is not the only factor. If a case warrants deviation from a policy the Tribunal should be prepared to justify it. In any case the Tribunal should identify the factors it relied on in coming to its decision. But in this case, the Tribunal said it was obliged to follow and was bound by the policy. This indicates that the policy was applied without regard to the merits of the applicant's case. That amounts to a fettering of discretion.

Conclusions:

[30] For these reasons, the decision of the Appeals Tribunal is set aside. The matter is remitted to the Tribunal for a rehearing.

[31] Ordinarily costs follow the event. My inclination would be to award costs to the applicant. I will, however, hear submissions from counsel should they be unable to agree on this point.

J.Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 2nd day of December 1998

Counsel for the Applicant:	James R. Posynick
Counsel for the Respondent Board:	Adrian C. Wright
Counsel for the Appeals Tribunal:	Ian W. Blackstock

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