

committee, and to issue a new order reversing the adjudicating committee's denial of relator's protest of an auditor's finding that relator was liable for unpaid premiums.

{¶2} This matter was referred to a magistrate of this court pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, including findings of fact and conclusions of law which is appended to this decision, recommending that this court deny relator's request for a writ of mandamus. Relator has filed objections to the magistrate's decision.

{¶3} Relator first contends that the BWC failed to explain its reasoning in its final order issued April 30, 2009. Specifically, relator challenges language in the final order of the BWC stating: "Based on the testimony and other evidence presented at the hearing, the Administrator's Designee affirms the decision, findings, and rationale set forth in the order of the Adjudicating Committee." Relator maintains that the final order does not meet the requirement that the BWC explain its decisions, in contravention of *State ex rel. Ochs v. Indus. Comm.*, 85 Ohio St.3d 674, 1999-Ohio-294 (holding that the BWC has a duty to explain its decisions in accordance with the dictates of *State ex rel. Mitchell v. Robbins & Myers, Inc.* (1983), 6 Ohio St.3d 481, and *State ex rel. Noll v. Indus Comm.* (1991), 57 Ohio St.3d 203).

{¶4} Relator's argument is not well-taken. The Supreme Court of Ohio has previously held: "Where a regional board adopts the reasoning and decision of the district hearing officer and the district hearing officer's order satisfies *Mitchell*, we consider the regional board's order in compliance as well." *State ex rel. DeMint v. Indus. Comm.* (1990), 49 Ohio St.3d 19, 20. See also *State ex rel. Gen. Motors Corp. v. Indus. Comm.*, 66 Ohio St.3d 26, 28, 1993-Ohio-196 ("In adopting and affirming the regional board's

order without citing conflicting evidence or evidence not relied on by the board, the staff hearing officers are deemed to have adopted the evidence named by the board").

{¶5} In the instant case, the order of the BWC affirmed the "rationale set forth in the order of the Adjudicating Committee." The order of the adjudicating committee adequately set forth its reasoning as well as the evidence it relied upon, and, under such circumstances, the BWC was not required to restate that evidence.

{¶6} In his second objection, relator argues the magistrate erred by not finding that the BWC abused its discretion when it "summarily assessed premiums" against relator for the period of September 1, 1999 through December 31, 2005. Relator argues that the BWC erred in determining that sufficient criteria were present such that all individuals who worked for relator during portions of the audit period should be picked up for premium purposes for the entire audit period. Relator points to language from the auditor's report stating that "[a]ll individuals expensed on * * * past tax returns were picked up for premium purposes."

{¶7} In response, the BWC argues that the premium determined to be due was based solely upon amounts paid to the various individuals during the period of the audit; more specifically, the "payroll" amount (used in calculating an employer's premium) was derived from the relator's tax returns as reflected under "costs of labor" on the Form 1099s supplied. Thus, according to the BWC, if one or more of the individuals at issue did not work for relator during a specific period of time, no wages would be shown, and, correspondingly, no premium would be due.

{¶8} We initially note that, while relator's written protest to the audit challenged the auditor's finding that relator "employed" various individuals (as opposed to utilizing

independent contractors) over the relevant time period, relator did not raise before the adjudicating committee the issue as to the number of individuals assessed for premium purposes. In general, "a party's failure to raise an issue at the administrative level precludes the party from raising it before a reviewing court." *State ex rel. Schlegel v. Stykemain Pontiac Buick GMC, Ltd.*, 120 Ohio St.3d 43, 2008-Ohio-5303, ¶17, citing *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 1997-Ohio-71.

{¶9} Further, despite relator's focus on the "number of individuals" assessed for premium purposes, we agree with the BWC's argument that the record belies relator's contention that premiums were assessed for periods during which individuals did not work for relator. In its statement of facts to the adjudicating committee, the regional audit supervisor noted that the "only records" the employer made available for the audit were federal tax returns and 1099s. The audit supervisor further noted that "[t]he auditor used the 'cost of labor' amount from Mr. Hoffman's Schedule C's and divided in half to determine six month earnings for premium purposes." Upon review, we find no abuse of discretion.

{¶10} In his final objection, relator asserts the magistrate erred in not finding the BWC abused its discretion in determining that at least ten of the enumerated criteria set forth under R.C. 4123.01(A)(1)(c) were satisfied so as to render relator an employer of contracted individuals over the audit period. Relator essentially raises the same arguments presented to the magistrate, disputing the evidence in the record with respect to the statutory criteria. Upon review, however, we find that the magistrate properly considered the criteria and determined there was some evidence to support the BWC's order affirming the determination of the adjudicating committee that the auditor correctly

classified individuals working for relator as employees rather than independent contractors.

{¶11} Based upon this court's independent review, pursuant to Civ.R. 53, we overrule relator's objections and adopt the magistrate's decision as our own, including the findings of fact and conclusions of law. In accordance with the magistrate's recommendation, we deny the requested writ of mandamus.

Objections overruled; writ denied.

SADLER and FRENCH, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Christopher C. Hoffman,	:	
Relator,	:	
v.	:	No. 09AP-738
Marsha Ryan, Administrator, Bureau of Workers' Compensation,	:	(REGULAR CALENDAR)
Respondent.	:	
	:	

MAGISTRATE'S DECISION

Rendered on February 26, 2010

Donaldson Law Offices, L.P.A., and Joshua A. Dunkle, for relator.

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

IN MANDAMUS

{¶12} Relator, Christopher C. Hoffman, has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Ohio Bureau of Workers' Compensation ("BWC"), to grant relator's protest and to perform a new audit of relator's business for the period of coverage in question.

Findings of Fact:

{¶13} 1. Relator is involved in the business of repairing and replacing roofs on residential homes, doing business as "Hoffman Roofing."

{¶14} 2. Relator had originally applied for workers' compensation coverage in February 1999. That policy lapsed for failure to pay premiums on September 1, 1999. No payroll reports were ever submitted and no premium was paid to the BWC by relator.

{¶15} 3. Chad Kitts, Sr., filed a claim for living maintenance wage loss benefits.

{¶16} 4. Based upon information received regarding Kitts' claim, the BWC undertook an audit of relator's roofing business in late 2005 for the period September 1, 1999 through December 31, 2005.

{¶17} 5. As a result of the audit, the BWC determined that the men who worked for relator were employees for whom premiums were due. The following relevant findings were made in the audit:

Risk had 7 other individuals that worked for risk in 2005. All were paid cash. Risk would provide all tools (air compressor, air guns, ladders, and dump truck). All materials were provided by Hunt Home Improvement. All alleged independent contractors were paid via verbal agreement which varied from job to job. No set amount. Risk would look at the job and give a price, so much for tear off, so much for wood replacement, so much for shingling, so much for clean up and so on. The employer did not have any proof of insurance (BWC or liability) for any of the alleged subs. nor did any of the alleged sub contractors invoice for work done. On many occasions[,] their [sic] were 2-3 individuals working on the same job at any given time. The policy holder did indeed control the manor [sic] and means in which the jobs were done. Risk did admit to having to pick up and drop off some of the individuals that worked for him as they did not have means of transportation (at times).

{¶18} 6. Relator protested the BWC's audit findings in April 2006. In his protest, relator indicated that, at most, six of the criteria under R.C. 4123.01(A)(1)(c) applied.

Specifically:

Criteria #3: * * *

"The person's services are integrated into the regular functioning of the other contracting party[.]"

* * *

Criteria #5: * * *

"The person is hired, supervised, or paid by the other contracting party[.]"

* * *

Criteria #15: * * *

"The person is provided with the facilities used to perform services[.]"

* * *

Criteria #16: * * *

"The person does not realize a profit or suffer a loss as a result of the services provided[.]"

* * *

Criteria #19: * * *

"The other contracting party has a right to discharge the person[.]"

* * *

Criteria #20: * * *

"The person has the right to end the relationship with the other contracting party without incurring liability pursuant to an employment contract or agreement."

{¶19} 7. Relator also submitted affidavits for 12 employees in an effort to establish that they were independent contractors and not employees. One affidavit was signed in each of the following years: 2000, 2001, 2002, and 2003. Five of the affidavits were signed in 2004 and one of the affidavits was signed in 2005. Each of the affidavits provided as follows:

* * * I accept the responsibility of a sub-contractor for Hoffman Roofing. By signing this agreement[,] I will accept all financial responsibility for paying my wage tax to include Federal, State, Counties, and city taxes. I also accept all responsibility for all medical insurance including eye, dental, and workers[] compensation coverage and expense. I release Hoffman Roofing and any affiliations of any of the above taxes, payments, or claims.

{¶20} 8. A hearing was held before the adjudicating committee March 5, 2008. At that time, relator submitted additional records including "sub-contractor pay sheets, 2005 1099 forms, 2006 invoices and receipts, affidavits and sub-contractor agreements." Following the hearing, the adjudicating committee denied relator's protest as follows:

* * * The Committee finds the auditor's determinations concerning the classification of the individuals working for Hoffman Roofing as employees to be correct. The workers were supervised by Hoffman or an admitted Hoffman employee, Mr. Kitts, paid regularly by Hoffman, the manner and method of services was controlled by Hoffman, there was a continuing, integrated relationship between the parties and Hoffman provided tools, job specifications and, at times, transportation necessary to complete the job. In addition, there was no showing during the audit period that the workers had independent workers' compensation coverage, worked for other employers, held themselves out to the general public as self-employed or incurred any risk of profit on loss of any particular job.

{¶21} 9. Relator appealed and the matter came before the administrator's designee on April 29, 2009. The administrator's designee affirmed the decision, findings, and rationale as set forth in the order of the adjudicating committee.

{¶22} 10. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶23} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶24} At issue here is whether the BWC abused its discretion in finding that the men who worked for relator were employees as defined in R.C. 4123.01(A)(1)(c). For the reasons that follow, it is this magistrate's decision that the BWC did not abuse its discretion and this court should deny relator's request for a writ of mandamus.

R.C. 4123.01 provides:

(A)(1) "Employee" means:

* * *

(c) Every person who performs labor or provides services pursuant to a construction contract, as defined in section 4123.79 of the Revised Code, if at least ten of the following criteria apply:

(i) The person is required to comply with instructions from the other contracting party regarding the manner or method of performing services;

(ii) The person is required by the other contracting party to have particular training;

(iii) The person's services are integrated into the regular functioning of the other contracting party;

(iv) The person is required to perform the work personally;

(v) The person is hired, supervised, or paid by the other contracting party;

(vi) A continuing relationship exists between the person and the other contracting party that contemplates continuing or recurring work even if the work is not full time;

(vii) The person's hours of work are established by the other contracting party;

(viii) The person is required to devote full time to the business of the other contracting party;

(ix) The person is required to perform the work on the premises of the other contracting party;

(x) The person is required to follow the order of work set by the other contracting party;

(xi) The person is required to make oral or written reports of progress to the other contracting party;

(xii) The person is paid for services on a regular basis such as hourly, weekly, or monthly;

(xiii) The person's expenses are paid for by the other contracting party;

(xiv) The person's tools and materials are furnished by the other contracting party;

(xv) The person is provided with the facilities used to perform services;

(xvi) The person does not realize a profit or suffer a loss as a result of the services provided;

(xvii) The person is not performing services for a number of employers at the same time;

(xviii) The person does not make the same services available to the general public;

(xix) The other contracting party has a right to discharge the person;

(xx) The person has the right to end the relationship with the other contracting party without incurring liability pursuant to an employment contract or agreement.

{¶25} Relator argues that the BWC abused its discretion by failing to explain the reasons for finding that relator's workers were employees citing *State ex rel. Ochs v. Indus. Comm.* (1999), 85 Ohio St.3d 674, and *State ex rel. Craftsmen Basement Finishing Sys., Inc. v. Ryan*, 121 Ohio St.3d 492, 2009-Ohio-1676, in support. In *Ochs*, the Supreme Court of Ohio held that the requirements of *State ex rel. Mitchell v. Robbins & Myers, Inc.* (1983), 6 Ohio St.3d 481, and *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203 applied to the BWC. In *Craftsmen*, the Supreme Court rejected the BWC's argument that, in premium-related matters, "if the bureau says something is so, it is so, and that is explanation enough." The court ordered the BWC issue orders which informed the "parties and potentially a reviewing court of the basis for the [agency's] decision." *Craftsmen* at ¶18.

{¶26} Contrary to relator's arguments, the magistrate finds that the BWC did adequately explain its reasoning here.

{¶27} As noted previously in the findings of fact, relator acknowledged that there was evidence that his workers met six of the above criteria: 3, 5, 15, 16, 19, and 20. The BWC was required to present evidence satisfying at least four additional criteria to establish that relator's workers were employees as defined in R.C. 4123.01(A)(1)(c).

{¶28} Based on a review of the auditor's report, the adjudicating committee order, and other evidence in the record, it appears that the BWC concluded that relator's workers met as many as six additional criteria: "The person is required to comply with instructions from the other contracting party regarding the manner or method of performing services"; "A continuing relationship exists between the person and the other contracting party that contemplates continuing or recurring work even if the work is not full time"; "The person is required to follow the order of work set by the other contracting party"; "The person is paid for services on a regular basis such as hourly, weekly, or monthly"; "The person's tools and materials are furnished by the other contracting party"; and "The person does not make the same services available to the general public."

{¶29} With regard to criteria "#1" and "#10," the BWC determined that the workers were required to comply with relator's instructions and follow the order of work set by relator. The BWC noted that relator hired a foreman to provide direction to the workers and check on their progress. This is some evidence in support of criteria "#1" and "#10."

{¶30} With regard to criteria "#6," the BWC determined that a continuing relationship existed between relator and many of the workers. Specifically, the BWC

found that the workers were hired repeatedly for different jobs. This is some evidence of a continuing working relationship.

{¶31} The BWC also determined that the workers were paid regularly. The evidence here is, admittedly, minimal. Part of relator's argument that the workers were independent contractors was based upon the fact that these workers all signed affidavits attesting to the fact that they were independent contractors. These workers included Kitts, whom relator admitted was actually an employee and not an independent contractor. The record indicates that the workers were all paid in cash and that records were not kept. Given that Kitts was actually an employee and not an independent contractor, and the fact that relator regularly hired the same workers, the BWC determined that they were paid regularly. Relator was unable to present any evidence that they were not paid regularly. As such, arguably, there was some evidence upon which the BWC could rely.

{¶32} The BWC also found that criteria "#14" was met. While it was determined that these workers did provide their own basic hand tools, it was also determined that relator provided air compressors, air guns, ladders, and dump trucks for the jobs that were completed. This constitutes some evidence relative to this criteria.

{¶33} Lastly, the BWC also found that criteria "#18" was met finding that these workers did not make their services available to the public. Although relator stated that the workers were free to perform jobs for other contractors or other individuals, the auditor found no evidence that any of these workers actually performed other work. There was some evidence upon which the BWC could rely. In addition, it is apparent that the

