[Cite as *State ex rel. Bodine, Carr, Perry, L.L.C. v. Ohio Bur. of Workers' Comp.*, 2009-Ohio-3234.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Bodine, Carr, Perry, LLC f/k/a Jas Manufacturing, LLC, et al.,	:	
Relators,	:	
v.	:	No. 08AP-294
Ohio Bureau of Workers' Compensation,	:	(REGULAR CALENDAR)
Respondent.	:	

D E C I S I O N

Rendered on June 30, 2009

Millisor & Nobil Co., L.P.A., Daniel P. O'Brien, *Michael J. Reidy,* and *Nicole H. Farley*, for relator Bodine, Carr, Perry, LLC, f/k/a JAS Manufacturing, LLC.

Wegman, Hessler & Vanderburg, and *Antoinette F. Gideon*, for relators Riley Enterprises, LLC and PCF Services, LLC.

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

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

McGRATH, J.

{¶1} Relators, Bodine, Carr, Perry, LLC f/k/a JAS Manufacturing, LLC, Riley Enterprises, LLC, and PCF Services, LLC, filed this original action requesting that this court issue a writ of mandamus ordering respondent, Ohio Bureau of Workers'

Compensation ("BWC"), to vacate its order finding JAS Manufacturing, LLC ("New JAS") as continuing the business previously operated by JAS Manufacturing Inc. ("Old JAS") resulting in a transfer of Old JAS' workers' compensation experience to New JAS.

{¶2} This matter was referred to a magistrate of this court pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals.[1] The magistrate examined the evidence and on September 29, 2008, issued a decision, including findings of fact and conclusions of law, which is appended to this decision. Therein, the magistrate concluded the BWC did not abuse its discretion in concluding that New JAS was a "successor in interest" to Old JAS and in transferring the experience rating of Old JAS to New JAS. Therefore, the magistrate recommended that this court deny the requested writ of mandamus.

{¶3} Relator Bodine, Carr, Perry, LLC f/k/a JAS Manufacturing, LLC has filed the following two objections to the magistrate's decision:

> 1. The Magistrate Erred in Failing to Apply the Holding in [*State ex rel.*]*Valley Roofing* [*LLC v. Ohio Bur. of Workers' Comp*, Franklin App. No. 07AP-181, 2007-Ohio-6277], to the Instant Case.
>
> 2. The Magistrate Erred in Holding that the BWC did not Abuse its Discretion in Concluding that New JAS was a "Successor in Interest" to Old JAS.

{¶4} No party has filed objections to the magistrate's findings of fact, and upon an independent review of the same, we adopt them as our own. Even so, a brief recitation of those facts is proper at this juncture.

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[1] On June 20, 2008, the magistrate issued a decision recommending that this court grant BWC's motion for judgment on the pleadings because relators had an adequate remedy at law through a pending protest action. Objections were filed to the magistrate's decision. Said objections, however, were rendered moot pursuant to the magistrate's order of July 15, 2008, and subsequent proceedings.

{¶5} Old JAS filed for bankruptcy in 2002 and its assets were acquired by the bank. New JAS acquired from the bank certain assets of Old JAS and began operations. As part of the process of obtaining workers' compensation coverage, the BWC transferred Old JAS's workers' compensation experience to New JAS based upon the BWC's finding that New JAS was continuing the business previously operated by Old JAS, and as such, was a successor in interest. New JAS objected and the matter eventually came before this court as a mandamus action.

{¶6} The BWC argued that prior precedent, specifically, *Crosset v. Conrad* (2000), 87 Ohio St.3d 467, 2000-Ohio-464, was not applicable in an instance such as this that concerns the transfer of rating experience to a successor. Instead, according to the BWC, *Crosset* applied to the transfer of contractual retrospective claims costs from a prior company to a successor.

{¶7} This issue, however, was recently put to rest by the Supreme Court of Ohio in *State ex rel. Valley Roofing, LLC v. Ohio Bur. of Workers' Comp.*, __ Ohio St.3d. __, 2009-Ohio-2684 (Slip Opinion). In *Valley Roofing*, this court held that because Valley purchased the prior company's assets from the bank in possession of those assets, and because the prior company was not a party to the purchase agreement, then Valley was not a "successor in interest" as defined by R.C. 4123.32(D) for workers' compensation purposes. Therefore, Valley should not have had the prior company's claims experience transferred to it. The Supreme Court of Ohio affirmed this court's decision. As stated by the *Valley Roofing* court:

> A successor in interest, under R.C. 4123.32(C), assumes "in proportion to the extent of the transfer, * * * the [prior] employer's account and shall continue the payment of all

> contributions due under this chapter." One element of this account is the experience rating, which factors into an employer's merit rating for workers' compensation premium purposes.
>
> We have defined successor in interest, for workers' compensation purposes, as a "transferee of a business in whole or in part." *State ex rel. Lake Erie Constr. Co. v. Indus. Comm.* (1991), 62 Ohio St.3d 81, 83-84, 578 N.E.2d 458. This definition, however, does not apply if the business assets of the predecessor entity have been purchased from a bank and not directly from that employer. As we stated in *Crosset*, "the specific language of R.C. 4123.32(D) [now R.C. 4123.32(C)] * * * *i.e.,* 'employer transfers his business in whole or in part or otherwise reorganizes the business,' is plain and unambiguous. The language of the statute clearly refers to a voluntary act of the employer and not the involuntary transfer of the employer's business through an intermediary bank." *Crosset*, 87 Ohio St.3d at 471, 721 N.E.2d 986.

Id. at ¶4-5.

{¶8} Because Valley did not purchase the prior company's assets from the prior company but, rather, acquired them from an intermediary bank, the Supreme Court of Ohio held that "[u]nder *Crosset*, *Lake Erie's* definition of successor in interest does not apply" and Valley could not be considered to be the prior company's successor in interest and could not be assigned the prior company's experience rating. Id. at ¶6. Likewise, New JAS acquired Old JAS's assets, not from Old JAS, but from an intermediary bank. Therefore, New JAS cannot be considered Old JAS's successor in interest and cannot be assigned Old JAS's experience rating, and the BWC abused its discretion in finding otherwise.

{¶9} Accordingly, we sustain relator's objections to the magistrate's decision. As a result, we grant the writ of mandamus ordering the BWC to vacate its order finding New

JAS to be a successor in interest to Old JAS and to determine the experience rating of New JAS without considering the prior experience rating of Old JAS.

Objections sustained; writ of mandamus granted.

SADLER and TYACK, JJ., concur.

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Bodine, Carr, Perry, LLC f/k/a Jas Manufacturing, LLC,	:	
Relator,	:	
v.	:	No. 08AP-294
Ohio Bureau of Workers' Compensation,	:	(REGULAR CALENDAR)
Respondent.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered September 29, 2008

Millisor & Nobil Co., L.P.A., Michael J. Reidy and *Nicole H. Farley*, for relator Bodine, Carr, Perry, LLC, f/k/a JAS Manufacturing, LLC.

Wegman, Hessler & Vanderburg, and *Antoinette F. Gideon*, for relators Riley Enterprises, LLC and PCF Services, LLC.

Nancy H. Rogers, Attorney General, and *Stephen D. Plymale*, for respondent.

IN MANDAMUS

{¶10} Relators, Bodine, Carr, Perry, LLC f/k/a JAS Manufacturing, LLC, Riley Enterprises, LLC and PCF Services, LLC, filed an original action requesting that this court issue a writ of mandamus ordering respondent, Ohio Bureau of Workers' Compensation

("BWC"), to vacate its order finding JAS Manufacturing, LLC ("New JAS") as continuing the business previously operated by JAS Manufacturing Inc. ("Old JAS") resulting in a transfer of Old JAS' workers' compensation experience to New JAS.

Findings of Fact:

{¶11} 1. JAS Manufacturing Inc. (Old JAS) filed for bankruptcy in June 2002.

{¶12} 2. The assets of Old JAS were acquired by the bank.

{¶13} 3. Relator, Bodine, Carr, Perry, LLC, formerly known as JAS Manufacturing, LLC (New JAS) acquired certain assets of Old JAS.

{¶14} 4. New JAS leases the building and some of the equipment of Old JAS from Patriot Equipment Company ("Patriot") which purchased the building and certain equipment from the bank.

{¶15} 5. New JAS is operating out of the same building as Old JAS did and continues to display the company name of Old JAS on its signage.

{¶16} 6. By September 2003, New JAS had hired all four of the former employees of Old JAS.

{¶17} 7. The BWC transferred Old JAS' workers' compensation experience to New JAS based upon a finding that New JAS was continuing the business previously operated by Old JAS.

{¶18} 8. New JAS filed a protest and, by order mailed November 27, 2006, the adjudicating committee upheld the BWC's finding that New JAS was a successor to the business of Old JAS and transferring Old JAS' experience to New JAS. In that order, the adjudicating committee noted the following: (a) representatives of the BWC made two on-site visits to New JAS; (b) New JAS was operating at Old JAS' former location; (c) the

same or similar equipment was being used; (d) most of the employees were the same; (e) both businesses performed machining and fabrication under a virtually identical name; and (f) the president of Old JAS is employed by New JAS.

{¶19} 9. New JAS appealed.

{¶20} 10. While the appeal was pending, New JAS entered into an agreement of purchase and sale of its assets with buyers including Riley Enterprises, LLC ("Riley Enterprises") and PCF Services, LLC ("PCF Services").

{¶21} 11. New JAS lost its appeal and the finding that New JAS was a successor to the business of Old JAS was upheld.

{¶22} 12. The BWC began billing the new company, including Riley Enterprises and PCF Services.

{¶23} 13. Riley Enterprises and/or PCF Services filed a protest with the BWC on September 14, 2007, arguing that they were not liable because the BWC had erred in transferring experience from Old JAS to New JAS.

{¶24} 14. On April 9, 2008, Bodine, Carr, Perry, LLC, formerly known as JAS Manufacturing, LLC (New JAS), Riley Enterprises and PCF Services filed the instant mandamus action in this court.

{¶25} 15. On April 10, 2008, Riley Enterprises and PCF Services asked the BWC to stay their protest proceedings while this mandamus action was pending.

{¶26} 16. On May 21, 2008, the BWC filed a motion in this court for judgment on the pleadings asserting that Riley Enterprises and PCF Services had not exhausted their administrative remedies inasmuch as Riley Enterprises and PCF Services had a protest

pending with the BWC concerning the same matter and issues raised in this mandamus action.

{¶27} 17. On June 4, 2008, Riley Enterprises and PCF Services filed a brief in opposition, attached certain documents, and requested that this court convert the BWC's motion to one for summary judgment.

{¶28} 18. On June 10, 2008, the BWC filed a memorandum in reply arguing that Riley Enterprises and PCF Services' additional exhibits did not change the fact that Riley Enterprises and PCF Services had failed to present an issue which was ripe for adjudication because they had not pursued their administrative remedies.

{¶29} 19. On June 20, 2008, the magistrate issued a decision granting the motion of the BWC and dismissing Riley Enterprises and PCF Services as parties to this action.

{¶30} 20. The matter remains pending with New JAS as relator and is currently before the magistrate at this time.

Conclusions of Law:

{¶31} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28.

{¶32} For the reasons that follow, it is this magistrate's decision that this court should deny a writ of mandamus in the instant case.

{¶33} R.C. 4123.32, formerly R.C. 4123.32(D), states in part:

> The administrator of workers' compensation, with the advice and consent of the bureau of workers' compensation board of directors, shall adopt rules with respect to the collection, maintenance, and disbursements of the state insurance fund including all of the following:
>
> * * *
>
> (C) Such special rules as the administrator considers necessary to safeguard the fund and that are just in the circumstances, covering the rates to be applied where one employer takes over the occupation or industry of another or where an employer first makes application for state insurance, and the administrator may require that if any employer transfers a business in whole or in part or otherwise reorganizes the business, the successor in interest shall assume, in proportion to the extent of the transfer, as determined by the administrator, the employer's account and shall continue the payment of all contributions due under this chapter[.]

{¶34} Ohio Adm.Code 4123-17-02(B) is captioned "Succeeding employers—experience" and states in part:

> (1) Where one legal entity, not having coverage in the most recent experience period, wholly succeeds another legal entity in the operation of a business, his or its rate shall be based on the predecessor's experience within the most recent experience period.
>
> (2) Where a legal entity having an established coverage or having had experience in the most recent experience period wholly succeeds one or more legal entities having established coverage or having had experience in the most recent experience period and at least one of the entities involved has a merit rating experience, the experience of all the involved entities shall be combined to establish the rate of the successor.
>
> (3) Where a legal entity succeeds in the operation of a portion of a business of one or more legal entities having an established coverage or having had experience in the most recent experience period, the successor's rate shall be based on the predecessor's experience within the most

> recent experience period, pertaining to the portion of the business acquired by the successor.

{¶35} Several cases are pertinent to the issue presented here. The first is *State ex rel. Lake Erie Constr. Co. v. Indus. Comm.* (1991), 62 Ohio St.3d 81. In that case, the Paul E. Bleile Company ("Bleile") incorporated in 1957, constructed highway guardrails, installed signs and landscaped roadways. Lake Erie Construction ("Lake Erie") performed similar work.

{¶36} In April 1983, Bleile's Board of Directors decided to cease competitive biding on government contracts as of June 1, 1983. The board's minutes indicated they were negotiating to sell Bleile's tools and equipment to Lake Erie and that Lake Erie had already agreed to continue the employment of all Bleile employees, to assume Bleile's leases, and to purchase its inventory and equipment. The minutes also indicated there were plans for Lake Erie to continue the Bleile profit-sharing plan.

{¶37} Bleile stopped competing for new projects as planned. Approximately three weeks into Bleile's final construction project, five Bleile employees died in a plane crash en route to the construction site. Ohio workers' compensation death claims were allowed on behalf of the deceased. Bleile's workers' compensation premium rates increased substantially as a result. Bleile formerly dissolved in 1986.

{¶38} In May 1987, after completion of an audit, the BWC recommended that Bleile's experience rating be combined with Lake Erie's. The BWC adjudicating committee adopted the recommendation and Lake Erie unsuccessfully appealed to the commission. Lake Erie filed a complaint in mandamus in this court. This court denied the writ and Lake Erie appealed as of right to the Supreme Court of Ohio.

{¶39} The *Lake Erie* court stated:

> Appellant [Lake Erie] proposes that (1) it is not Bleile's successor in interest, and (2) it does not meet the common-law criteria for successor liability assumption and, therefore, cannot assume Bleile's rate experience. We disagree.
>
> The current controversy centers on the definition of "successor in interest." Appellees define the term by the statutory language that precedes it—successor in interest being the transferee of a "business in whole or in part." Appellant responds that R.C. 4123.32 does not define the term and, therefore, under R.C. 1.49, the court must adopt a common-law definition. This argument fails.
>
> We find no evidence in either R.C. 4123.32(D) or Ohio Adm.Code 4121-7-02(B) that "successor in interest" is intended to be the term of art that appellant claims. Both sections imply that a successor in interest, for workers' compensation purposes, is simply a transferee of a business in whole or in part. Presumably, the General Assembly would have expressly set forth a more specialized meaning if that was its intent. Contrary to appellant's representation, there is no need to look beyond these provisions.

Id. at 83-84.

{¶40} Years later, a similar case came through this court and then was appealed to the Supreme Court of Ohio. *State ex rel. Crosset Co., Inc. v. Conrad* (Nov. 7, 1996), Franklin App. No. 95APD10-1300; *State ex rel. Crosset Co., Inc. v. Conrad* (2000), 87 Ohio St.3d 467. In the *Crosset* case, Old Crosset was a member of the state insurance fund and obtained workers' compensation coverage for its employees. In 1990, Old Crosset submitted an application to the BWC to participate in a retrospective-rating plan. The BWC approved the application.

{¶41} In 1993, Old Crosset was forced to cease operations of its business when the banks foreclosed on the company's assets. On June 12, 1993, an asset sale

agreement was executed between the banks and New Crosset. Old Crosset was not a party to this agreement and New Crosset continued in the same business and continued to use Old Crosset's name for its business.

{¶42} In July 1993, New Crosset filed an application with the BWC for workers' compensation coverage. The BWC conducted an audit and found that Old Crosset ceased operating on June 12, 1993 when they were foreclosed by their banks. The auditor concluded that all of Old Crosset's assets and operations were sold to New Crosset and transferred Old Crosset's claims experience to New Crosset. The BWC also determined that New Crosset was responsible for Old Crosset's retrospective-rating plan obligations.

{¶43} New Crosset filed a mandamus action in this court seeking a writ of mandamus ordering the BWC to find that New Crosset was not responsible for any costs incurred under the retrospective-rating plan. New Crosset did not challenge the BWC's determination that Old Crosset's claims experience properly transferred to New Crosset.[2]

{¶44} In considering the matter, this court considered R.C. 4123.32 as well as Ohio Adm.Code 4123-17-51(F) which still provides as follows:

> (F) Successor: entity not having coverage Predecessor: retrospective-rated
>
> When an entity not having coverage wholly succeeds a retrospective-rated entity, the experience of the predecessor shall be transferred to the successor-employer effective as of the actual date of succession. The successor remains liable for any and all open retrospective-rated premium or other charges associated with the predecessor. The successor entity will become retrospective-rated as of the date of succession until the end of the policy year, with the

[2] The fact that New Crosset did not challenge the BWC's transfer of Old Crosset's claims experience is an important fact to keep in mind.

> same plan parameters chosen by the predecessor risk. The adjustment for combinations in the experience rating system will follow the same rules that are in effect as of the date of succession.

{¶45} As above indicated, Ohio Adm.Code 4123-17-51(F) specifically provided that the successor employer remained liable for any and all open retrospective-rated premium or other charges associated with the predecessor. Upon review of the facts, this court concluded that the issue was whether New Crosset had "wholly succeeded" Old Crosset. If so, then New Crosset would be liable under Ohio Adm.Code 4123-17-51(F). Because this determination had not been made by the BWC, this court granted a limited writ vacating the BWC's order and directing the BWC to reevaluate New Crosset's liability in accordance with R.C. 4123.32 and, if applicable, Ohio Adm.Code 4123-17-51.

{¶46} Both New Crosset and the BWC appealed this court's decision. The Supreme Court of Ohio capsulized this court's decision as follows:

> On October 10, 1995, New Crosset filed a complaint in the Franklin County Court of Appeals requesting that a writ of mandamus issue vacating the order of the Bureau and compelling the Bureau to find that New Crosset is not responsible for the retrospective-rating claims costs incurred by Old Crosset. The court of appeals concluded that the Bureau had abused its discretion when it declared that New Crosset was liable for the *entire* amount of Old Crosset's outstanding retrospective-rating claims costs. The court of appeals instead found that New Crosset had only partially succeeded Old Crosset, and thus granted a limited writ of mandamus vacating the order of the Bureau and ordering the Bureau to reassess New Crosset's liability based on a partial succession.

Id. at 470. (Emphasis sic.)

{¶47} The Supreme Court of Ohio framed the issue before it as follows:

> The issue presented for our review is whether a corporation that purchases the foreclosed assets of another corporation

> through an intermediary bank may be held liable for the outstanding workers' compensation claims costs incurred during the predecessor's participation in a retrospective-rating plan. * * *

Id. at 471.

{¶48} The parties made the following arguments:

> New Crosset urges that *Lake Erie* is inapplicable to the instant matter, since the issue under consideration therein involved risk *experience* ratings and not a retrospective-rating premium plan, two concepts that New Crosset contends are irreconcilable. In contrast, the Bureau argues that the court's decision in *Lake Erie* did not hinge on the type of rating involved and urges that we apply the definition of "successor in interest" set forth therein. The Bureau contends that New Crosset fits the definition of "successor in interest" espoused in *Lake Erie* because New Crosset is merely a transferee of Old Crosset's business.

Id. at 473. (Emphasis sic.)

{¶49} The court concluded that there was "a distinct and fundamental difference between the transfer of ratings based upon a predecessor's claims experience and holding a successor company liable for claims due that the predecessor itself promised to pay under a retrospective-rating plan." Id. at 474.

{¶50} Thereafter, the court noted that R.C. 4123.32(D), now R.C. 4123.32(C), conferred two distinct types of role making power on the BWC. First, the BWC is to adopt rules establishing which workers' compensation premium rates apply when one employer takes over the industry of another. Second, the BWC is to adopt rules establishing who should assume payments due on an employer's account after he transfers the business, in whole or in part, or otherwise reorganizes the business. The court went on to hold that the law espoused in Lake Erie continued to be properly applied for purposes of

transferring or combining the experience ratings of employers. However, the court found that this rationale was irrelevant in a retrospective-rating plan. Further, the court went on to note that there was no transfer between Old Crosset and New Crosset, no agreement or negotiations between the two, and no opportunity for New Crosset, through the intermediary bank, to determine the claims obligations of Old Crosset. Id. As such, the court found that New Crosset could not be labeled a "successor in interest" as contemplated by Lake Erie and R.C. 4123.32.

{¶51} Following the Supreme Court of Ohio's decision in Crosset, emphasis was placed on the court's distinction between a transfer of Company A directly to Company B and a transfer of Company A to a bank and then from a bank to Company B. Thereafter, when challenging the BWC's transfer of Company A's claims experience to Company B, parties before this court have argued that the determination hinges exclusively on whether the transfer is direct from A to B or indirect from A to the bank and then to B.

{¶52} For example, in State ex rel. Valley Roofing, LLC v. Ohio Bur. of Workers' Comp., Franklin App. No. 07AP-181, 2007-Ohio-6277, the parties exclusively argued that the case turned exclusively upon the applicability of Crosset to the facts presented. In that case, Valley Roofing, LLC ("Valley Roofing") sought a writ of mandamus ordering the BWC to vacate its decision finding that Valley Roofing was a "successor in interest" to Tech Valley Contracting, Inc. ("Tech Valley"), pursuant to R.C. 4123.32 and the Lake Erie case, and ordering the BWC to find that Valley Roofing was not a "successor in interest" to Tech Valley for workers' compensation purposes. Tech Valley defaulted on obligations to its financial lender, PNC Bank. On April 24, 2003, Valley Roofing was formed as a limited liability company. On April 29, 2003, PNC Bank sent a letter to Tech Valley

confirming that PNC Bank had taken possession of the equipment, accounts, work-in-progress and general intangibles such as contract rights in accordance with the terms of a security agreement executed by Tech Valley due to its default. The same day, PNC Bank entered into an asset purchase agreement with Valley Roofing providing that Valley Roofing would purchase, acquire, and assume from PNC Bank free and clear of any liabilities, all rights, title and interest to the enumerated assets of Tech Valley.

{¶53} In June 2004, Valley Roofing was notified by the BWC that the claims experience rating of Tech Valley was being transferred to Valley Roofing based on the following: Valley Roofing was operating out of the same facility from which Tech Valley operated; the existing contracts were transferred to Valley Roofing by the bank and were serviced by Valley Roofing, and several of the same employees who were employees with Tech Valley were now employed by Valley Roofing.

{¶54} Valley Roofing filed a protest; however, the adjudicating committee denied the protest finding that the sale from PNC Bank to Valley Roofing was more than a mere sale of assets and that it constituted a transfer of a business under the Lake Erie decision.

{¶55} Valley Roofing filed a mandamus action in this court asserting that the BWC had failed to consider the implications of the Crosset case. The BWC argued that the Crosset case should not be applied. This court determined that the case turned upon the applicability of Crosset to the facts presented by Valley Roofing's situation. Specifically, this court stated:

> * * * The Supreme Court of Ohio decided the Crosset case based upon the failure of a direct transfer of the assets between the companies involved and construed R.C.

> 4123.32 to require a direct transfer for a successor in interest relationship to exist. * * *
>
> * * *
>
> Tech Valley did not transfer a business. Tech Valley lost a business to a bank as the result of a security agreement. Valley Roofing bought the assets from the bank.

Id. at ¶5-6.

{¶56} As above indicated, all the arguments in the Valley Roofing case focused on the applicability of *Crosset* and the Supreme Court of Ohio's distinction between a direct transfer of assets between two companies and the acquisition of Company A's assets from a bank following bankruptcy proceedings.

{¶57} At this time, New JAS argues that the Supreme Court's decision in *Crosset* should apply whether the issue involves a transfer of liability under a retrospective-rating plan or the transfer of an employer's claims experience. On the other hand, the BWC argues that the *Crosset* case did not address the issue presented here and, in *Crosset*, the Supreme Court emphasized the distinction between the BWC's regulation of *rates* and the BWC's regulation of *payments*.

{¶58} Upon careful consideration and realizing that this argument was not made in the *Valley Roofing* case, the magistrate believes that the BWC is correct to argue that the *Crosset* decision does not apply to the transfer of an employer's claims experience even though Company A's assets are acquired by a bank and then Company B acquires those assets from the bank. An employer's claims experience rating is used by the BWC to calculate the company's workers' compensation premiums. In determining an employer's claims experience, the BWC considers claims made in prior years. When a

new company is formed, and that company has not been in business and does not have a claims experience rating and, thereafter, that new company acquires the assets of a formerly established company, the "successor in interest" principles are applicable to determine whether the claims experience rating of the old company should be transferred to the new company. In the present case, New JAS is not being asked to pay the obligations of Old JAS pursuant to a retrospective-rating plan to which Old JAS agreed in the past. Instead, the BWC determined that New JAS was a "successor in interest" so that the claims experience of Old JAS should transfer to New JAS.

{¶59} Since the rationale from the *Crosset* case should not apply to the transfer of an employer's experience rating, the magistrate likewise finds that the BWC did not abuse its discretion in actually concluding that New JAS was a "successor in interest" to Old JAS. New JAS is operating its business out of the same building that Old JAS did. The fact that New JAS is leasing that building and does not own the building is not dispositive. As this court stated in *State ex rel. Lynnhaven XIV, LLC v. Conrad, Admr., Bur. of Workers' Comp.*, Franklin App. No. 02AP-36, 2003-Ohio-825, neither R.C. 4123.32 as supplemented by Ohio Adm.Code 4123-17-02(B), nor any case interpreting the same, instructs or holds that there can be no finding of a successor in interest when the facility is leased rather than purchased. The decision to negotiate a lease rather than a sale is not critical or determinative of the successorship issue. The transferee, in this case New JAS, assumed possession and control over the facility. Further, as the BWC noted, New JAS has kept the same signage as Old JAS. Further, New JAS currently employs all four former employees of Old JAS and, one of the major principles of Old JAS is still directly involved in the operations of New JAS.

{¶60} Relator argues that the facts warrant a finding that New JAS is not a successor in interest to Old JAS.

{¶61} The commission identified the following factors in support of its order: (1) New JAS is operating out of the same location as Old JAS; (2) New JAS purchased the building; (3) New JAS uses the same or similar equipment; (4) most of the employees remain the same; (5) both companies perform machining and fabrication; (6) New JAS essentially kept Old JAS' name; (7) the president of Old JAS is employed by New JAS; and (8) the operations of the two companies are essentially the same. Relator argues the commission's findings as to factors 2, 3, 4, 5 and 8 are incorrect. Relator's arguments will be addressed in the following paragraphs.

{¶62} Factor number 2: the commission stated that New JAS purchased the building formerly owned by Old JAS. Relator contends that it leases the building from Patriot. Given this court's decision in *Lynnhaven*, the magistrate finds that this misstatement is not material.

{¶63} Factor number 3: the commission found that New JAS uses the same or similar equipment which had been used by Old JAS. Relator points to exhibit E, a letter from Robert R. Carr, President of New JAS. In that letter, Carr indicates that Patriot bought some of Old JAS' equipment and that New JAS leases that equipment from Patriot. This may or may not be accurate. According to exhibit G, statement of facts prepared by Michael Demyan, New JAS is using the same equipment. In exhibit I, New JAS' position statement, relator states that only 20 percent of Old JAS' equipment is being used by New JAS. The statement promises to attach documentation identifying all equipment Old JAS had in 2001 (189 pieces) and documentation identifying all equipment

New JAS had in 2005 (41 from Old JAS). Unfortunately, this documentation was not included in the record. Relator argues that exhibit K establishes its position; however, this magistrate disagrees. Exhibit K is an email from Brian Zachetti who conducted an inventory of New JAS' equipment. That email provides:

> The following is a list of equipment at your facility. This list was developed by conducting a cursory review and does include most of the major equipment present during the inventory visit. All of the equipment observed is mainly used in the fabricating and machining processes.
>
> Numerous Lathes, Lathe Mounted Welders, Lifting Magnets, Chains, Slings, Burn Table, (2) 20 Ton Cranes, Several Floor Welders, Horizontal & Vertical Band Saws, Powered Industrial Trucks, Mills, Drill Presses, Grinders, and numerous hand tools. * * *

{¶64} Nothing in this email indicates what equipment from Old JAS is being used by New JAS.

{¶65} Factor number 4: the commission stated that most of the employees remain the same. In exhibit I (position statement) relator indicates that Old JAS had four employees while New JAS has over 50 employees. However, exhibit I specifically names the initial employees hired by New JAS in 2001 (8) and indicates that four more were hired in 2003 (one was Daniel Perry, formerly with Old JAS). Further, exhibit A contains a request from the BWC and a response from New JAS regarding payroll from January 1 through June 25, 2002. In a response purportedly from Daniel Perry, New JAS had only five employees who were all classified as Clerical Office Employees. Exhibit B is an application for Ohio workers' compensation coverage for New JAS. This document requested "Payroll by operation type," and the response was Millwright 3 and Clerical 4.

{¶66} Factor number 5: the commission found that both companies performed machining and fabrication. Relator argues that Old JAS was classified as Pipe or Tube Manufacturing-Iron or Steel (3028) and Machine Shop (3632) while New JAS is classified as Machinery or Equipment Erection or Repair (3724). (See Exhibit I – Position Statement.) The record also contains other descriptions. In exhibit B (application for coverage), relator's primary services are identified as millwrights labor, general construction, and office duties. Exhibit E (Carr letter) does identify Old JAS as related to machining while New JAS is related to fabrication.

{¶67} Factor number 8: the commission found that the operations of the two companies are essentially the same. Relator argues that New JAS does not have any of the former clients of Old JAS because New JAS' operations are different. See, also, exhibit L, a pre-hearing order prior to an on-site visit by Darrel Springer. However, the adjudicating order specifically indicates that New JAS did retain some of Old JAS' customers but sought different types of clients.

{¶68} As above indicated, although relator contends that the evidence establishes that most of the factors found by the commission are incorrect, the record contains conflicting "evidence" related to those factors. It appears that this decision may have been a "close call" by the commission, but relator has not met its burden of establishing that the commission abused its discretion. As such, the magistrate finds that the BWC did not abuse its discretion in finding that New JAS was a "successor in interest" to Old JAS and transferring the experience rating of Old JAS to New JAS.

{¶69} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the BWC abused its discretion and this court should deny relator's request for a writ of mandamus.

/s/ *Stephanie Bisca Brooks*
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).