N.Z. Accident Compensation Appeal Authority
[illegible] decisions

IN THE HIGH COURT OF NEW ZEALAND
(ADMINISTRATIVE DIVISION)
WELLINGTON REGISTRY

M. 354/82

KH
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A171

IN THE MATTER of Section 169 of the Accident Compensation Act 1972

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IN THE MATTER of an appeal by THE WAITEMATA CITY COUNCIL against a decision of the Accident Compensation Appeal Authority dated the 24th day of June 1982

Judgment: 30/9/84

Hearing: 19 June 1984

Counsel: B.H. Clark for Appellant
B.S. Paki for Respondent

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FURTHER JUDGMENT OF CASEY J.

In my judgment of 18th October 1983 I determined that Clause 3(1)(b) of the Accident Compensation Earners' Scheme Levies Order 1973 contemplated as the proper classificatic for employees only one industrial activity of their employer from the list in the Schedule, and it must be the one which most accurately described the latter's industrial activity as defined in Clause 2. I also referred to the qualification in Clause 3(2), which applies in certain circumstances when an employer is engaged in more than one industrial activity. At the hearing on 18th October Mr Mines (for the Corporation) made lengthy submissions and tendered material relevant to Clause 3(2), and I thought there was sufficient to enable me to draw an inference that the Appellant kept appropriate records, requiring classification of the employees concerned in this appeal into Class 507 - Road and surface construction and repair etc. However, I was not prepared to draw this inference without giving the Council the opportunity to produce further evidence and submissions about its recording and accounting procedures. Owing to the direction the case had taken previously, the relevance of Clause 3(2) may not have

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been apparent to the parties. At no stage during that hearing was it suggested that Clause 3(2) had any relevance and I said as much in my judgment.

The matter came before me again on 19th June 1984 when Mr Clark continued to appear for the Appellant, but Mr Paki replaced Mr Mines for the Corporation. It was agreed that he also could adduce evidence and make submissions. Mr Clark confined his remarks to Clause 3(2). However, Mr Paki dealt not only with that Clause but also submitted that Clause 3(3) applies to require the classification sought by the Corporation and I gave Mr Clark leave to make submissions in reply, and these have now been received. He questions the propriety of the Court entertaining this additional point at this late stage, especially as none of the evidence had been directed towards it. However, he also made submissions about the interpretation of the subclause, and its place in Clause 3.

As I have already noted, Clause 3(1) provides that "except as hereinafter provided", employees are to be classified according to the description of industrial activity which most accurately describes that of their employer. Subclauses (2) and (3) are as follows:-

> "(2) Subject to subclause (3) of this clause, where an employer is engaged in more than one industrial activity and for the purposes of managing and operating any one industrial activity maintains records which clearly separate to that one industrial activity the employees employed therein, and the earnings as employees paid to those employees, then, for the purpose of calculation and payment of levies, the employees so employed shall be classified in the employer's industrial activity in which they are so recorded.
>
> (3) Where an employee does not actually undertake work normally performed by employees engaged in the employer's industrial activity, or any division of that industrial activity, but the employee's work contributes to or services that industrial activity or division, then, for the purpose of calculation and payment of levies, that employee shall be classified in that description or division of his employer's industrial activity:
>
> Provided that, if such an employee is engaged in work which contributes to or services more than one of his

employer's industrial activities, that employee shall be classified, for the purpose of calculation and payment of levies, in the description or division of those industrial activities to which the employee's work contributes or services and for which the highest rate of levy is prescribed by this order."

Having regard to the qualifications and exceptions in subclauses (1) and (2), the task of classifying an employee under Clause 3 should be approached by asking firstly whether he comes under 3(3); if not, then one turns to Clause 3(2) to ask whether his employer is engaged in more than one industrial activity for which it maintains the appropriate records. If this does not apply, then he has to be classified under subclause (1).

I turn first to Mr Paki's submission that all employees engaged on road work come under subclause 3(3). I think this must fail at the outset. It applies only to those personnel who do not "actually undertake work normally performed by employees engaged in the employer's industrial activity" (emphasis added). Although the term "industrial activity" appears in the singular, it must be read in conjunction with the rest of Clause 3, acknowledging that employers can engage in more than one activity. It certainly does not state that the employees considered to be working normally are only those engaged in the "classification" activity arrived under Clause 3(1)(b) - i.e., that description in the Schedule which most accurately describes the employer's industrial activity. Road construction, maintenance and repair workers are engaged in one of the Council's recognised activities, and it would be unrealistic to limit the words I have underlined - "the employer's industrial activity" - in the way Mr Paki suggests, as meaning simply the Council's overall function of organising and administering the provision of services to the community. In my view they mean in this context a particular activity of the employer in which its workers are normally engaged.

As appears from my discussion of the evidence applicable to Clause 3(2), roading is a function of the Council's Works Department, but its individual employees may at any given time be engaged on other distinct activities. When they are

engaged in roading it is as part of their normal work in that Department. In my view subclause 3(3) is designed to cover the "odd lot" worker who does not fit into the general pattern of work done by other employees engaged in the industrial activity as part of their normal job, but who contributes to or services that operation. As an example, I would suppose a cleaner (not an independent contractor) employed on an intermittent basis on special cleaning jobs in a bakery might come under this provision. So I conclude that if the Council's roading workers are to be levied under Classification 507 it must be as a result of the application of subclause 3(2) to which I now turn.

The appeal is concerned with the year 1979 and although the Council has no doubt updated its accounting systems since, I am satisfied (as one would expect) that it did maintain detailed primary records in the form of time sheets for each employee in the Works Department setting out the hours spent each day on various jobs, and these were checked and certified by a supervisor. From the samples supplied I am satisfied that they cannot fairly be regarded as records "which clearly separate to that one industrial activity (i.e. 507 - Road construction, repair etc.) the employees employed therein and the earnings as employees paid to [them]". As a typical example I take the sheet for Bruce Lowrey; on the first day he worked eight hours general maintenance all areas; on the second, eight hours general maintenance Hobsonville Road; on the third, general maintenance for three hours on Hobsonville Road and for two hours on Ranui Avenue, then two hours on the footpath Don Bucks Road and one hour general maintenance Cyril Road. The next three days were spent between footpaths and general maintenance, interspersed by two hours as a flagman on roundabouts. He received a special allowance for two dead cats. Another worker, Mr Butts, was engaged for one week on stormwater, a rubbish run and "goal posts".

Mr Paki concentrated on two categories of road worker - namely, those engaged under the P.E.P. scheme and its predecessor, and work which was done to qualify for National

Roads Board subsidy. The former worked mainly on footpaths, and Mr Clark conceded that this could be regarded as road work within the meaning of Classification 507. On the other hand only the construction and maintenance of the carriageways qualified for National Roads Board subsidies. I am satisfied, from the Roading Policy and Procedure Manual issued by the Board, that most of the work prescribed therein would also fall within Classification 507. There are some obvious exceptions such as the construction and maintenance of bridges or ferries but they should present no problem.

The point about both these areas of activity is that proper wage records must be kept by the Council and be separately available for costing those portions of roading construction or repair undertaken in accordance with these schemes. This emerged very clearly from the evidence and I have no doubt that the Council was required to keep these records and did so. They would fall within the requirement of Clause 3(2), as records clearly separating the earnings of employees engaged in the industrial activity classified under Item 507. However, the other requirement is that the records must clearly separate into that industrial activity the employees employed therein. The P.E.P. workers present no problem because they are taken on for a specific job and are not engaged in any other activity for its duration. However, the only record submitted to me of employees engaged in subsidised work were the time sheets to which I have referred, and the Council's organisation charts setting out the structure and personnel in its various departments. Its Road Workers are listed under "Works Department" and I imagine there are similar listings for those engaged full time in water works, drainage or sewage, library and other activities which have been acknowledged as fitting into the appropriate Classifications and levied accordingly. As I have already noted, the problem with the Works Department is that its employees are generally engaged on a range of activities involving different Classifications and rates. There is nothing in the material provided which would entitle me to find that the Council maintained records clearly separating its workers in that Department into the industrial activity of road construction

and repair etc. under Classification 507, apart from the P.E.P. workers. If in fact the Council had kept and produced a record of named employees engaged on a particular subsidised National Roads Board job during its course, the position might be different.

The effect of this further hearing is therefore to confirm the overall view taken on these Regulations by the Appellant. On the evidence submitted to me I find that only the P.E.P. workers fall within the classification provisions of Clause 3(2) of the Levies Order. As this was very much a test case it may not be appropriate to make any order for costs, but I will hear Counsel on this if necessary.

M.B. Casey J.

Solicitors:

Earl Kent & Co., Auckland, for Appellant
Accident Compensation Corporation, Wellington, for Respondent