

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1862/05

- [1] This appeal was heard in Toronto on September 29, 2005, by a Tribunal Panel consisting of:
E.J. Smith: Vice-Chair,
M. Meslin: Member representative of employers,
A. Grande: Member representative of workers.

THE APPEAL PROCEEDINGS

- [2] The employers W. F. and W. T. appeal the decision of the Board Appeals Resolution Officer (ARO) dated May 25, 2004. That decision concluded that the business activities of W. F. at its T. Road location had been correctly classified, in their entirety, in Rate Group (RG) No. 033-2, classification unit (CU) 2512-000: Sawmill and Planing Mill Products.
- [3] W. T. is an associated company providing ancillary services to W. F. The classifications imposed on W. F. have therefore been flowed through to W. T. and W. T. joins in the appeal. However the classification of the T. Road site is the only issue, relevant to both employers, and the appeals have been heard together.
- [4] For the purposes of this decision, W. F. is referred to as W. F. or as “the employer”, and W. T. is referred to as W. T.
- [5] The employer and W. T. appeared and were represented by Ms. J. Jodouin. Ms. T. Zigomanis, articling student, appeared on behalf of the Tribunal Counsel Office (TCO). Mr. S. Recchi, Board Counsel, provided submissions as *amicus curiae*.

THE RECORD

- [6] The Panel considered:
- Exhibit #1: Case Record for W. F. prepared by the Office of the Vice-Chair Registrar dated August 25, 2004;
 - Exhibit #2: Addendum No. 1 for W. F. dated August 25, 2004;
 - Exhibit #3: Addendum No. 2 for W. F. and W. T. dated August 3, 2005;
 - Exhibit #4: Addendum No. 3 for W. F. and W. T. dated September 8, 2005;
 - Exhibit #5: Tribunal Counsel Office Generic Information;
 - Exhibit #6: Tribunal Counsel Office Employer Classification Casebook dated September 2005;
 - Exhibit #7: Case Record for W. T. dated August 25, 2004;

- Exhibit #8: Addendum No. 1 for W. T. dated August 25, 2004;
- Exhibit #9: History of A-033-02 (CU 2512-000) Sawmill and Planing Mill Products and F-681-01 (CU 5631-001) Lumber, Plywood and Millwork, Sales.

[7] The Panel also heard oral evidence from the employer's Chief Financial Officer. Ms. Jodouin and Ms. Zigomanis made submissions. The Board's amicus curiae submissions are found in Addendum No. 3.

THE ISSUES

[8] The issue is whether the T. Road facility is correctly classified in R.G. A-033-02: Sawmill and Planing Mill Products. The employer W. F. requests that the entire operation be placed in Rate Group No. F-681-01, CU 5631-001: Lumbar, Plywood and Millwork, Sales. W. T. joins in this request.

[9] The Panel has also considered whether the business activities at the T. Road location should be classified partly in one of these Rate Groups and partly in the other.

THE REASONS

(i) Background

[10] The employer was audited in November 2001. The Notice of Audit Visit is dated October 24, 2001 and the audit results were communicated to the employer by letter dated May 15, 2002. The changes in classification have been made retroactive to January 1, 2001.

[11] Prior to January 1, 2001, the employer's entire business activity was classified in R.G. No. F-681-01: Lumber, Plywood and Millwork, Sales. "F" is the Class for retail and wholesale activities. In his audit visit of November 2002, the auditor found that the employer was carrying out business activities in its "re-work" division (referred to on file as the "mill") at its T. Road location that fell outside the definition of the wholesale activity, and re-classified that business activity at that location under R.G. A-033-02: Sawmill and Planing Mill Products. "A" is the Forest Products Class and this Class covers the manufacturing of forest products.

[12] The auditor identified the equipment used in the mill as including a pop-up saw, a yards cut to length saw, a Yates planer, a table saw, multi-rip equipment, a Newman planer, a Re-saw #1, and a Re-saw #2, and a Holitec cut to length machine.

[13] The auditor agreed that there was segregated payroll for the mill.

[14] In the Auditor's Memo dated March 20, 2002, the auditor recognized that the employer was carrying out two business activities (addressing its departments at all locations):

- 1) Wholesaling of wood and lumber products through its five operating divisions... These products are stored in two warehouses [at T. Road and at another warehouse]... and sold without further processing to customers.

2) Processing of raw lumber by cutting and dressing this according to customer's specifications. This business activity is done at the company's mill at [the T. Road location.]

[15] The auditor also identified ancillary business activities of 1) upper management and human resources 2) accounting, finance and administration 3) sales, purchasing and sales support for the industrial division 4) sales, purchasing and sales support for the hardwood division 5) operations management and 6) yard workers.

[16] In its letter to the employer dated May 15, 2002, informing the employer of the audit results, the auditor stated:

You need to prorate the payroll of common or ancillary workers (people who support two or more of your operations) based on the direct labour reported in each classification unit. Include the prorated portions in the applicable classification units.

[17] However the auditor concluded that the only direct labour at the T. Road location was the labour in the milling activity. None of the labour at that location was treated as direct labour payroll of the wholesaling activity, despite the fact that only about 18 of the over 100 employees at this location worked in the "re-work" department and despite the fact that the auditor agreed that the payroll of these employees was segregated. The auditor explained the reasons for the approach in a further letter dated December 18, 2002, as follows:

The workers at the [T. Road] warehouse provide the ancillary service of warehousing for the firm's manufactured products and for non-manufactured products. The earnings of these workers should be prorated between the two business activities (manufacturing and wholesaling) of the firm, based on direct labour costs. However, there are no direct labour costs for the wholesaling business activity which can be directly associated with the [T. Road] warehouse. Therefore earnings of warehouse workers at [the T. Road] warehouse were all allocated under the manufacturing rate.

[18] We understand this to mean that the auditor's approach results from the difficulty, at this location, in distinguishing between payroll attributable to the employer's wholesaling business activity and payroll that was ancillary to the milling activity. In his list of what he considered the employer's ancillary functions, in his May 15, 2002 letter, he listed essentially all the functions carried out at this location except for the milling function. Assuming that a portion of the time of these employees is dedicated to the wholesale activity, that payroll is not segregated from the activities that the auditor defined as ancillary in part to the milling activity. Since he could not segregate the payroll between direct wholesale and ancillary functions he classified all remaining payroll at this location as entirely ancillary to the milling function. He classified the entire business activity at this location in RG A-033, from January 1, 2001.

(ii) Testimony

[19] The witness described the employer's business. It is a wholesale distributor. It has been in this business for seventeen years. Primarily, it buys rough lumber. All the lumber it buys has already been shaped into lumber. It does not buy any round wood. It also buys wood products that have already been engineered.

[20] There is a re-work department at the T. Road location. The re-working is done to meet the requirements of specific orders received from customers. If there is insufficient inventory on

hand to meet an order, the employer may produce the product in the re-work department. As an alternative, it may choose to obtain the product elsewhere. Most of the reworking function involves cutting the lumber to size as needed for the order. The cut might be to change the length or the width or thickness. Multigrip equipment is used to split the wood to different thicknesses. One machine also makes a groove in the wood. The wood might also be given a smooth finish.

- [21] He testified that the re-work function involves processing about 3% to 4% of the product sold, in the entire business operation. Of the product sold from the T. Road location, the witness estimated that that re-worked lumber would not be more than 10% of the total sales. The witness testified that the staff employed in the mill are about 11% of the employer's total staff, on a head count basis. The wages paid to the mill-workers are also in the range of 10% or 11 % of the employer's total payroll.
- [22] The witness testified that the mill operates at a loss. It is not a profit centre in its own right. He also testified that in his opinion the function is not that of a "sawmill" within the industry's definition of that term. A sawmill receives round logs and forms them into lumber.
- [23] The witness testified that generally the lumber is taken from the warehouse area to the re-work area and then does not return to the warehouse. Because it is milled to meet the needs of specific orders, it goes straight from the mill area to the loading area. Occasionally lumber might go back to the storage area, if it doesn't fit in the loading area, but that would be the exceptional case. It would happen less than one per cent of the time.
- [24] We note that this evidence is not the same as the auditor's finding. The auditor states that the warehouse function was used for both the milled and unprocessed products. We accept the witness's testimony on this point.
- [25] The witness testified that to his understanding most of the employer's competitors are classified under RG No. F-681. They are not classified under RG No. A-033. He thought that the companies classified under A-033 are traditional sawmills.
- [26] The witness described the different work functions carried out at the T Road location and made an approximate estimate of the number of employees involved in each function. We understand that these were rough estimates only, but repeat them here because they provide information about the nature of the work done. The witness testified that in the time period in issue at the T Road location about 45 persons were involved in sales. About 35 were involved in administration. About 12 persons worked in shipping. About 8 worked in the yard and another 5 or 6 persons in the warehouse. He estimated that about 18 to 20 persons worked in the re-work area.
- [27] The witness testified that not all the lumber sold is stored in the warehouse facility. The employer's sales team brokers a lot of the wood: i.e. it buys and resells the lumber without ever receiving it on site. About 40% of the wood sold never goes through the facilities of the business.

(iii) Law and Board Policy**(a) Regulation 175/98**

[28] Section 6 of the Regulation states:

(1) For the purposes of calculating an employer's premiums an operation of the employer that is ancillary to a business activity of the employer shall be deemed to be part of that business activity.

(2) If an operation is ancillary to more than one business activity those portions of the ancillary operation that relate to each business activity shall be deemed to be part of that business activity.

(3) An operation is ancillary to a business activity if it supports or is incidental to the business activity and it falls within any one of the following paragraphs:

...

7. The warehousing or distribution of goods produced or sold by the employer.

8. The transportation of an employer's personnel or of goods produced by the employer.

9. Wholesaling of goods produced by the employer.

10. The maintaining of security to the employer's operations.

11. Administration related to the employer's operations.

13. Marketing, promotion or communication related to goods sold...

[29] A number of other ancillary functions are also listed, but we do not understand them to be relevant here.

[30] Section 6 continues as follows:

(4) If part of an operation of an employer is ancillary to one or more business activities of the employer and part of the operation is carried on as a business activity then the following rules apply:

1. If the part of the operation that is carried on as a business activity is properly segregated from the part that is ancillary, this section applies only to that ancillary part and the premiums for the part that is carried on as a business activity shall be calculated separately.

2. If the part of the operation that is carried on as a business activity is not properly segregated from the part that is ancillary, the premiums for the entire operation shall be calculated using the highest of the premium rate for the operation and the premium rate or rates of the business activity or activities to which the operation is partly ancillary.

3. The operation shall not be considered to be a business activity for the purposes of section 9.

[31] Section 9 of the Regulation provides:

If an employer has more than one business activity, the employer's premiums shall be calculated using the highest of the premium rates for the employer's business activities subject to the following rules:

1. If a business activity of an employer is properly segregated from the employer's other operations, the premiums with respect to that segregated business activity shall be calculated separately.

[32] Other rules relate to small employers and are not relevant here.

(b) The Introduction to the Classification System

[33] The Introduction to the Classification System describes the classification scheme. Class A is Forest Products. Class D is Manufacturing. Class F includes the retail and wholesale trades.

[34] A note to Class D states:

Manufacturing includes making, preparing, altering, repairing, ornamenting, printing, finishing, packing, packaging, inspecting, testing, assembling the parts of and adapting for use or sale any article or commodity or raw material.

[35] This is relevant because the term manufacturing is included in the CU description for RG A-033-2. The functions in issue in this appeal are cutting and finishing and, Ms. Jodouin submits, possibly packaging, the latter function having further implications addressed below.

[36] Notes to Class F state:

Wholesaling is the business of buying products for resale to other businesses, to government establishments, or to other institutions.

The WSIB generally considers a wholesale business activity to involve both taking title to goods and handling them, and lists all wholesale activities in Class F. The business activity of arranging for the sale of goods without handling them, with or without taking title, falls under Class I, Other Services.

For certain activities in Class F, the WSIB does not distinguish between retail and wholesale in the classification scheme. In these cases, both retail and wholesaling business activities appear in the same CU.

[37] The Introduction to the Classification Scheme also addresses the requirement for segregated payrolls. It states that:

Once the WSIB has established that an employer is carrying on distinct business activities that are recognized as separate classifications (i.e. they are not ancillary or incidental activities as defined by the WSIB) the most important criterion for multiple classification is that status of the employer's payroll and wage records. These documents must record each worker's insurable (assessable) earnings as defined by the WSIB. The WSIB requires all employers engaged in multiple business activities that are classified in different CUs to maintain segregated payrolls and wage records for each business activity...

Ancillary operations

The WSIB defines an ancillary operation as one that supports, or is incidental to, the employer's business activity. Thus, ancillary operations are assigned the same classification as the employer's business activity. If an operation is ancillary to two or more business activities classified in separate CUs, any ancillary earnings that cannot be segregated and directly allocated to a CU are considered "common earnings" and are assigned to the CUs proportionally according to the insurable earnings under each CU.

[38] The Introduction to the Classification System includes a list of ancillary operations that generally reflect the Regulation. A note provides that:

Packaging an employer's own goods (whether produced, assembled, or sold) is considered an ancillary marketing operation. The packaging remains ancillary when carried out in accordance with specifications provided by a third-party employer or regulatory body.

[39] The Introduction also contains provisions that relate to the "one-off exception" from manufacturing classifications that applies for cutting or reshaping items to length for specific customer orders. That provision was previously included in the policy applicable to both wholesaling and retailing, and is therefore discussed in several of the decisions relevant to this case, below. In the form of the policy applicable to this appeal, that rule applies only to retail operations, and is included in the context of the integrated operations rule for retail activities. For convenience, we include the full form of the current rule, although it is no longer directly applicable to wholesaling:

As a general rule, the Board considers the business activity of a Class F retail store at one work location to be an integrated unit regardless of whether it includes an activity (or activities) which might be considered a distinct business activity if carried out as a business in its own right.

...

Exceptions

In addition to special operations as defined in Ontario Regulation 175/89, the following two kinds of business activities are excluded from the general rule of integrated retail operations:

1. Value-added business activities

Any business activity such as cutting, reshaping or installing (Class G) that adds value to a product is considered a distinct business activity when carried out in conjunction with a retail operation. The only exception is cutting or reshaping to length on a one-off basis upon request by a customer...

[40] [The other exception is not relevant here.]

(c) OPM Document No. 08-03-04: Segregated Payrolls: The Process Breakdown Rule

[41] The Board has also issued policy on its requirements for segregated payrolls. Board *Operational Policy Manual* (OPM) Document No. 08-03-04: Segregated Payrolls addresses the rule set out in section 9 of the Regulation, above, and also describes a "process breakdown" rule as follows:

An employer with segregated payrolls for two or more distinct business activities or processes which the scheme normally includes under different CUs could possibly have as many separate CUs as business activities. However, in those cases where the employer carries on a multi-CU operation at one work location, the WCB may place limits on this kind of "process breakdown".

Different Work Locations

As a general rule the WCB assigns multiple CUs to clearly distinct, separable, and classifiable operations carried out at totally different work locations...

Same Work Location

For multiple business activities in the same work location, the WCB generally assigns each activity a separate CU only if each activity sells to or services another employer.

(d) The Rate Group Descriptions

[42] The Rate Group descriptions specifically in issue in this case are:

1) A-033-02: Sawmill and Planing Mill Products dated October 1, 1999

[43] This CU description states:

Business activities include the sawing or planing of round wood, timber, or lumber into basic shapes without further fabricating.

Also included is the activity of upgrading lumber using sawmill and planing mill machinery, and wood drying or preservation when carried out in conjunction with a sawing or planing activity such as those involved in the manufacture of products used in this CU.

This includes the manufacture of products such as:

...

- lumber, rough and dressed

2) RG No. F-681-01: Lumber, Plywood and Millwork Sales, dated March 15, 2001

[44] The CU description for this Rate Group is:

Business activities include the sale of rough and dressed lumber, plywood, millwork and veneers, whether sold to other businesses or final consumers, from a lumber yard.

Excluded is any value-added or upgrading activity which would otherwise be classified as a forest product (Class A) or manufacturing (Class D) activity if carried out as a business in its own right. Examples of such value-added activities include cutting beyond a minimal cut or trim to length as requested by the customer, kiln drying, planing, sanding and/or coating, and wood preservation....

This category includes the sale and distribution of products such as

- lumber, rough or dressed.

[45] Numerous other wood products are also listed.

[46] The exclusion for value-added activities was added in the October 1999 version of the CU description and is not found in the CU description for RG F-681 dated March 1999. However, it was included in the Rate Group description in the time period relevant to this case.

(e) Tribunal Jurisprudence

[47] *Decision No. 499/00I* sets out the Tribunal's "best fit" test, as follows:

Regarding the test to be applied in assessing the appropriate classification for the employer, we note the following excerpt from the Tribunal's *Decision No. 114/9712*, at page 19:

In determining which of several possible classes is "the best fit" for the employer, we note that the Tribunal panels have considered the history of the employer, the structure of

the industry and the employer's role and association in the industry, reclassification of competitors, the production process (what equipment, workers and expertise are required), the employer's cost and pricing, the cost/revenue ratio, the Board's treatment of the industry, and classification in other jurisdictions.

At page 20 the Panel stated:

In effect we look at the classification and look at what the words say. As far as looking at the end product the Panels have looked at the primary purpose of the business and looking at primary purpose involves looking at the nature of the business, the equipment used, the hours worked and the activity that generates the major revenue.... If there is more than one rate group the Panels have looked at what is the "best fit", what is the narrowest definition, what is the most specific wording that is in accordance with the placement of the employer....

Finally, at page 21, the Panel stated:

This Panel notes in particular that where the employer fell within two classes, the narrower and more specific is preferred.

The Panel adopts and applies that analysis to the present case.

[48] We also adopt and apply this test.

[49] In *Decision Nos. 3130/01, 1572/03, 1192/03 and 101/04* Tribunal Panels considered the "value-added" exclusion as it was previously applicable to wholesaling activities. Those cases considered the exclusion from wholesale business activities involving "cutting" and "reshaping", as set out in the former version of the Introduction to the Classification System. These cases addressed the "one-off" exception to that exclusion. The provision that was considered for the purposes of the first three of these decisions stated:

Excluded from Class F is any activities such as cutting or reshaping that adds value to a product prior to resale. The only exception is cutting or reshaping to length on a one-off basis upon request from a customer.

[50] The Panel in *Decision No. 3130/01* found that the function of cutting plastic rods, tubes, sheets and film to the sizes needed by customers was not a value-added activity. The Panel found rather that it fell within the exception of Board policy of "cutting or reshaping to length on a one-off basis upon request by a customer." The Panel stated:

It was clear to the Panel that the essential business activity carried on by this employer was one of wholesaling. We acknowledge as well however that the Board in the exercise of its discretion to develop a classification system, has decided that a wholesaler, while in possession of goods, may carry out certain activities (such as cutting or reshaping) which add value to a product prior to resale and which may then place the employer's entire operation in another rate group. The policy does allow an exception to the general rule however, and we are satisfied, after considering the evidence before us, that the cutting activity performed by this employer falls within that exception and that the employer's operations ought to have remained classified as wholesale.

[51] The Panel found that the entire business activity was to be classified as wholesaling.

[52] The Panel clarified this decision in *Decision No. 3130/01R* in response to a request from the Board, as follows:

After reviewing the material before us, we agree with Ms. McAdam that it is the employer's "main operation" which is to be reclassified into Rate Group 643 and that those few employees involved in manufacturing will remain in Rate Group 263. As noted by Ms. McAdam, the employer's General Manager, MC, who testified at the hearing, indicated:

...that there were two employees in the Toronto location who fabricated plastic products and he did not dispute their inclusion in Rate Group 263.

Similarly, the employer's representative, in his submissions, had suggested it would be appropriate that "...the employees who fabricate plastic products...remain in Rate Group 263...".

In light of these comments, we agree that the two employees who continue to manufacture plastic products, ought to remain in the manufacturing rate group, number 263.

[53] Although the facts are not entirely clear, we understand the clarification to mean that the two employees who remained in the manufacturing classification were not the same employees as those engaged in the cutting or "one-off" activity. We understand that there were two other employees who were engaged in fabricating of a sort that was clearly manufacturing and that was not in dispute. Further, in its request for clarification, the Board did not suggest that the employer had any activities that should be considered ancillary to this manufacturing activity.

[54] In *Decision No. 1572/03* the Panel found that a textile wholesaler that cut cloth to length was not excluded from Class F because the function was ancillary. The Panel found that the cutting to length was an element of packaging for the purposes of distribution. The cutting did not alter the nature or quality of the product sold. It did not add value. Therefore it also fell within the "one-off" exception.

[55] We note that there was a clear finding in this case that the cutting activity was ancillary to the primary wholesale function. Therefore no issue arose about whether other activities of the employer might have been ancillary to the cutting activity.

[56] In *Decision No. 1192/03* the Panel considered the case of a wholesaler who wholesaled plastic sheets, rods and tubes. Two employees were engaged in cutting and shaping plastic sheets. The sale of the cut sheeting constituted about 10% to 12% of sales. The Panel describes the auditor's findings of fact as follows:

The employer was subject to a routine audit by the Board that was completed on March 29, 2000. In a memorandum dated November 25, 1999, the auditor provided the following findings with respect to the employer's classification:

The firm is involved in two distinct business activities:

1) the firm is involved in the wholesale distribution of industrial plastics. The firm purchases sheets of industrial plastics and then resells them on a wholesale basis to its customer base.

2) The firm is involved in the cutting of industrial sheeting to customer specifications. The firm employs two cutters on a full-time basis who cut these sheets of plastic to particular customer specifications (sizes).

Currently, the firm is incorrectly rated under rate 617-16, Other Wholesale Product Operations, CU 5999-000. This classification unit includes those employers engaged in the wholesale dealing in products which are not elsewhere classified.

In this employer's case, a breakdown of their company operations reveals that the following departments all provide ancillary benefits to both business activities: purchasing, computer, office, reception, sales, warehouse/packing and shipping/receiving. The cutting aspect of the firm's operations stands alone in terms of providing a benefit for the firm. The cutters only provide a benefit to the cutting aspect of the firm's operations.

As a result, I have deleted rate 617-16, Other Wholesale Product Operations CU 5999-000, effective December 31, 1996, and replaced it with rate 263-01, Other Plastic Operations, CU 1699-000 effective January 1, 1997. This classification unit includes those employers engaged in using synthetic resins to produce moulded or extruded plastic products which are not elsewhere classified. Also included are employers engaged in fabricating products (not elsewhere classified) from plastic in primary forms...

The employer was advised of the results of the audit in a letter dated May 16, 2000. Citing section 6 of Regulation 175/98, the auditor stated that, since "your firm cannot segregate wages, the entire operation must assume the highest insurable premium rate (in this case, being the rate pertaining to the cutting operation.)"

[57] The Tribunal Panel followed the reasoning of *Decision No. 3130/01*, and found that the employer fell within the "one-off exception" and should have retained the wholesaling classification. The Panel stated:

The only distinction between this case and that [considered in *Decision No. 3130/01*] was the evidence cited in *Decision No. 3130/01* that [that employer] did not charge its customers in any way for the service of cutting its products. However, this is not a distinction with respect to whether the Panel should follow *Decision No. 3130/01*, since [that employer] was still adding value to the product by selling it in a form that was more useful to customers, whether or not it charged for this service.

[58] This is a finding that to be value-added, an activity need not be the subject of a specific charge to the customer. The question was whether the product was sold in a form that was more useful to customers.

[59] After finding that the employer fell into the "one-off exception" and was entitled to the wholesale classification, the Panel in *Decision No. 1192/03* went on to classify separately, under the manufacturing classification, the two employees who did the cutting. The Panel stated:

As was the case in *Decision No. 3130/01R*, the Panel finds that the payroll of the two employees engaged in cutting will continue to be classified under [the manufacturing rate group].

[60] In our view, with greatest respect, the Panel in *Decision No. 1192/03* may have misconstrued *Decision No. 3130/01R*. We read that Decision to have clarified manufacturing as the appropriate classification for two workers whose functions clearly involved manufacturing, and for whom the "one-off" exception was not claimed. We understand that *Decision No. 3130/01* did include within the wholesale classification those employees who worked in the cutting function that was found to be within the "one off" exception. This is because they did not fall within the provision that excluded them from the wholesale classification. They fell within the exception to the exclusion. Therefore their work remained integral to the wholesaling function and subject to the wholesaling classification. This is the implication of the wording of the "one-off" exception and in our view is consistent with the process breakdown rule. It appears that these activities were carried out at the same site.

[61] We note that the approach of *Decision 1192/03* has some further implications. Generally speaking, once an employer has been given two different classifications for two different business activities, it is necessary to address how ancillary costs are to be pro-rated. On the facts set out above, the auditor in this case identified numerous ancillary functions. We understand from the above description of the facts that the auditor was not able to identify any direct payroll associated with the wholesale function. In other words, having classified the payroll of the cutting function as excluded from wholesale, he considered that a portion of the identified ancillary functions were related to the manufacturing activity. Since that portion of the ancillary function was not segregated from the primary wholesale activity, section 6(4) applied to bring the entire business activity under the manufacturing rate.

[62] Therefore, given the Panel's findings that there were two different classifications applicable at the site, one of which was manufacturing, its findings raise the difficulties about the allocation of ancillary costs raised by the facts of this case. However, the Panel did not address that aspect of the issue.

[63] This is a key concern on the facts of this case, and is discussed further below.

[64] This question was considered again in *Decision No.101/04*. That decision addressed the business activity of a textile wholesaler. To supply customers it was necessary to cut fabric from the bulk roles with scissors. Because of this activity the Board placed the entire business in a manufacturing Rate Group. The cutting function was not segregated. The Panel found that the provision considered in the Decisions cited above, excluding "cutting" from wholesale activities, no longer applied at the relevant time period because of amendments to the Introduction to the Classification System. At the relevant time period it applied only to retail activities. The Panel also found that the cutting function of that employer was part of the packaging of the product sold. It was therefore ancillary to the wholesale function and entitled to the wholesale rate. Because the cutting function was itself ancillary, as in *Decision No. 1572/03*, there was no need to address the pro-rating of other ancillary functions between different Rate Groups.

[65] We note that the above decisions address changes in the Introduction to the Classification System over time. On March 31, 1999 the wording referred to in the first three Decisions discussed above was added to the Introduction, applicable to Class F, i.e., to both wholesaling and retail activities. On May 30, 2000 the provision was moved to the portion of the policy that addresses retail operations. Therefore it no longer directly applied to wholesaling operations.

[66] However a similar provision has been introduced into the CU description for Rate Group F-681-01, applicable in this case, and so the principles addressed by these provisions must be considered here.

[67] The term "value added" is also addressed in *Decision No. 1373/05*. In that Decision the Panel found that installing car stereos was a value-added activity, which had a commercial value, despite the fact that the employer did not charge for that service.

[68] Ms. Jodouin also relies on *Decision No. 2050/03*. She submits that that Decision sets out a test for what is ancillary, identifying a number of relevant criteria. The relevant portions of that Decision are:

In *Decision No. 1259/99*, the Panel articulated the following interpretation of subsection 6(3):

Regulations 1102 and 175/98 seem to suggest that an activity must be “ancillary” and, in addition must be covered by one of the 15 activities listed. Or, put another way, the activity must “support” or be “incidental” to the business *and* must be specified.

As Mr. Nixon submitted, the mere fact that an activity is listed in subsection 6(3) of Regulation 175/98 does not mean that the activity will always be ancillary. Rather, the activity must be found to be ancillary and, in addition, must be covered by one of the 15 listed activities. If the activity is not ancillary, then it is irrelevant that it is listed in subsection 6(3).

Decision No. 1259/99 suggested that the following questions should be asked in determining whether or not a business activity is ancillary to another:

Are the operations separate legal entities?

- Do they pay their own taxes?
- Do they operate in separate premises?
- Do they pay for their own equipment and premises?
- Do they pay their own staff or have segregated payroll?
- Do they have their own management structure?
- Do they hire, train and terminate their own employees?
- Do they have their own Mission Statement?
- Do they have their own training/employment materials?
- Are they audited separately?
- Do they market their operations separately?
- Does a significant amount of business come from other sources?
- Does one entity require the approval of another to carry out its business activity?

The Panel stated that it is not necessary to have all these questions answered in the affirmative before two operations can be considered separate and distinct...

[69] A number of other Tribunal decisions have also considered what functions are ancillary. I note for example *Decision Nos. 235/04, 1349/03, 1392/03 and 1555/04*. However, for the most part, those Decisions also consider whether an activity has sufficient indicia of independence to be considered a separate business activity in its own right. These decisions do not directly address how subsection 6(4) of *Regulation 175/98* applies if an operation is carried out partly as a business in its own right and partly as ancillary to a second business activity. *Decisions No. 1349/03 and 1555/04* appear to approach this question based on an analysis of the predominant nature of the activity. *Decision No. 1349/03* suggests that it is inappropriate for the tail to wag the dog. However these Decisions do not address the specific wording of subsection 6(4), which in our view applies to this situation. Both subsection 6(4) and section 9 appear to require, on some facts, that a “tail” be allowed to “wag the dog.”

[70] The Board’s Introduction to the Classification System indicates that ancillary activities that are common to more than one business activity are to be pro-rated. That is not the situation addressed in subsection 6(4) of *Regulation 175/98*. That provision applies when the payroll of a

primary business activity is not segregated from the payroll that is ancillary to a second business activity. This fact situation occurs generally when an employer carries on one of the businesses listed in section 6 as a primary business activity, and, at the same time, carries on that activity as incidental to and in support of a second business activity. The Introduction does not appear to have any wording paralleling the provision of subsection 6(4). However, in that situation, it does appear that subsection 6(4) of the Regulation would have application.

(iv) Submissions

(a) Submissions of the Employer Representative

[71] Ms. Jodouin makes several submissions to the Panel.

[72] 1) First, she submits that RG F-681, and not RG A-033, is the correct classification because RG A-033 should be read to apply to sawmills and not to this business activity.

[73] 2) Secondly, relevant to this first point, she submits that the re-work function is not a value-added activity and therefore is not excluded from RG F-681 because of the exception found in that Rate Group.

[74] Therefore she submits that RG F-681 is the best fit. She submits that the employer's competitors are found in that Rate Group.

[75] 3) Thirdly, even if otherwise excluded, she submits that the re-work function should be classified under RG F-681 as an ancillary function. She submits that it should be considered as packaging. She also relies on *Decision No. 2050/03* to support the position that if an activity is "integral" it may be considered ancillary. She submits that the employer's business meets the criteria for whether an activity is integral, as set out in that case.

[76] 4) Fourthly, she submits that the re-working activity is subject to the process breakdown rule.

[77] 5) Finally, in response to a question from the Panel, she submits that even if the milling operation is classified separately it is necessary to consider whether the remaining operations at the T. Road location have been properly classified under the same rate group as those operations.

[78] Ms. Jodouin's more detailed submissions are addressed further under each point, below.

(b) TCO submissions

[79] Mrs. Zigomanis reviewed the Tribunal jurisprudence discussed above, and the Board's amicus curiae submissions.

(c) Amicus Curiae Submissions

[80] Mr. Rechhi describes the two business activities of this employer in a way that is somewhat different from the description of the auditor, as set out above. Mr. Recchi states:

The auditor classified the direct earnings of the workers engaged in the milling operation at [the T. Road location] in [RG. 033].

The auditor found that the ...sales forces at [the T. Road location] were engaged in two business activities:

- Their sale of product processed by the milling operation was ancillary to the milling manufacturing operation and therefore classifiable in the same CU...
- Their sale of unprocessed product was a wholesale business activity in its own right classifiable in [R.G. F-681].

None of these sales forces could segregate their earnings between the two business activities.

[81] Mr. Recchi's analysis identifies the sales activity as the primary business activities in a way that the auditor did not. The auditor appears to have focused more directly on the warehousing activity as the wholesaling activity and on the manufacturing activity as the second business activity.

[82] However, on either analysis, the issue is the same: whether there is a function that is ancillary to the milling function that is not properly segregated from the primary wholesaling activity.

[83] For the purpose of our analysis below we have adopted the analysis of Mr. Recchi: that the primary wholesale activity is found in the sales function rather than in the warehousing function. For a wholesaler, it is the sales function that is the essential function. Not all the product sold is ever placed in the warehouses of the employer.

[84] Mr. Recchi submits that the sales forces could not segregate their earnings between the primary and ancillary business activities. Therefore the entire payroll was appropriately placed in the higher rate group.

[85] He submits that the employer's milling function is a value-added activity and as such is excluded from RG F-681.

[86] He also addresses the process breakdown rule. He submits that it does not apply in this case, because the applicable CU does not allow this process to be considered integral to the business activity of the CU. That is because RG 681-01 specifically excludes value-added activity of the sort carried out in the milling department.

(v) Conclusions

[87] We have considered the issues under three headings. First we have considered relevant findings of fact. Secondly, we have considered the best-fit test as it applies to the re-work function, based on those findings of fact and based on our analysis of whether the re-work function is ancillary or is subject to the process breakdown rule. Thirdly, assuming that the re-work function is properly classified in RG A-033, we have considered the proper classification for the other activities carried out by the employer at the T. Road location.

(a) Findings of Fact

[88] Ms. Jodouin submits that RG A-033 applies to round wood and sawmill functions and not the re-working function of this employer. It is therefore not the best fit for this employer.

[89] In order to address this submission, for convenience, we have considered first 1) whether the re-work activity is a value-added activity, 2) whether the re-work activity constitutes “packaging”, and 3) whether it involves activities of the type listed in the Rate Group that go beyond “a minimal cut or trim to length”. These matters involve findings of fact about the specific work activity that affect the subsequent analysis.

1) Is the Re-Work Activity Value-Added

[90] Ms. Jodouin submits that the re-work business activity is not captured by the exclusion in RG F-681-01 that applies to a value-added or upgrading activity that would otherwise be classified as a forest product activity if carried out in its own right. She submits that there is no charge for the cutting activity. The activity is carried out at a loss.

[91] However, we find that the activity is a value-added or upgrading activity. We agree with the analyses of *Decision Nos. 1192/03*, and *1373/05*, above, that an activity that has commercial value, and that renders a product more useful to a customer, is a value added activity. We find that, if carried out in its own right, this re-working activity would fall within RG A- 033-02. It includes planing and finishing the wood, adding grooves, and cutting for thickness as well as length. We do not consider that the words “value-added” require that the operation be carried out as a profit centre or be separately included as a component of the price.

2) Is the Activity “Packaging”

[92] On the same basis, we are not satisfied that the activity constitutes packaging. In *Decision Nos. 1572/03* and *101/04* the Tribunal found the cutting functions to be packaging, and therefore ancillary to the wholesale function. However, the activity in question in those cases was considerably more limited than in this case. The employers were textile wholesalers. The wholesale product was kept on rolls of cloth. Although not done in response to specific orders, the cutting function was to cut the cloth to length to meet the needs of customers. In *Decision No. 101/04* the only machinery used were pairs of ordinary scissors. The Panels found that the activity was not a value-added activity. It did not change the character of the material sold. It was part of the requirement to package the material for delivery.

[93] Generally, in our view, a function that adds value to a product would not be considered packaging.

3) The Exception for a Minimal Cut or Trim to Length

[94] Although the re-work activity of this employer is based on specific customer requests, it is not restricted to a minimal cut or trim to length. The exclusion in the CU description applies to cutting (beyond the above), and to planing. In this case, from the testimony, we understood that the largest component of the milling activity likely did involve cutting to length. However, at least a portion of the functions carried out in the re-work area involved planing, upgrading and finishing the product. That part of the activity was not segregated.

[95] We are satisfied that the employer does engage in the activities described as excluded.

(b) The Best-Fit Test

1) The CU Descriptions

[96] Based on these findings of fact, it follows that RG A-033 is a better fit for the re-work business activity than RG-A-681-01, if that activity is considered on a stand-alone basis. We understand that RG A-033 applies to sawmills and that this employer's business is not a sawmill. However, the wording of the CU description is not exclusive to saw mills. We find that this employer does fall within the words:

Business activities include the sawing or planing of ...lumber into basic shapes without further fabricating.

Also included is the activity of upgrading lumber using ... planing mill machinery.

This includes the manufacture of products such as:

...

- Lumber, ...dressed

[97] Ms. Jodouin also made submissions about the classification of competitors as relevant to the best-fit test.

[98] However, given our findings about the CU descriptions, we do not consider the evidence about the employer's competitors sufficient to change that finding. It is not clear if there might be differences in the nature of the business activities of those other employers. The ARO indicates that several have not been audited. Further it is not clear whether the differences result from differences in the application of the primary classification issue, or from differences in how the exception might apply, or in the application of one of the other relevant considerations discussed below.

[99] In this case, we have next addressed whether, despite our finding about the nature of the business activity, the re-work function for this employer is entitled to the same classification as the wholesale business either because it is ancillary, or because of the process breakdown rule.

2) Is the Re-Work Function Ancillary to the Wholesale Function

[100] We have found that the re-working activity is not packaging, and this finding is sufficient to address the first aspect of Ms. Jodouin's argument that the function is ancillary.

[101] Ms. Jodouin makes a further argument that the function is ancillary based on her analysis of *Decision No. 2050/03*. She submits that the re-working function is ancillary to the wholesaling function because it is carried out for the purpose of the wholesaling business activity and meets the criteria set out for an "integral" business activity as described in that Decision.

[102] However, in our view, Ms. Jodouin has misconstrued *Decision No. 2050/03*. That Decision considered criteria developed in *Decision No. 1259/99*. Both those Decisions considered requests from employers that they be granted a separate classification for a distinct business activity. The Board had determined that the business activities in question were ancillary. The Panels state explicitly that to be found to be ancillary the function in question must "support" or be "incidental" to the relevant business activity and must, in addition, be

specified on the list of ancillary functions set out in section 6 of the Regulation. There was no question in those cases that the functions addressed fell within the listed items. Therefore the decisions turned on an analysis of the other requirement of section 6: that the activity “support” or be “incidental” to the primary activity.

[103] To establish that a function is *not* ancillary, it is necessary to find only that *one* aspect of the dual test of section 6 fails to be met. To be ancillary, the activity must satisfy *both* aspects of the dual test. In this case the employer is requesting that the re-work function be identified as ancillary. The re-work activity in our view does meet the test of “supporting” or of being “incidental” to the primary wholesale activity, as that test is addressed in these decisions. From a layman’s point of view, we consider that it would be correct to describe that activity as ancillary. However this is not sufficient for the function to be found to be ancillary within the terms of the Regulation. The activity must, in addition, meet the second branch of the section 6 requirements. It must be one of the business activities specifically listed in section 6. The re-working business activity is not listed in section 6. Therefore it is not ancillary to the wholesale function within the meaning of this term as specifically defined, in the Regulation.

3) Does the Process Breakdown Rule Apply

[104] We also find that the process breakdown rule does not apply. That rule is that:

...in those cases where the employer carries on a multi-CU operation at one work location, the WCB may place limits on this kind of “process breakdown”...

For multiple business activities in the same work location, the WCB generally assigns each activity a separate CU only if each activity sells to or services another employer.

[105] The words used are “may place limits” and “generally assigns”. This wording indicates only that the Board may exercise discretion in this respect. While the rule offers guidance about the practice that is most often appropriate, it contemplates that there may be situations in which the rule is not applied.

[106] We have found that the words of RG F-681-01 apply to exclude the re-work function from this Rate Group. Given the specific exclusion, the question is whether the process breakdown rule applies to override that exclusion. In our view the test is which policy statement is more specific. The process breakdown rule is phrased in general terms and contemplates that there may be situations in which the rule is not appropriate. We consider that it does not apply to override the specific exclusion in the CU description.

[107] Therefore we find that the milling function has been correctly classified under RG A-033.

(c) The Board’s Determinations About Ancillary Functions: Is the Wholesaling Function Entitled to Separate Classification from the Milling Activity

[108] However, despite the classification of the milling function, we find that all other activities at the T. Road location are to retain their wholesale classification under RG F-681-01.

[109] The Panel asked Ms. Jodouin to address the Board’s finding that, because it found that there were ancillary functions that were not segregated, all activities at the T. Road facility were

appropriately classified in the milling rate. She submitted that the difficulty was that the “tail” has been made to “wag the dog”.

- [110] We agree with Ms. Jodouin that the Board’s approach has resulted in a classification that causes the “tail to wag the dog.” The milling activity affects only about 10% of the lumber sold from the T. Road location. Further, it is likely that the largest portion of the milling activity, itself, would be eligible for the “one-off exception”, if segregated from the other upgrading. Therefore a very small component of processing activity has affected the classification of the entire location. Because the upgrading does not fall entirely within the one-off exception, and is not segregated, the entire milling activity falls under RG A-033. Because the sales of the processed lumber are not segregated from the remaining sales activity, the remaining business activity was also reclassified. A reasonable estimate might be that less than 5% of the business activity has resulted in the higher cost classification for this entire location.
- [111] In some cases, this is the result intended by section 9 and/or subsection 6(4) of the Regulation. The Regulation does provide that, where those provisions apply, and the employer’s segregation of payroll is insufficient, it is required that the “tail” must “wag the dog”. However, where the result is anomalous - because of the extent of the “leveraged” effect - it is reasonable that special scrutiny be applied to consider whether the facts support the result.
- [112] Ms. Jodouin has not made any submission to suggest that the “cut to length” aspect of the milling function is segregated from the other upgrading carried out in the mill, and so we consider that section 9 applies to bring the entire re-work activity within the milling classification: RG A-033.
- [113] We also agree with the Board that subsection 6(4) of *Regulation 175/98* applies if a portion of the non-milling business activity is found to be ancillary to the milling function and that activity is also carried out, without segregation, as a primary business activity.
- [114] However, we consider there to be an issue about the way in which the Board has analyzed ancillary activities. Subsection 6(4) applies only if a primary business activity is not segregated from a function that is ancillary to a second business activity. We have considered the Board’s finding that some of the sales activities carried out at the T. Road location were ancillary to the milling function. On this point, we find *Decision Nos. 2050/03* and *1259/99* relevant. We note the discussion above: that to find a business activity to be ancillary, the activity must meet a **dual** test. It must be one of the activities listed in section 6 of the Regulation. It must also support or be incidental to the relevant primary business activity.
- [115] The sales activity is listed in section 6, which includes the “wholesaling of goods produced by the employer.” There is no question about this aspect of the test. The employer does wholesale the lumber processed in the re-work department. The question therefore turns on whether that portion of employer’s wholesale activity “supports or is incidental to” the business activity carried out in the re-work department, and therefore meets the definition of ancillary.
- [116] However, to consider this issue, we find it necessary to address the business reality of the employer’s undertaking. The result cannot simply be automatic: i.e. if the result flowed automatically from the fact that the employer processes milled products, and wholesales those

processed products, these additional words in the Regulation would have no meaning. The Board appears to have addressed the issue as if the result were automatic. However, we do not consider that to be the case. We must consider which activity “supports” and is “incidental to” the other activity. We are satisfied that the business reality of this employer’s operation is that the milling work supports and is incidental to the wholesaling function, not the other way around. This finding flows from the fact that milling is only carried out after the employer receives a specific order from a customer. It is carried out to facilitate the filling of the order, if suitable stock is on hand which can be re-worked. The function is a minimal part of the overall activity: the portion of that activity that falls outside the one-off exception is likely not more than about 5% of the business activity at this location.

[117] There is little issue that, except for the exclusion found in RG F-681, the re-work function would be found to be integral to the wholesale function. The process breakdown rule would apply. We have accepted that, in layman’s terms, the milling function is ancillary to the wholesale function. It has been separately classified only because of the specific narrow definition of the term ancillary found in section 6 of the Regulation, and because of the exclusion in the CU description of RG. F-681, which we have found overrides the process breakdown rule.

[118] However the exclusion found in the wording of that Rate Group applies only to the milling function, itself. It says nothing about ancillary functions. It does not change the character of the wholesale operation carried out by this employer. To consider whether any aspect of the sales activity is ancillary, it is necessary to return to first principles and consider the nature of the employer’s business. In our view, the sales activity is not ancillary to the activities of the re-work department. The sales activity in its entirety constitutes the wholesale operation: it is the primary wholesale business of this employer. The re-work department supports and is incidental to the wholesale function, despite its separate classification. In our view, the entire sales payroll is the payroll that constitutes the direct wholesale payroll of the employer at this location.

[119] It follows that we do not consider that any of the other functions of the employer that the auditor has identified as ancillary at this location are ancillary to the re-work function. They are ancillary to the wholesale function. They are incidental to and support the wholesale function.

[120] Therefore only the payroll of the mill itself is to be placed in RG A-033. All other payroll at the T Road location is to retain its classification under F-681-01.

[121] We note that this result is consistent with the approach taken in *Decision Nos. 3130/01R* and *1192/03*, although the issue of ancillary functions is not directly addressed in those Decisions.

(d) The Classification of W. T.

[122] It follows that the classification of W. T is to be pro-rated in accordance with the revised classifications applicable to W. F.

THE DECISION

[123] The appeal is allowed in part.

[124] 1. The milling payroll at the T. Road location is to remain in Rate Group A-033: Sawmill, Planing Mill Products.

[125] 2. All other payroll at the T. Road location is to be classified under Rate Group F-681-01: Lumber, Plywood, and Millwork: Sales. None is to be classified as ancillary to the milling function.

[126] 3. The payroll of W. T. is to be pro-rated to reflect the revised classification applicable to W. F.

DATED: November 8, 2005

SIGNED: E.J. Smith, M. Meslin, A. Grande