

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Labor Works of Dayton LLC,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-22
	:	
Ohio Bureau of Workers' Compensation,	:	(REGULAR CALENDAR)
	:	
Respondent.	:	
	:	

D E C I S I O N

Rendered on December 21, 2010

*Coolidge Wall Co., L.P.A., David C. Korte, Michelle D. Bach
and Joshua R. Lounsbury, for relator.*

*Richard Cordray, Attorney General, and Gerald H. Waterman,
for respondent.*

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

BRYANT, J.

{¶1} Relator, Labor Works of Dayton LLC, commenced this original action requesting a writ of mandamus that orders respondent, Ohio Bureau of Workers' Compensation ("bureau"), to vacate the final order of the administrator's designee, mailed

September 11, 2009, which affirmed the order of the adjudicating committee denying relator's protest of the audit findings of the bureau.

I. Procedural History

{¶2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 10 of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended to this decision. The magistrate determined the requested writ should be denied because (1) relator failed to maintain its records as required under applicable statutes and administrative rules and failed to provide the necessary records for the bureau's auditors during the audit, and (2) relator failed to present sufficient evidence at the hearing before the administrator's designee to overcome the prima facie case arising from the bureau's good faith efforts in attempting to assign manual classifications and determine premiums.

II. Objections

{¶3} Relator filed objections:

1. The Magistrate mistakenly found that "it is undisputed that relator did not/was not able to provide the BWC with all the information necessary to complete the audit."
2. The Magistrate erred when she ignored the Auditor's decision to fabricate payroll and assign this payroll to a manual code that was arbitrary and capricious.
3. The Magistrate erred when she ignored the arbitrarily selected manual classifications used by the Auditor, as those classifications do not remotely reflect the actual risk encountered by Labor Works' employees.
4. The Magistrate erred when she found that the Auditor's finding of the premium was based upon "the information that is available," as required by R.C. § 4123.24 and O.A.C. §4123-17-17.

5. The Magistrate erred when she concluded that the BWC Order met the requirements of *State ex rel. Noll v. Industrial Commission* (1991), 57 Ohio St. 3d 203 and *State ex rel. Craftsmen Basement Finishing System, Inc. v. Mabe* (2009), 121 Ohio St. 3d 492.

{¶4} Relator's first objection contends the magistrate improperly concluded "it is undisputed that relator did not/was not able to provide the [bureau] with all the information necessary to complete the audit." Relator suggests the finding does not credit relator with the efforts it undertook to provide the information requested in the audit.

{¶5} While the parties may debate the information relator provided in relation to that which the bureau requested, relator's memorandum in support of its objection admits "the information provided by Labor Works does not include an individual breakdown of payroll by employee as requested by [bureau]." (Objections at 10.) Likewise, "Labor Works concedes that it did not list the policy numbers of its clients and did not always have verification from its clients regarding the correct manual classifications to use." (Objections at 11.) The magistrate's factual finding addresses what relator admits: relator failed to present all the documents the bureau needed to complete an audit. Relator's first objection is overruled.

{¶6} Relator's remaining objections will be addressed jointly, as together they challenge the magistrate's analysis that concluded the bureau did not abuse its discretion. Pursuant to R.C. 4123.24, employers are required to "maintain complete records" that "detail all expenditures for payroll," including "the division of such expenditures into the various divisions of the employer's business." On an employer's failure to keep such records, "the bureau may determine upon such information as is available to it the

amount of premium due from the employer and its findings shall constitute prima facie evidence of the amount of premium due from the employer." Ohio Adm.Code 4123-17-17. When the bureau conducted an audit of relator, relator failed to provide the information that was requested. As a result, the bureau estimated the premium due. Relator contends the premium assessed is arbitrary.

{¶7} The proceedings before the administrator's designee consisted of the statements of relator's representative, relator's counsel, the bureau's legal counsel, and a bureau audit supervisor. Relator's counsel largely argued the bureau failed to provide assistance, as promised, in the face of relator's inability to gather the information necessary to keep appropriate records.

{¶8} William Luken, the bureau audit supervisor, explained "[t]here was actually no way to actually do the audit, so after going back and forth for a month and getting the employer the information on how to retrieve the information and what he needed to do[.] [O]ur only alternative was to do additional payroll because we couldn't do the audit. We could have taken all of his payroll and put it into the highest classification, we could have done that, but we chose just to put a certain amount of payroll into one of their classifications in case they could come back and then give us the information so we could actually do the audit." (Tr., 21-22.)

{¶9} Similarly, Richard Blake, legal counsel, clarified, "[W]e did the best that we could and these findings are now binding upon the employer because they didn't keep the [records] as required by both the administrative code and the revised code sections that address the keeping of records." (Tr. 25.) He added that "you can make the argument that

the findings are arbitrary, but the reason for that is because of what the employer hasn't given us not because of any failing on our part." (Tr. 25.)

{¶10} In the end, the administrator's designee did not find relator's arguments persuasive, noting they failed to overcome the prima facie case arising under statute and the administrative code. He concluded relator's own failure to maintain the necessary records caused the bureau to engage in the findings and conclusions subject of relator's request for a writ of mandamus. Although relator contended at the hearing that the bureau's action in response to relator's failure to maintain adequate records was arbitrary, the administrator's designee heard the arguments on both sides of the issue and determined no arbitrariness was evident. On this record we cannot say the bureau acted arbitrarily or abused its discretion.

{¶11} Finally, to the extent relator contends the order at issue fails to comply with *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203, the order of the administrator's designee explains relator failed to present evidence to overcome the "prima facie case that resulted from the Bureau's good faith efforts to assign manual classifications and determine premiums based on the incomplete information" relator provided. (Mag. Dec., ¶28.) The order thus plainly notes the decision was based on relator's failure to carry its burden.

{¶12} For the reasons stated in the magistrate's decision, as amplified in this decision, the objections are overruled.

III. Disposition

{¶13} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the salient law to them.

Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

*Objections overruled;
writ denied.*

BROWN and CONNOR, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

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State of Ohio ex rel.	:	
Labor Works of Dayton LLC,	:	
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Relator,	:	
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v.	:	No. 10AP-22
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Ohio Bureau of Workers' Compensation,	:	(REGULAR CALENDAR)
	:	
Respondent.	:	
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MAGISTRATE'S DECISION

Rendered on August 13, 2010

Coolidge Wall Co., L.P.A., David C. Korte, Michelle D. Bach and Joshua R. Lounsbury, for relator.

Richard Cordray, Attorney General, and Gerald H. Waterman, for respondent.

IN MANDAMUS

{¶14} Relator, Labor Works of Dayton LLC, has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Ohio Bureau of Workers' Compensation ("BWC"), to vacate the final order of the administrator's designee, mailed

September 11, 2009, affirming the order of the adjudicating committee which denied relator's protest of the audit findings of the BWC.

Findings of Fact:

{¶15} 1. Relator is a temporary staffing company that supplies, on a temporary basis, workers to a variety of businesses in Ohio. Relator's headquarters is located in Louisville, Kentucky. Relator obtained Ohio workers' compensation coverage in October 2001 and has made its semi-annual premium payments to the BWC based upon reported payroll since then.

{¶16} 2. By letter dated May 11, 2007, the BWC informed relator that its account had been selected for audit and informed relator that the following records must be forwarded to the BWC within 15 days:

Ohio Department of Job and Family Services (ODJFS) **quarterly summary and detail reports-SUTA** (Unemployment Report for Ohio or Employer Contribution Report) for the time periods of **January 1, 2005 to December 31, 2006.**

Ohio Department of Job and Family Services (ODJFS) payroll summaries per each period of the audit to include individual employee name and payroll amount(s).

If the company **does not report** to the Ohio Department of Job and Family Services (ODJFS) please provide employee(s) **quarterly** pay and W2's.

Worker's Compensation semi-annual Payroll Reports for the time periods **January 1, 2005 to December 31, 2006.**

Also include a worksheet with each employees name, wages, & BWC job classifications for the time periods of **January 1, 2005 to December 31, 2006.**

(Emphases sic.)

{¶17} The letter also informed relator of the consequences of its failure to provide the requested information:

Failure to comply in a timely manner or failure to provide requested documentation will result in estimated billings for assessed premiums, penalties and interest. This could jeopardize your eligibility for group or alternative rating plans and result in liens being filed by the Ohio Attorney General.

(Emphasis sic.)

{¶18} 3. Relator did submit a certain amount of documentation in response to the BWC's request. However, it is undisputed that relator did not/was not able to provide the BWC with all the information necessary to complete the audit.

{¶19} 4. Because relator failed to provide all necessary documentation, the BWC auditors completed Uncooperative Employer Estimate Forms estimating the premium and assessing a premium to relator that resulted in a significant increase.

{¶20} 5. In a letter dated April 21, 2008, Sean P. Fore, identified as relator's Vice President on relator's application for workers' compensation coverage in Ohio, directed a letter to the BWC regarding the audit, stating:

I am in receipt of an invoice for an audit over a 2 year period for the above referenced policy. There is no explanation at all just a Class Code, Payroll and Rate. If I use the BWC's information, I will be paying on wages that we did not have. Please have someone who did the audit contact us to explain what they have done and what adjustments were made. We think this audit is in error and cannot pay until we have further clarification of the audit procedures.

{¶21} 6. BWC auditor William Luken sent a letter to relator dated October 27, 2008. That letter provides:

The complaint received on 9/09/08 disagreeing with the reportable payroll found because of an estimated audit has

undergone a departmental review. Regrettably, the BWC has denied your request and the audit findings for the period 07/01/05 to 06/30/07 have been affirmed.

4123-17-17 Auditing and adjustment of payroll reports.

(A) Every employer amenable to the workers' compensation law shall keep, preserve and maintain complete records showing in detail all expenditures for payroll and the division of such expenditures in the various divisions and classifications of the employer's business. Such records shall be preserved for at least five years after the respective time of the transaction upon which such records are based.

(B) All books, records, papers, and documents reflecting upon the amount and the classifications of the payroll expenditures of an employer shall be kept available for inspection at any time by the bureau of workers' compensation or any of its assistants, agents, representatives or employees. If any private fund, county, or public employer taxing district employer fails to keep, preserve and maintain such records and other information reflecting upon payroll expenditures, or fails to make such records and information available for inspection, or fails to furnish the bureau or any of its assistants, agents, representatives or employees, full and complete information in reference to expenditures for payroll when such information is requested, the bureau may determine upon such information as is available to it the amount of premium due from the employer and its findings shall constitute prima facie evidence of the amount of premium due from the employer.

Per review, it was determined 1) The records supplied for the audit were not sufficient to perform the audit because the wages of the employees were not segregated by the actual employees wages, by the policy number of the employer that the employee was [sic] went to, and by the manual of that employer. 2) No policy numbers of client employers were originally provided, and after the complaint you provided about 42 % of the policy #s and BWC was able to research and find about 30% of the policy #s which still leaves about 28% as unknown. 3) Many of the policies have various manual classifications which presents a second set of problems in identifying where payroll would be placed. 4) Individual employees and wages for that employee are not

shown in your records, thus we could not segregate wages for the audit. Wages are divided by client employer name.

The BWC sympathizes with your situation, but we cannot waive application of the rule.

I would suggest that you continue to try to obtain sufficient records for the audit, and if that can be done and be supplied to BWC in a reasonable time frame, that BWC could perform the audit.

If you have any additional questions or concerns, please feel free to contact me.

(Emphases added.)

{¶22} 7. In response to Mr. Luken's letter, relator did not submit additional information pertaining to the audit for the BWC to consider. Instead, in a letter dated October 30, 2008, relator notified Mr. Luken that the audit findings would be appealed.

{¶23} 8. Mr. Luken prepared a statement of facts for the upcoming hearing which provided as follows:

An estimated audit was completed on 3/4/08 for the periods of 7/1/05 to 6/30/07, as employer did not supply records to correctly segregate wages[.]

The employer is in business as: Temporary Agency. The employer was sent letters for an audit and it was explained what records were needed. The employer did not supply policy numbers and manual numbers of client employers, and did not show payroll segregated by employee, by policy number and manual number of the employer where the employee worked.

The employer, Sean Fore, stated that they did not have the information concerning client lists, and thus were not able to segregate wages to the manuals as we requested. Sean went on to say that he felt BWC should be able to do that.

The employer filed a letter of protest stating: Risk is protesting the audit findings because risk feels that they should not have to segregate their payroll.

The employer was contacted and was able to identify about 35% of their clients policies, and Mari Widmyer, BWC Account Examiner was able [to] identify about another 25% of their clients policies.

The employer needs to be able to segregate wages by employee, by client employer, by manual number, so that an audit can be performed.

The findings are correct because: Findings are correct due to ORC 4123-17-17 guidelines.

{¶24} 9. Because the BWC did not receive the necessary information from relator, the BWC estimated the premium for the four reporting periods at issue.

{¶25} 10. Relator's protest was heard by the adjudicating committee of the BWC on January 21, 2009 and was denied. The order provides as follows:

* * * BWC audited the employer from July 1, 2005 to June 30, 2007. The auditor picked up employees additional earnings as reportable payroll. The auditor determined that there was payroll that the employer had failed to report to the Bureau.

The employer protested the findings and requested a hearing before the Adjudicating Committee.

* * *

The employer's representative stated the Bureau assigned all of the payroll to the highest rated manual. Therefore, the audit is unfair to the employer. Many of the clients did not have policy numbers or were out of state. Therefore, they did not know the manual numbers of the clients.

BWC's representative stated that the employer did not have adequate records to conduct a proper audit. The employer failed to provide information regarding the clients of the company. Therefore, the Bureau was forced to estimate

large parts of the audit findings. The employer reported a significant amount of payroll to the warehouse manual. However many of the clients were not warehouse businesses.

Based on the testimony at the hearing and the materials submitted with the protest, the Adjudicating Committee upholds the audit findings and DENIES the Employer's protest. The employer failed to properly provide the records needed to segregate a substantial part of its client's payroll.

(Emphasis sic.)

{¶26} 11. Relator appealed pursuant to R.C. 4123.291 and the matter came before the administrator's designee on September 8, 2009. At the hearing, counsel for relator argued that the BWC arbitrarily assigned classifications to relator's payroll which were unfair, inexplicable, and resulted in a substantial increase in relator's premiums. Further, counsel argued that the BWC provides temporary staffing companies with an "800 number" to help employers determine the appropriate classifications for clients. Counsel implied that Mr. Fore had dialed the number and the BWC's employees provided little, if any, help. According to relator, the BWC should have been able to determine the proper manual classifications without any assistance from relator.

{¶27} 12. Further, at this hearing, relator submitted documentation for review which had not been provided to the auditor.

{¶28} 13. The administrator's designee affirmed the order of the Adjudicating Committee as follows:

Pursuant to Ohio Revised Code Section 4123.291, this matter came on for hearing before the Administrator's Designee on the employer's appeal of the Adjudicating Committee order dated January 21, 2009. At issue before the Administrator's Designee, the Employer protested the Auditor's decision to pick up additional wages as reportable

payroll. Further, the Bureau transferred payroll to the higher rated manual when the audited [sic] determined that the employer's records did not comply with OAC 4123-17-17 and 4123-17-08.

* * *

The Administrator's Designee adopts the statement of facts contained in the order of the Adjudicating Committee.

Based [on] the information provided at the hearing, the Administrator's [D]esignee affirms the order of the Adjudicating Committee. It is incumbent upon the employer to maintain complete payroll records and to make such records available for inspection by the Bureau. See Revised Code 4123.24 and Ohio Administrative Code 4122-17-17 [sic]. The employer failed to carry out its obligation under this statute and related rule. Because of this failure, the Bureau made good faith efforts to assign manual classifications and determine premiums based on the incomplete information made available to it by the employer. Under R.C. 4123.24, the results of such efforts are prima facie evidence of the amount of premium due from the employer. The employer did not provide sufficient evidence to rebut the prima facie case that resulted from the Bureau's good faith efforts to assign manual classifications and determine premiums based on the incomplete information provided by the employer.

{¶29} 14. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶30} Relator argues that the BWC abused its discretion when it fabricated payroll and arbitrarily assigned it to certain manual codes and denied relator's protest. In making this argument, relator asserts: (1) while it is difficult for a temporary staffing company to acquire the required information, relator provided sufficient information to the BWC for the audit; (2) to the extent relator failed to provide sufficient information, the BWC should have been able to accurately determine the proper codes and determine relator's actual

premium accordingly and it should not have been necessary to arbitrarily classify any employees; and (3) the BWC's order does not cite the evidence relied upon and does not provide a sufficient explanation as required by *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203, and *State ex rel. Craftsmen Basement Finishing Sys., Inc. v. Ryan*, 121 Ohio St.3d 492, 2009-Ohio-1676.

{¶31} For the reasons that follow, it is this magistrate's decision that relator has not demonstrated that the BWC abused its discretion. Relator failed to maintain its records as required by law and failed to provide the necessary records for the BWC's auditors during the audit. Further, relator failed to present sufficient evidence at hearing to overcome the presumption that these findings were correct. As such, this court should deny relator's request for a writ of mandamus.

{¶32} In order for this court to issue a writ of mandamus, relator must demonstrate that it has a clear legal right to a new audit, that the BWC has a clear legal duty to provide a new audit, and that relator has no other adequate legal remedy. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141.

{¶33} Section 35, Article II of the Ohio Constitution authorizes the board to "classify all occupations, according to their degree of hazard." Implemented by what is now R.C. 4123.29(A)(1), the result is the Ohio Workers' Compensation State Fund Insurance Manual. The manual is based on the manual developed by the National Counsel on Compensation Insurance ("NCCI") and has hundreds of separate occupational classifications. See Ohio Adm.Code 4123-17-04, Appendix A. It also specifies the basic rate that an employer must pay, per \$100 in payroll, to secure workers' compensation for its employees. See Ohio Adm.Code 4123-17-02(A).

{¶34} "The bureau is afforded a 'wide range of discretion' in dealing with the 'difficult problem' of occupational classification." *State ex rel. Roberds, Inc. v. Conrad* (1999), 86 Ohio St.3d 221, 222, quoting *State ex rel. McHugh v. Indus. Comm.* (1942), 140 Ohio St. 143, 149. Thus, we have "generally deferred to the [bureau's] expertise in premium matters" and will find an abuse of discretion "only where classification has been arbitrary, capricious or discriminatory." *State ex rel. Progressive Sweeping Contrs., Inc. v. Ohio Bur. of Workers' Comp.* (1994), 68 Ohio St.3d 393, 396.

{¶35} In *Progressive*, the Supreme Court of Ohio pronounced:

Judicial intervention in premium matters has traditionally been warranted only where classification has been arbitrary, capricious or discriminatory. *Id.*; [*State ex rel. Minutemen, Inc. v. Indus. Comm.* (1991), 62 Ohio St.3d 158]. See, generally, 4 Larson, Workmen's Compensation Law (1990), Section 92.67.

{¶36} Given this high threshold, courts have been—and will continue to be—reluctant to find an abuse of discretion merely because the employer's actual risk does not precisely correspond with the risk classification assigned.

{¶37} Pursuant to R.C. 4123.29 and 4123.34, the administrator of the BWC has the responsibility for classifying occupations or industries with respect to their degree of hazard and determining the risks of the different classes according to the categories the NCCI establishes, and is required to fix and maintain, for each class of occupation or industry, the lowest possible rates of premium consistent with the maintenance of a solvent state insurance fund and the creation and maintenance of a reasonable surplus. R.C. 4123.34(A) further provides that it is the responsibility of the administrator to keep an accurate account of the money paid in premiums by each of the several classes of

occupations or industries, and the losses on account of injuries, occupational disease, and death of employees thereof, and also keep an account of the money received from each individual employer and the amount of losses incurred against the state insurance fund.

{¶38} In order to facilitate the administrator's ability to meet these requirements, employers amenable to the Ohio's Workers' Compensation Act are required to maintain records and make them available for inspection by the BWC for auditing purposes. Specifically, R.C. 4123.24 requires:

Every employer amenable to this chapter shall keep, preserve, and maintain complete records showing in detail all expenditures for payroll and the division of such expenditures into the various divisions and classifications of the employer's business. The records shall be preserved for at least five years after the respective times of the transactions upon which the records are based.

All books, records, papers, and documents reflecting upon the amount and the classifications of the payroll expenditures of an employer shall be kept available for inspection at any time by the bureau of workers' compensation or any of its assistants, agents, representatives, or employees. If an employer fails to keep, preserve, and maintain the records and other information reflecting upon payroll expenditures, fails to make the records and information available for inspection, or fails to furnish to the bureau or any of its assistants, agents, representatives, or employees, full and complete information in reference to expenditures for payroll when the information is requested, the bureau may determine the amount of premium due from the employer upon such information as is available to it, and its findings are prima-facie evidence of the amount of premium due from the employer.

(Emphases added.)

{¶39} Ohio Adm.Code 4123-17-17 similarly provides:

(B) All books, records, papers, and documents reflecting upon the amount and the classifications of the payroll expenditures of an employer shall be kept available for inspection at any time by the bureau of workers' compensation or any of its assistants, agents, representatives or employees. *If any private fund, county, or public employer taxing district employer fails to keep, preserve and maintain such records and other information reflecting upon payroll expenditures, or fails to make such records and information available for inspection, or fails to furnish the bureau or any of its assistants, agents, representatives or employees, full and complete information in reference to expenditures for payroll when such information is requested, the bureau may determine upon such information as is available to it the amount of premium due from the employer and its findings shall constitute prima facie evidence of the amount of premium due from the employer.*

(Emphasis added.)

{¶40} The necessity for employers to provide these records and for the BWC to conduct audits is obvious. The workers' compensation system is based upon the payment of premium dollars to the BWC by employers and the disbursement of those premiums as qualifying workers' compensation expenditures. "The employer's submission of premium and payroll data to the bureau is essentially on an honor system. Unless an audit of the employer's records reveals otherwise, the bureau presumes that the employer has correctly reported its premiums." *Roberds*, at 222. However, as R.C. 4123.24 and Ohio Adm.Code 4123-17-17 provide, if an employer fails to supply the records necessary for an audit, the BWC is authorized to make a finding of premium due based upon the information available and this finding is prima facie evidence of the amount actually due.

{¶41} It is fundamental that Ohio employers are obligated to pay their fair share into the workers' compensation system. This is accomplished by the assignment of premium rates to the various manual classification codes established by the NCCI. See R.C. 4123.29(A) and Ohio Adm.Code 4123-17-04. These manual classification codes reflect the degree of hazard and loss associated with each particular industry and these rates are then applied to the actual payroll for all the employees under each manual classification code. R.C. 4123.29(A) and *State ex rel. Minutemen, Inc. v. Indus. Comm.* (1991), 62 Ohio St.3d 158.

{¶42} Relator is a temporary labor service company. Relator's employees perform a variety of jobs and relator's clients are involved in a diverse range of industries. As such, relator does not have its own manual classification. Instead, the manual classification codes for relator's employees will differ depending upon the client to whom that employee is sent and the job duties which that employee then performs.

{¶43} Ohio Adm.Code 4123-17-08(D)(3)(f) provides guidance to employers whose payroll is associated with the unique operation of labor leasing, labor contracting and temporary labor services, where the labor service's employee is actually performing the work for another employer. Specifically, that provision provides:

(D) Classification procedures.

The purpose of the classification procedure is to assign the one basic classification that best describes the business of the employer within a state. * * *

* * *

(3) Assignment of more than one basic classification.

* * *

(f) Employee leasing, labor contractors and temporary labor services.

(i) Workers assigned to clients must be classified the same as direct employees of the client performing the same or similar duties.

(ii) If the client has no direct employees performing the same or similar duties, leased employees are classified as if they were direct employees of the client entity.

Example of how to classify workers assigned to clients of employee leasing companies, labor contractors, and temporary labor services:

The client is a retail store classified to code 8017:

(a) Code 8017 is applicable to the worker assigned as a cashier, just as it is applicable to the client's employee who works as a cashier.

(b) Code 7380 is applicable to the worker assigned as a delivery truck driver, just as it is applicable to the client's employee who drives a delivery truck.

{¶44} The obligation is clearly on the employer to segregate its payroll into the various classifications under which it reports. As such, temporary labor service employers must obtain from their clients the manual classification codes that the particular client uses for the employees performing the jobs that the temporary labor service employees are performing. In the present case, relator was responsible for segregating its payroll based upon information relator obtained from each of the companies to whom relator sent its employees.

{¶45} Relator does not deny that it failed to provide the BWC with all the necessary payroll information. Because the BWC did not have all the information it needed from relator, the BWC applied R.C. 4123.24 and Ohio Adm.Code 4123-17-17

and, based upon the information relator actually provided, determined the amount of premium due. Relator argues that the manner in which the BWC completed the audit was arbitrary and unjust.

{¶46} As noted previously, relator does not deny that it failed to maintain the proper records and was unable to provide the BWC with the necessary information for the BWC to properly complete the audit. Relator's only response was made in statements by relator's counsel during the September 8, 2009 hearing on relator's appeal of the order from the adjudicating committee which had denied relator's protest. At that time, counsel implied that relator had contacted the BWC via an "800 number" provided to temporary service employers for help determining the proper classification codes. Thereafter, counsel questioned Mr. Fore concerning an earlier audit. Mr. Fore stated that, when contacting a BWC representative, they had been unable to answer his questions. Further, Mr. Fore stated that when he did contact the relevant employers, they were often unable to provide him with the appropriate manual classifications. Therefore, it appears relator argues that it tried to obtain the proper information, but was unable to receive the necessary help from the BWC. However, the magistrate notes that nothing in the transcript from the September 8, 2009 hearing indicates when relator had contacted the BWC for this information. Further, relator eventually produced additional documentation at this hearing which relator had not made available to the BWC in time for the audit. As such, it is apparent that relator was able to obtain the information, but, for whatever reason, relator failed to do so during the time the BWC was conducting its audit and when relator's protest was being heard.

{¶47} After the audit was completed, Mr. Luken provided relator the opportunity to present the relevant information and indicated the BWC would conduct the audit. However, relator failed to do so and opted to file its protest instead.

{¶48} In its brief, relator argues for the first time that the BWC simply took relator's payroll and multiplied it by 20 percent to arrive at the premium then assessed. Relator argues that handwritten notes on documents in the record prove this. However, relator had the opportunity to make this argument and present this evidence to overcome the prima facie finding of the BWC, but failed to do so. This court looks only at the evidence presented before the fact finder.

{¶49} The record is clear that relator sent employees to Ohio companies to perform various jobs, but failed to obtain from all those Ohio companies the proper manual classification codes. Because relator failed to obtain this information, relator was unable to provide the documentation necessary for the BWC to *accurately* conduct the audit of relator's business. When this occurs, the law provides that the BWC is authorized to estimate the information which is missing. While relator argues that the BWC's estimate is arbitrary, this magistrate cannot say that relator is correct. Neither the Ohio Revised Code nor the Ohio Administrative Code provide any kind of formula for the BWC to utilize in making this estimate. Instead, the BWC is authorized to use whatever information has been made available in making the estimate. Relator simply cannot demonstrate that the BWC abused its discretion here. Further, relator's attempt to shift its burden of obtaining and maintaining the required information to the BWC is inappropriate and the fact that the BWC was able to determine some of the missing information on its

own is irrelevant. Relator failed to keep the proper documentation and, as a result, the BWC was forced to estimate relator's premium.

{¶50} Relator also contends that the BWC's order fails to satisfy the requirements of *Noll* because it does not identify the evidence upon which it is based and fails to provide an explanation for how the estimate was calculated. Relator cites *Craftsmen* in support. In *Craftsmen*, the issue was the BWC's occupational reclassification of certain employees for purposes of workers' compensation premiums. *Craftsmen* was in the home-renovation business and employed sales persons who scheduled in-home appointments with perspective customers to discuss their remodeling needs. During those visits, sales personnel took measurements and gathered other information to prepare estimates. Initially, these employees were classified under code 8747 which pertains to traveling salesman, no handling or delivery of products. After the BWC adopted the NCCI classification scheme as required by R.C. 4123.29(A)(1), the classification was changed to code 8742 which pertains to outside sales persons.

{¶51} The BWC periodically reviewed its classifications and reclassified these employees into code 5605, construction estimators. This reclassification significantly increased *Craftsmen's* premiums and *Craftsmen* objected arguing that nothing had changed in its employees' job description to warrant the reclassification and that these employees did not satisfy the criteria for code 5605 because they were not exposed to construction, but, instead, went into existing homes.

{¶52} The BWC argued that code 5605 defined a construction site as a space of ground occupied or to be occupied by a building having either an existing building or a building under construction. The BWC maintained that *Craftsmen's* employees were on a

"construction site" preparing estimates and that code 5605 was the appropriate classification.

{¶53} The adjudicating committee upheld the BWC's reclassification. However, the committee made no findings of fact and merely summarized the parties' positions. That decision was affirmed on appeal to the administrator's designee.

{¶54} Craftsmen filed a mandamus complaint in this court alleging that the BWC's order was contrary to law and did not adequately explain its reasoning as required by *Noll*. This court agreed with Craftsmen's argument and, on appeal to the Supreme Court of Ohio, this court's judgment was affirmed. The BWC completely failed to explain why the classification was changed.

{¶55} The situation here differs from the situation in *Craftsmen*. In the present case, the problem with relator's argument is that it shifts the attention away from its requirement to provide accurate information to the BWC so that it can make an accurate determination of relator's premiums, and places the burden on the BWC to somehow gather all the information necessary to make an accurate determination of relator's premium. Here, the BWC never stated that the premium assessed is an accurate reflection of relator's premium. In fact, it is acknowledged that the estimate is not accurate and cannot be accurate, specifically, because relator failed to provide the information the BWC needed to make an accurate assessment. Essentially, there is no way for the BWC to identify the evidence relied upon or explain the determination.

{¶56} The BWC's findings constitute prima facie evidence of the amount of premium due from relator and relator failed to provide evidence in a timely fashion to

overcome the BWC's findings. BWC representative Richard Blake specifically addressed this issue at the hearing:

* * * [T]he audit was completed over a year and a half ago.
* * * We are looking at the period July 1, 2005 to June 30, 2007. We are in the process of auditing shortly after that with this employer. We don't remotely have the information necessary to make an informed decision. They do the best they can. The audit is completed March 4, 2008. They make their findings. And, again, I will quote from both the statute [and] from the administrative code section, and its findings shall constitute prima facie evidence of the amount of premium due from the employer. That's our duty. That's what we're supposed to do. That's what we did. We did the best that we could and these findings are now binding upon the employer because they didn't keep the records requisite as required by both the administrative code and the revised code sections that address the keeping of records.

Additionally, Mr. Korte [relator's counsel] mentioned several times, six to eight to ten times, that the decision we made was arbitrary. You could say that's true when you don't provide us with the records to make an informed decision. We have to apply these codes sections and we have to review it and we had to do the best we can and again that's binding. So in every single instance that we implement the provisions set forth here in both the revised code and the administrative code, you can make the argument that the findings are arbitrary, but the reason for that is because of what the employer hasn't given us not because of any failing on our part. He also indicated that there was no explanation a couple of times and then he summed it up with the Craftsmen case.

* * *

* * * I would just indicated [sic] that the Craftsmen case has to do with us journalizing things so that it's understandable to an employer in the final order that you and the adjudicating committee might issue - - well, we don't even have those final orders out, so you couldn't basically fail to meet your obligation when you haven't even journalized it. I suspect due to the promulgation set forth in the Craftsmen case that when it's all set and done Mr. Korte will understand the basis

of your [September 8, 2009] decision. I am not worried in the least that we are going to fail to live up to the criteria set forth in the Craftsmen case. So in summation[,] this audit was completed in early '08 based on the '05 – '07 audit period. We did the best we could because the employer didn't provide us with the things that we were supposed to receive. We did exactly what we were supposed to by virtue of the chaos that was created by the employer. What we did was not arbitrary. It's a little late now to surface with all this material which our auditors and our people haven't even seen and then to argue that we are just arbitrary and giving no explanation for what we are doing and then to argue the Craftsmen case that has to do with the way we journalize orders.

{¶57} In the final order, the administrator's designee affirmed the order of the adjudicating committee explaining as follows:

* * * It is incumbent upon the employer to maintain complete payroll records and to make such records available for inspection by the Bureau. See Revised Code 4123.24 and Ohio Administrative Code 4122-17-17 [sic]. The employer failed to carry out its obligation under this statute and related rule. Because of this failure, the Bureau made good faith efforts to assign manual classifications and determine premiums based on the incomplete information made available to it by the employer. Under R.C. 4123.24, the results of such efforts are prima facie evidence of the amount of premium due from the employer. The employer did not provide sufficient evidence to rebut the prima facie case that resulted from the Bureau's good faith efforts to assign manual classifications and determine premiums based on the incomplete information provided by the employer.

{¶58} The magistrate finds that relator has not demonstrated that the BWC's final order violates the requirements of *Noll* and *Craftsmen*.

{¶59} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that it has a clear legal right and that the BWC has a clear legal duty to conduct a new audit simply because relator has now (18 months later) finally provided the

