



WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 2453/05

BEFORE:

E.J. Smith: Vice-Chair
C.J. Robb: Member representative of employers
M. Ferrari: Member representative of workers

HEARING:

December 13, 2005, at London
Oral Hearing

DATE OF DECISION:

January 17, 2006

NEUTRAL CITATION:

2006 ONWSIAT 100

DECISION(S) UNDER APPEAL: WSIB ARO Decision dated July 7, 2004.

APPEARANCES:

For the employer:

Mr. Paul Allen, consultant

For the Tribunal Counsel Office:

Ms. Tanya Zigomanis, articling student

REASONS

(i) Introduction/Background

- [1] The employer appeals the decision of the Board Appeals Resolution Officer (ARO) dated July 7, 2004. That decision concluded that the employer's facility at "T" was correctly reclassified from CU 7799-004, Rate Group I-933-07: Custom Packaging, to CU 4599-001 Rate Group E-570-10: Other Services Incidental to Transportation, effective January 1, 2001.
- [2] The employer requests classification in either R. G. I-933-07: Custom Packaging (its prior classification) or R.G. E-560-03: Other Storage and Warehousing Operations. The employer requests, alternatively, that it be given split rates between R. G. I-933 and E-560 or, as a last alternative, split rates between R.G. E-570 and E-560.
- [3] At hearing, Mr. Allen described the employer's business activity as having three facets: 1) The company is involved in parts storage, in order to assist its sole customer (an automobile manufacturer) with assembly of automobiles overseas; 2) it creates CKD ("complete knock down") kits to be sent to the overseas plants. These contain all the parts needed to assemble a car: they are "boxed" cars. The company uses engineering processes to maximize efficiency in the packing and design of the kits and to ensure the parts are protected. 3) Thirdly, the company is involved in sequencing how the boxes arrive overseas so that the right box will be delivered directly to the right place in the assembly process. The CKDs are packed so that they can be unpacked with the car parts taken out in the order needed to put the car together.

(ii) The Classification Unit (CU) Descriptions

- [4] R.G. I-933-07 reads as follows:
- Business activities include custom packaging other people's products using various packaging materials. This may include incidental cutting.
- This category includes
- Blister packaging
 - Co-packaging (repackaging)
 - Disassembling and rendering useless small or light manufactured items
 - Plastic wrapping
 - Product sorting (including incidental quality control inspection).
- [5] The CU description for R.G. E-560-03: Other Storage and Warehousing Operations states:
- Business activities include operating, on a custom basis, warehouses or other storage facilities which are not elsewhere classified.
- [6] The CU description for R.G. E-570: Other Services Incidental to Transportation states:
- Business Activities include providing services incidental to transportation which are not elsewhere classified, including car-pool operators...

Also included here is the crating and packing of goods (excluding used household or office goods) in conjunction with, or for the purposes of, transportation or storage, including intermodal transportation.

(iii) The Auditor's Memo; the ARO Decision

- [7] The auditor described the employer's business activity as follows:

The firm is engaged in the business of packaging goods for export transportation...Crating and packaging is conducted by the firm to reduce shipping costs for the manufacturer by consolidating shipments to distant locations. This method of shipping also helps to ensure parts are not damaged during shipment to the production facilities...The firm is also able to create customer crating and storage solutions...

- [8] The auditor included additional detail about the business activity, consistent with the testimony below, except that the auditor stated that every attempt was made for the employer to receive goods one day and ship the next day. The testimony at the Tribunal hearing was that goods were held typically for about a week. However, given our decision below, nothing turns on this difference.

- [9] The ARO found that the employer's business falls within the wording of R.G. 570, within the words "crating and packing". She denied the employer's request to be classified in R.G. 560, under warehousing, because she found that that aspect of the business activity was ancillary to the business activity of crating and packing. The ARO also addressed the meaning of the word "custom" as that word is found in R.G. 560-03, but stated:

[The employer] is not in business to warehouse goods on a custom basis...For WSIB purposes "custom warehousing" means warehousing that is performed for others for a fee, that is, situations in which customers pay the employer to warehouse their goods...Custom refers to work that is done for a customer rather than for oneself or as part of another operation of the employer.

- [10] The ARO also addressed the employer's submissions about competitors, but found that the companies referred to by the employer were not comparable.

- [11] At the Tribunal hearing, the employer requested R.G. 560 or, alternatively, R.G. 933, or split rates involving these two classifications. The ARO did not directly discuss R.G. 933 in her decision. She also does not directly discuss the possibility of split rates. Therefore the Panel considered its jurisdiction to address these issues as a preliminary matter.

(iv) Preliminary Issue: Jurisdiction

- [12] After hearing submissions, the Panel ruled that we had jurisdiction to consider both arguments. We ruled that the question of split rates (between warehousing functions and other functions) is implicit in the ARO's discussion of whether the warehousing function is ancillary. Given the ARO's finding that this function was ancillary, it was not necessary for her to further consider whether the activities were segregated or otherwise entitled to split rates.

- [13] From her decision we also understand that the thrust of the employer's submission at the Board hearing was for R.G. 560, the warehousing classification. The ARO does not expressly consider why R.G. 933, the employer's original classification, was not appropriate, except that she found that R.G. 570 applied. However, given that R.G. 933 was the Rate Group from which the

employer was transferred to R.G. 570, and that it is listed by the ARO in the list of Rate Groups considered, we find that it was implicitly before the ARO and that we have jurisdiction to consider it.

(v) Testimony

(a) Testimony of M.C.

- [14] The Panel heard testimony from the witness, M.C. who is the quality manager for all the employer's locations, in Canada and the U.S. There are three Ontario locations, in "T", "W" and "O". The employer is engaged in receiving, warehousing, picking, packing, staging, and shipping, automobile parts. The "T" facility handles all the parts of automobiles for a single customer. It ships these parts to be assembled at overseas plants. The parts are brought to the facility in trailers and unloaded by forklift in the receiving area. They are inspected and moved to lanes in the warehouse, which contain "footprints" for each item. Like parts are placed together. The parts may be sorted into bins.
- [15] When it is time to deliver them to the sea containers they are packed into crates. The employer's staff members who carry out this function are called "pickers" and "packers". The pickers are given tickets with the part numbers required, and the quantity and location, and obtain the parts. They check them against a master sample. About 1 % are scrapped as deficient. The parts are then taken to the packing area, and packed into the crates. The company uses special materials and packing ("dunnage") to secure the components. The crates are packed into sea containers for shipment overseas. Some require special packaging if they are fragile. Some components are packed in special wrapping, which emits vapours for protection against moisture and corrosion. Mostly the parts are packed into CKD kits, which contain all the parts necessary to assemble 12 identical automobiles.
- [16] The crates used for packing are manufactured by an associated employer at a different facility. They are sold to the customer by that facility, and so are not owned by this employer.
- [17] Usually, parts will stay in the warehouse for about a week. What is received one week will be processed for the next week. The company works on a "just in time" basis. The items are tracked with labels and scanning processes at every stage.
- [18] Under its contractual agreement the employer is required to audit 8% of the finished crates for quality. The audited items are selected at random.
- [19] The company has three plants at its T facility, Plants "A", "B" and "C". At Plant A, crates are packed for shipping. They are then sent to Plant B and loaded into sea containers. Other custom packed items are packed initially at Plant B and do not come from Plant A. There is a rail spur into Plant B and so large parts, such as hoods, are received directly in Plant B. They require special carting. These large parts are not usually kept as long in the warehouse because of concerns about corrosion. They might be kept 2 days or sometimes up to seven days. In Plant A, materials might sit up to three weeks, on occasion.
- [20] The customer informs the employer of what sea containers are to be packed and supplies the employer with the contents necessary for those containers to be packed. The customer has

inventory control systems to manage this function. The employer also does inventory checks to make sure it is not running low. If it is running low, it informs the customer and the customer orders more for delivery.

- [21] Crates might wait three or four days to be shipped out in the sea containers. Some components could be in the warehouse for a couple of days while the employer waits for other components to be received. The employer will only start loading the sea containers when all parts are ready simultaneously.
- [22] The employer has a “box development” department, located in Plant B, where it employs engineers who design how the goods are to be packed. The witness estimated there are about 5 people involved in “R &D”. There are about 17 people in the department. They also do box repair. They design boxes especially for the “custom” requirements in Plant B as well as for the power train items that are received in Plant A. In Plant A, less development work is required because the crates are more standard. For some parts, they have been using standardized crating for a number of years. For others, they need to do development work on the packing and the forms of special protection. For some types of parts, new design and development work is necessary every time a vehicle changes or a new model is introduced. The parts may be different sizes: for instance the hoods may be shorter. The way they are packed must be redesigned.
- [23] There is a quality control function in all plants, separate and apart from the engineering function. The engineering function is required mainly for the large parts received directly in Plant B and the power train items from Plant A. However the employer also has sample identifiers in each plant who create the master samples and work with engineering to create the packaging for all parts.
- [24] In Plants A and B the employer packs CKD kits. It has a third plant, Plant C, which packages parts for China. This Plant does not prepare kits. The orders from China are at the part level.
- [25] This witness also described the employer’s operations at the “W” and “O” plants. There are two facilities at the “W” location, “1” and “2”. In the first, the parts are received packaged (as they are at all locations) but in that facility the outer packaging is not removed. The parts received are inspected, tracked, stored in the warehouse until needed, then placed on racks to be shipped, and finally transferred by truck to the customer’s nearby manufacturing operation. The trucks are fitted out to take the specially designed racks. The customer in this case (also a car manufacturer) has its operations close by.
- [26] The company does do sequencing at the first W location, to make sure the right parts are shipped to the right place on the assembly lines, but less packaging is required. The parts are not being sent overseas. The employer is not packaging the parts in the CKD kits for the assembly of 12 cars. On questioning, the witness clarified that the customer uses the employer’s facilities for the functions in the first facility at the “W” location mainly for storage, because it is short of storage space. Mr. Allen clarified, with the assistance of his advisor, that this is the facility that the Board has classified under R.G. 560, as warehousing.

- [27] In the second facility at the “W” location the packages in which the parts arrive are opened, inspected, sorted and sequenced, and placed on racks, in much the way that this task is done at the T location. However, again, crates are not used because the customer’s plant is nearby.
- [28] This plant has been classified in R.G. 933, custom packaging, in a recent audit, the results of which are set out below.
- [29] At the “O” location, the employer carries out repacking and sequencing, as above, and also has an assembly function which is not done elsewhere. This facility was granted spit rates in the recent audit, between R.G. 933 for custom packaging and R.G. 421 for the assembly function.
- [30] The witness testified that the packaging and sequencing functions at the T facilities are the most complex, because the parts are going overseas. They have to meet regulatory requirements, needs for protection, and also require the “box development” of the CKD kits. The company only has a “box development” function, which it considers a research and development function, at the “T” location.
- [31] At the “W” and “O” locations, the racks are owned by the customers. At the “T” location, the crates are also owned by the customer, but they have been purchased from the employer’s associated crate manufacturing facility.
- [32] The witness testified that in her opinion another company, “B”, provides the same services as this employer. Mr. Allen has provided information that that company is classified under R.G. 933, custom packaging.

(b) Testimony of L. V.

- [33] The Panel also heard testimony from the manager of the “T” location. She described the computer tracking and management systems at the three plants at that location. She testified that the employer uses over 100 different types of boxes. Some are returnable, some not. Some are scrapped after use and some can be modified for different purposes. The engineering group decides what will be used or modified. Some of the goods shipped are hazardous or subject to special regulatory requirements for packaging and shipping. In her view, the main product at this facility is the CKD kit.
- [34] She testified that it is the customer who tells the employer what it needs, and the employer who designs the packaging to fit the need.

(vi) New Evidence

- [35] Mr. Allen referred us to two developments that have occurred since the date of the ARO decision. First, the company’s other two facilities, at “W” and “O”, have been audited. At “W”, one facility has been classified under R.G. 560, as warehousing, and the other under R.G. 933, as custom packaging. The “O” facility has been given split rates, under R.G. 933, custom packaging, and under a separate rate that reflects the assembly function carried out at that facility.
- [36] A copy of the field auditor’s letter dated August 19, 2004 has been provided for the record, and states:

I have added rate group 933, classification unit 7799-004, Custom Packaging, effective January 1, 2004. The reason this rate group was added is due to your firm's sequencing activity. Your firm, at both the [W] and [O] locations, provides sequencing services to [automobile manufacturers]. This sequencing includes sequencing and sorting of products according to your customers' specifications. Rate Group 933 included product sorting.

[37] Secondly, Mr. Allen refers us to the Court decision, discussed below.

(vii) Submissions/Law

[38] Ms. Zigomanis referred us to the Tribunal's test of best fit. *Decision No. 499/001* sets out that 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.

[39] We also adopt and apply this test.

[40] Ms. Zigomanis also referred us to the Tribunal decisions that find that what is required is a reasonable fit, rather than a perfect fit. She noted that information about competitors must be approached with caution, as they may not have been audited.

[41] Mr. Allen submitted that the ARO did not take into account the complexity of the employer's operation. He submitted that the employer's function should be considered warehousing. He submitted that this is not an ancillary function but is the nature of the business. The business should be classified under R.G. 560 in its entirety or, alternatively, as a split rate with R.G. 933. He submitted that the employer is able to segregate this activity. The question of whether the segregation is acceptable may be referred back to the Board. He noted that the first of the facilities at the "W" location has been granted this classification.

[42] In the alternative he submitted that the business activity is custom packaging. He relies on the fact that the similar functions carried out in the “O” facility and in the second facility at the “W” location have been given this classification. He submitted that this classification is supported by the principles of service, risk, and end use, set out in the Introduction to the Classification System. The service provided is not simply crating and packing. It is the creation of the “Complete Knock-Down Kit”, and related inventory services.

[43] Mr. Allen provided us with a Court decision received by the employer, dated December 14, 2004, which considers the eligibility of the employer’s “T” facilities for a deduction under the *Income Tax Act*. In order for the employer to be entitled to the deduction it was necessary to establish that the business activity constituted “processing” and not merely the packaging of the products for transportation out of Canada. The Court’s decision describes the employer’s function as filling the need of overseas plants for parts that are:

- (a) assembled in the sense that all parts needed for a production run of a certain number of vehicles of a certain make, model and colour are aggregated together in the correct number and type for a production run;
- (b) fit for assembly into the specific production run of the certain vehicle as described (i.e. no defective parts and, in particular, no corroded parts...)
- (c) Stored until use without corrosion in an often corrosive environment..

[44] The Court concluded:

- (a) The sophisticated operations of the Appellant were clearly not simply packaging. Nor was the Appellant involved in transportation as part of its service. The Appellant arranged transportation but the actual transportation was done by third party carriers.

...

- (e) It is clear that value was added by the Appellant and the (customer’s overseas plants) paid good money for the input of the Appellant. Reference is made to the fact that the relevant documentation establishes that in most cases the price allocation for “processing” was approximately 5 times that for the parts.

(viii) Conclusions

[45] We find that the employer’s facilities at the T location were appropriately classified in R.G. I-933-07: Custom Packaging and should not have been transferred to R.G. E-570-10: Other Services Incidental to Transportation, from January 1, 2001.

[46] We consider this to be a case in which there are two different R.G. descriptions that are broad enough to apply to the business activity. We agree with the ARO that the wording “crating and packing” “for the purpose of transportation” in R.G. 570 is broad enough to apply to this employer.

[47] However, we find that the wording of R.G. I-933-07: Custom Packaging also applies. We agree with the auditor who approved this classification for portions of the employer’s other facilities. We agree that this classification is appropriate because the reference to product sorting describes the sequencing function. The employer also is involved in co-packaging and plastic wrapping, which are functions listed in this classification.

- [48] The work at the three “T” location facilities is carried out to fit the customer’s very specific requirements. The need for the employer to meet the specific customer requirements, for a fee, is sufficient for the activity to be considered custom.
- [49] Given that two different Rate Group descriptions apply, the question is which is the more specific, and which is the best fit.
- [50] In addressing this question, we understand that the field auditor who classified the “O” and “W” locations would not have been addressing the same question as the Panel, in this respect, because in those cases the employer’s facilities were close to the manufacturer’s operations and little of the business activity related to crating and packing “for the purposes of transportation”. The items were not crated, but simply moved a short distance on racks. Therefore it is likely that the auditor in the 2004 audit of the “W” and “O” locations did not turn her mind to whether R.G. 570 might be a better fit than R.G. 933, for those locations. However, this Panel must address that question as it applies to the “T” location. At the “T” location, the transportation related requirements were of major importance.
- [51] However we agree with the analysis of the Court in the employer’s Revenue Canada case that the business activity at the “T” location was much more than simple packaging. R.G. 570 contains no wording that reflects the employer’s business activity of designing and sequencing, as part of the packaging process. In our view, from the evidence, this is the most critical component of the value added at the T facility. R.G. 933 best reflects this operation. Therefore we find R.G. 933 the best fit.
- [52] However, we agree with the ARO that the warehousing function at the “T” location is ancillary. The employer works on a “just in time” basis. It does not store parts any longer than is necessary in order to fulfil the primary business function, of packaging the parts and preparing the CKD kits. Its fee structure may contain some elements related to warehousing but the purpose of the employer maintaining inventory is not to provide storage. It is to best fulfil its “just in time” needs.
- [53] We recognize that the Board classified one of the plants at the “W” location under warehousing. However, the evidence indicates that the customer was using the services of the employer at that location mainly because of a need for additional storage space. The employer was not doing the custom packaging functions at that location that have been described at the “T” location.
- [54] Therefore we do not consider R.G. 560 an appropriate classification or that it is appropriate that the employer be given split rates. The employer is properly classified in R.G. I-933-07.

DISPOSITION

[55] The appeal is allowed.

[56] The employer's facilities at the "T" location are to be classified in R.G. I-933-07: Custom Packaging from January 1, 2001, rather than in R.G. E-570-10: Other Services Incidental to Transportation.

DATED: January 17, 2006

SIGNED: E.J. Smith, C.J. Robb, M. Ferrari