

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State of Ohio ex rel. G&S Metal
Products Company, Inc.,

Relator,

v.

Marsha Ryan, Administrator, Ohio
Bureau of Workers' Compensation,

Respondent.

:
:
:
:
:
:

No. 09AP-387

(REGULAR CALENDAR)

D E C I S I O N

Rendered on August 17, 2010

Little Mendelson, P.C., and Christine C. Covey, for relator.

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

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶1} Relator, G&S Metal Products Company, Inc. ("relator"), filed this action seeking a writ of mandamus directing respondent, Administrator of the Ohio Bureau of Workers' Compensation ("respondent" or "BWC"), to vacate its order holding that relator must report under Manual 3400 the payroll of its employees working at jobs other than

press operators at its Cleveland facility, and to enter an order permitting relator to report that payroll under Manual 8018 instead.

{¶2} We referred this case to a magistrate of this court pursuant to Civ.R. 53 and Loc.R. 12(M). On March 4, 2010, the magistrate rendered a decision, including findings of fact and conclusions of law, denying the requested writ, which is appended hereto. Relator filed objections to the magistrate's decision, and respondent filed a memorandum contra those objections.

{¶3} Relator operates two facilities in Ohio, one in Bedford Heights and one in Cleveland. The Cleveland facility, which is the facility at issue in this case, includes a metal stamping operation for manufacturing baking pans. Other activities carried out at the Cleveland facility include a manual packaging operation, an automated packaging operation, and a warehouse order filling operation ("the non-press operations"). The non-press operations include baking pans manufactured at the facility, as well as other goods manufactured elsewhere that are brought to the Cleveland facility. About 35 of the approximately 120 full-time employees at the Cleveland facility work in the metal stamping operation.

{¶4} Relator has taken steps to separate the metal stamping operation from its other activities. Unauthorized employees are prohibited from entering the metal stamping area. All employees must access the metal stamping area to clock in and out of work, but relator ensures that the press machines are not operating during times when other employees are in the area.

{¶5} Section 35, Article II of the Ohio Constitution gives BWC the power to classify occupations according to their risk in order to set workers' compensation

premiums. To that end, BWC has created the Ohio Workers' Compensation State Fund Insurance Manual, which uses classifications established by the National Council on Compensation Insurance ("NCCI"). Prior to an audit conducted by BWC in July 2007, relator had been reporting all of the employees at the Cleveland facility under the classification number 8018, entitled "STORE: WHOLESALE NOC." This classification includes receiving bulk merchandise for repackaging. After the audit, BWC concluded that all of relator's employees at the Cleveland facility should have been reported under the classification number 3400, entitled "METAL STAMPED GOODS MFG. NOC."

{¶6} Relator filed a protest of the audit findings, arguing that it should be allowed to continue to report the employees in the Cleveland facility engaged in non-press operations under Manual 8018. BWC's adjudicating committee heard relator's protest, after which it issued an order denying the protest. In the order, the committee described the operations at the Cleveland facility, and concluded that:

[T]he employer manufactures its products at the Cleveland location, and all other operations there, such as packaging and shipping, are incidental to the manufacturing of the product. * * * Further, if there were two functions, there was no payroll separation, and it can't be split.

{¶7} Relator appealed the committee's order to the administrator's designee. After a hearing, the administrator's designee affirmed the decision by the committee. Relator then filed this action seeking a writ of mandamus directing BWC to vacate its order, and enter an order allowing relator to continue reporting the payroll of its employees at the Cleveland facility engaged in non-press operations under Manual 8018.

{¶8} Ohio courts have traditionally recognized BWC's wide range of discretion in making determinations regarding occupational classifications, deferring to BWC's expertise in matters pertaining to the setting of premiums. *State ex rel. Ohio Aluminum Industries, Inc. v. Conrad*, 97 Ohio St.3d 38, 2002-Ohio-5307. Thus, courts have issued writs of mandamus reversing BWC's occupational classification only where the classification is arbitrary, capricious or discriminatory. *State ex rel Progressive Sweeping Contrs., Inc. v. Ohio Bur. of Workers' Comp.*, 68 Ohio St.3d 393, 1994-Ohio-303. Given this high threshold, courts have been reluctant to disturb BWC's occupational classifications, even where "the employer's actual risk does not precisely correspond with the risk classification assigned." *Id.* at 396.

{¶9} The procedure for establishing occupational classifications is set forth in Ohio Adm.Code 4123-17-08(D). According to the rule, "[t]he purpose of the classification procedure is to assign the one basic classification that best describes the business of the employer[.] * * * It is the business that is classified, not the individual employments, occupations or operations within the business." An employer seeking to have more than one basic classification assigned to its business must show three things: that the operation for which the separate classification is sought would be able to exist as a separate business if the principal business ceased to exist; that the operation is located in a separate building, on a separate floor within the same building, or on the same floor physically separated from the principal business by structural partitions; and the employer must maintain proper payroll records showing the actual payroll by classification. Ohio Adm.Code 4123-17-08(D)(3)(c)(i)(a) through (c).

{¶10} In this case, relator seeks to have a separate classification for the employees at its Cleveland facility who engage in non-press operations. In its order, BWC's adjudicating committee concluded that the non-press operations carried on at the Cleveland facility, i.e., warehousing, packaging, and shipping, were merely incidental to the metal stamping operation, and that relator had failed to maintain proper payroll records regarding the operation for which relator sought the separate classification.

{¶11} In his decision, the magistrate focused only on the first requirement for a separate classification – that the employer must show that the operation for which the separate classification is sought could exist as a separate business if the principal business ceased to exist. BWC's adjudicating committee did not address, and neither of the parties made any argument regarding, the second requirement that the separate operation must be physically separated from the principal operation. The magistrate found it unnecessary to address relator's argument regarding BWC's conclusion that relator failed to maintain proper payroll records for its allegedly separate operations.

{¶12} The magistrate found that BWC's conclusion that the non-press operations at relator's Cleveland facility were incidental to the metal stamping operation constituted a conclusion that those operations could not exist as a separate business if the metal stamping operation closed. The magistrate further found that there was some evidence in the record to support this conclusion, and therefore concluded that BWC did not abuse its discretion when it determined that all employees at the Cleveland facility should be classified under Manual 3400.

{¶13} In its objections, relator disagrees with the magistrate's conclusion that there is some evidence in the record to support the conclusion that the non-press operations being conducted at the Cleveland facility could not exist as a business separate from the metal stamping operation. Relator argues that the evidence in the record actually points to the opposite conclusion – that those operations could exist as a separate business.

{¶14} The magistrate cited evidence that the non-press operations combine or batch baking pans manufactured at the Cleveland facility with other products imported from outside the facility, and concluded that this evidence showed that those operations are dependent to some degree on receiving the goods manufactured by the metal stamping operation. In its objections, relator argues that, while some of the non-press operations are devoted to the products manufactured by the metal stamping operation, a "sizeable portion" of these operations are devoted to imported products.

{¶15} This argument goes not to the presence or absence of evidence to support BWC's conclusion that the non-press operations could not exist as a separate business, but rather to the conclusion itself. In other words, the cited evidence could as easily have been used to reach the conclusion that those operations could exist as a separate business as it was to reach the conclusion that the operations could not exist as a separate business. We cannot say that BWC abused its discretion when it chose between the two competing inferences and concluded that the non-press operations could not exist as a separate business.

{¶16} In its objections, relator also argues that the magistrate erred when he accepted BWC's conclusion regarding relator's failure to maintain separate payroll for its

purportedly separate operations. However, the magistrate did not accept BWC's conclusion in this regard, finding that relator's failure to establish the ability to exist as a separate business requirement set forth in Ohio Adm.Code 4123-17-08(D)(3)(i)(a) made it unnecessary to address the remaining two rule requirements. We agree with the magistrate's conclusion that it was not necessary to address BWC's conclusion regarding the maintenance of separate payrolls in order to deny the writ requested by relator.

{¶17} Accordingly, relator's objections to the magistrate's decision are overruled. Having independently reviewed the record, we find that the magistrate has properly discerned the facts and has applied the relevant law to those facts. Therefore, we adopt the magistrate's decision as our own, and deny relator's request for a writ of mandamus.

*Objections overruled;
writ of mandamus denied.*

BROWN and FRENCH, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State of Ohio ex rel. G&S Metal	:	
Products Company, Inc.,	:	
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Relator,	:	
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v.	:	No. 09AP-387
	:	
Marsha Ryan, Administrator, Ohio	:	(REGULAR CALENDAR)
Bureau of Workers' Compensation,	:	
	:	
Respondent.	:	

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

Rendered on March 4, 2010

Little Mendelson, P.C., and Christine C. Covey, for relator.

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

IN MANDAMUS

{¶18} In this original action, relator, G&S Metal Products Company, Inc., requests a writ of mandamus ordering respondent, Administrator of the Ohio Bureau of Workers' Compensation ("bureau"), to vacate an order holding that relator must report under Manual 3400 the payroll of its employees who are employed at its Cleveland

facility at jobs other than as press operators in its metal stamping operation, and to enter an order permitting relator to report that payroll under Manual 8018.

Findings of Fact:

{¶19} 1. Relator has two facilities in Ohio. Relator operates a warehouse and distribution center at Bedford Heights, Ohio. That facility is not involved in this action. The facility involved in this action is located in Cleveland, Ohio.

{¶20} 2. Relator's Cleveland facility houses a metal stamping operation (press operation) for manufacturing baking pans. It also houses three other operations: (1) a manual packaging operation, (2) an automated packaging operation, and (3) a warehouse order filling operation.

{¶21} 3. All four of the operations at the Cleveland facility are located on the same floor of the building.

{¶22} 4. After the baking pans are stamped in the pressroom, they are moved in crates to another location at the facility for packaging.

{¶23} 5. The Cleveland facility also receives goods that are not manufactured in the pressroom, but are imported from other manufacturers in the United States or even outside this country. In the packaging operation, the imported goods are often batched or combined with products stamped in the pressroom.

{¶24} 6. Approximately 120 full-time employees work at the Cleveland facility. About 35 employees work in the press department.

{¶25} 7. Relator has endeavored to separate its pressroom stamping operations from its other operations in order to protect its warehousing, shipping, and packaging employees from the hazards of the metal stamping department. Piles or stacks of steel

are used to partition the various operations. The presses are guarded with light curtains. Aisleways and lines painted on the floor are used. Also, there are walls that help separate the various operations.

{¶26} 8. There are signs prohibiting entry into the metal stamping area by unauthorized employees. Also, relator has a longstanding work rule prohibiting entry into the metal stamping area by unauthorized employees under penalty of disciplinary action up to and including termination.

{¶27} 9. It is necessary for all employees to enter the metal stamping area to access the time clock to punch in and out for work. To reduce the hazard that non-press employees might be injured by the presses while accessing the time clock, relator uses a single shift for all its operations. After all employees have clocked in and reported to their assigned locations, a whistle sounds at the start of the shift to signal that the presses will begin. A whistle sounds three minutes prior to the end of the shift to signal the shutdown of the presses and the departure of the employees from their work areas towards the clock. Employees do not punch the clock for break periods. If an employee is late for work after the presses have begun, the late employee is escorted by his supervisor to his work station.

{¶28} 10. In July 2007, the bureau completed an audit covering the two-year period from January 1, 2005 through December 31, 2006. The audit determined that all payroll for employees at the Cleveland facility must be reported under Manual 3400 rather than under Manual 8018 as relator had been reporting.

{¶29} 11. Relator timely filed a protest of the audit findings.

{¶30} 12. On July 2, 2008, the bureau's three-member adjudicating committee heard the protest. The hearing was recorded and transcribed for the record. Thereafter, the adjudicating committee issued an order denying relator's protest. The order explains:

At the hearing the employer stated, the company has two sites. One is a warehouse operation in Bedford Heights, which is assigned manual number 8018. The other site is in Cleveland and does manufacturing, packaging, and warehousing. The Cleveland location has been assigned manual number 3400 for all workers at that location. The employer's representatives stated that manual number 8018 should be used for warehousing, packaging, and shipping operations, rather than manual number 3400. The representatives stated that the warehousing, packaging and shipping operations are separated from the metal stamping operation by structural partitions, pursuant to Ohio Administrative Code Rule 4123-17-08(D)(3)(c)(1)(b) [sic]. The structural partitions include various measures, such as the use of painted lines on the floor, movable rope barriers, aisle ways, walls, and piles of stock, as well as signs and work rules to separate the metal stamping operation from the warehousing, packaging, and shipping operations. There is no commingling of employees. The employees who clock into the metal stamping area only do so when the presses are not operating. 70% of employees are not involved in press room operations, but are involved in warehousing, packaging, and shipping. The representatives stated that only press stamping employees should be under manual number 3400.

The Bureau representative stated that this business is a manufacturing company. In the 2001 audit, BWC allowed the use of manual number 8018 for the separate Bedford Heights location. The prior audit noted that there were two operations. One operation manufactured cookie sheets and pie pans. The second operation received, repackaged and shipped imported goods. Now the employer manufactures its products at the Cleveland location, and all other operations there, such as packaging and shipping, are incidental to the manufacturing of the product. O.A.C. 4123-17-08 looks at the employer's business operations, which are manufacturing in nature, rather than packaging, and the rule does

not support the employer's position. Incidental operations are rated the same as the main operation. Further, if there were two functions, there was no payroll separation, and it can't be split. The BWC representative stated that 3400 is the proper manual number.

Given the information provided at the hearing, the Adjudicating Committee upholds the classification of 3400 for the Cleveland operation. The employer's operations are best described by this classification. The employer's chief operational pursuit is as a maker of stamped and press products. All other operations are incidental to that pursuit. Further, even if the Adjudicating Committee was convinced there were two separate operations (which it is not), the employer does not have verifiable segregated payroll records between the packing of its own goods and those that come from foreign sources.

{¶31} 13. Relator administratively appealed the July 2, 2008 order of the adjudicating committee to the administrator's designee pursuant to R.C. 4123.291.

{¶32} 14. On March 10, 2009, the administrator's designee heard relator's appeal. The hearing was recorded and transcribed for the record. Thereafter, the administrator's designee issued an order affirming the decision of the adjudicating committee.

{¶33} 15. On April 15, 2009, relator, G&S Metal Products Company, Inc., filed this mandamus action.

Conclusions of Law:

{¶34} It is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶35} In *State ex rel. Ohio Aluminum Industries, Inc. v. Conrad*, 97 Ohio St.3d 38, 2002-Ohio-5307, ¶17, the Supreme Court of Ohio decided a case involving an employer's mandamus challenge to the bureau's manual reclassification that resulted in

a higher premium to the employer. In *Ohio Aluminum*, the court set forth law applicable to the instant case:

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 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).

{¶36} More recently, in *State ex rel. RMS of Ohio, Inc. v. Ohio Bur. of Workers' Comp.*, 113 Ohio St.3d 154, 2007-Ohio-1252, ¶6-7, the court states:

We have long recognized the challenges involved in establishing premium rates for workers' compensation coverage and have repeatedly confirmed the deference due the agency in these matters. *State ex rel. Reaugh Constr. Co. v. Indus. Comm.* (1928), 119 Ohio St. 205, 209, 6 Ohio Law Abs. 694, 162 N.E. 800; *State ex rel. McHugh v. Indus. Comm.* (1942), 140 Ohio St. 143, 149, 23 O.O. 361, 42 N.E.2d 774; *State ex rel. Minutemen, Inc. v. Indus. Comm.* (1991), 62 Ohio St.3d 158, 161, 580 N.E.2d 777; *State ex rel. Progressive Sweeping Contrs., Inc. v. Ohio Bur. of Workers' Comp.* (1994), 68 Ohio St.3d 393, 395, 627 N.E.2d 550. Deference is required "in all but the most extraordinary circumstances," with judicial intervention warranted only when the agency has acted in an "arbitrary, capricious or discriminatory" manner. *Progressive Sweeping*, 68 Ohio St.3d at 395-396, 627 N.E.2d 550.

The rate-making process starts with "classif[ying] occupations or industries with respect to their degree of hazard." R.C. 4123.29(A)(1). The goal is to "assign the one basic classification that best describes the business of the employer within a state." Ohio Adm.Code 4123-17-08(D). It is an undertaking, however, in which "absolute precision * * * is often impossible." *Progressive Sweeping*, 68 Ohio St.3d at 395, 627 N.E.2d 550. Accordingly, we are "reluctant to find

an abuse of discretion merely because the employer's actual risk does not precisely correspond with the risk classification assigned." Id. at 396, 627 N.E.2d 550.

{¶37} The parties to this action have stipulated to relevant portions of the NCCI Manual Classification Codes which the bureau used in determining the manual to assign for purposes of determining the premium to be set for workers' compensation coverage.

{¶38} Because relator contends that its non-press employees should be assigned Manual 8018 rather than 3400, those two NCCI Manual descriptions shall be set forth in pertinent part:

8018

PHRASEOLOGY STORE: WHOLESALE NOC

* * *

SCOPE Store: Wholesale NOC applies to stores which are engaged in the wholesale selling of merchandise not described by a specialty wholesale store classification in the Basic Manual. * * *

* * *

* * * Wholesale operations generally include the maintenance of warehouse inventories; the physical assembling, sorting and grading of goods, the breaking of bulk quantities and repackaging into smaller lots; and the promoting of sales through utilization of an outside sales force.

Other types of operations assigned to this classification are:

* * *

2. Packing - - receiving bulk merchandise for repackaging

* * *

3400

PHRASEOLOGY METAL STAMPED GOODS MFG. NOC

* * *

SCOPE Code 3400 is intended primarily for insureds whose operations involve extensive stamping, punching or blanking of sheet metal as well as shearing and braking operations. * * *

Code 3400 is applicable to insureds that engage in the mass production of small metal articles such as cookie sheets, license plates, mailboxes, metal toys, etc. * * *

{¶39} Ohio Adm.Code 4123-17-08 is captioned: "Classifications according to National Council on Compensation Insurance." Ohio Adm.Code 4123-17-08(A) is captioned: "Classification system." Thereunder, Ohio Adm.Code 4123-17-08(A)(2) states: "Subject to certain exceptions, it is the business of the employer within a state that is classified, not separate employments, occupations or operations within the business."

{¶40} Ohio Adm.Code 4123-17-08(D) is captioned: "Classification procedures." Thereunder, the rule provides:

The purpose of the classification procedure is to assign the one basic classification that best describes the business of the employer within a state. Subject to certain exceptions described in this rule, each classification includes all the various types of labor found in a business.

It is the business that is classified, not the individual employments, occupations or operations within the business.

Certain exceptions apply and are noted below.

* * *

(3) Assignment of more than one basic classification.

More than one basic classification may be assigned to an insured who meets conditions a, b, or c below. * * *

* * *

(c) The insured conducts more than one operation in a state.

(i) For purposes of this rule, an insured is conducting more than one operation in a state if portions of the insured's operations in that state are not encompassed by the classification applicable to the insured's principal business. To qualify for a separate classification, the insured's additional operation must:

(a) Be able to exist as a separate business if the insured's principal business in the state ceased to exist.

(b) Be located in a separate building, or on a separate floor in the same building, or on the same floor physically separated from the principal business by structural partitions. Employees engaged in the principal business must be protected from the operating hazards of the separate additional operations.

(c) Maintain proper payroll records. Refer to (F)(2) of this rule on maintenance of proper payroll records.

{¶41} Ohio Adm.Code 4123-17-08(F) is captioned: "Payroll assignment: interchange of labor." Thereunder, the rule provides:

Some employees may perform duties directly related to more than one properly assigned classification according to paragraph (D)(3) of this rule. Their payroll may be divided among the properly assigned classifications provided that:

(1) The classifications can be properly assigned to the employer according to the rules of the classification system, and

(2) The employer maintains proper payroll records, which show the actual payroll by classification for that individual employee.

(a) Records must reflect actual time spent working within each job classification and an average hourly wage comparable to the wage rates for such employees within the employer's industry.

(b) Estimated or percentage allocation of payroll is not permitted.

Note: if payroll records do not show the actual payroll applicable to each classification, the entire payroll of the individual employee must be assigned to the highest rated classification that represents any part of his or her work.

{¶42} Before the adjudicating committee and the administrator's designee, relator claimed that it qualified for the assignment of more than one basic classification for its employees of the Cleveland facility. That is, relator claimed that it qualified for an exception to the general rule that one basic classification is assigned to a business. Relator claimed an exception under Ohio Adm.Code 4123-17-08(D)(3)(c).

{¶43} To prove entitlement to the exception at Ohio Adm.Code 4123-17-08(D)(3)(c), relator had to show that: (1) its non-press operations would be able to exist as a separate business if the press operations ceased to exist, (2) that the press operations located on the same floor as the non-press operations are physically separated so as to protect employees from the hazards of the pressroom, and (3) that relator has maintained its payroll in compliance with Ohio Adm.Code 4123-17-08(F).

{¶44} Notably, neither the adjudicating committee nor the administrator's designee made a finding as to whether relator had shown compliance with Ohio Adm.Code 4123-17-08(D)(3)(c)(i)(b) regarding physical separation of the operations by structural partitions. Rather, the adjudicating committee and administrator's designee found that relator had failed to meet the other two requirements found at Ohio Adm.Code 4123-17-08(D)(3)(c)(i)(a) and (c).

{¶45} To reiterate, Ohio Adm.Code 4123-17-08(D)(3)(c)(i)(a) states: "Be able to exist as a separate business if the insured's principal business in the state ceased to exist."

{¶46} The adjudicating committee addressed the above-quoted provision when it held that relator's "chief operational pursuit is as a maker of stamped and press products. All other operations are incidental to that pursuit." While the word "incidental" does not appear at Ohio Adm.Code 4123-17-08(D)(3)(c)(i)(a), it is clear the bureau's conclusion that relator's packaging and shipping operations are "incidental" to the manufacturing operation is, in effect, a finding that the packaging and shipping operations are not able to exist as a business if the manufacturing operation ceased to exist.

{¶47} There is clearly some evidence in the record to support the bureau's conclusion that the packaging and shipping operations at the Cleveland facility could not exist as a separate business if relator's press operations ceased to exist.

{¶48} That the packaging operation combines or batches the imported goods with the baking pans stamped at the pressroom is indeed some evidence that the packaging operation and its related shipping operation could not exist as a viable business if the press operation ceased to exist. Clearly, the packaging and shipping operations are dependent to some degree on receiving the goods manufactured at the pressroom. The bureau was not required to accept relator's assertion that its packaging and shipping operations could continue to exist as a separate business without the pressroom operation.

{¶49} That the bureau's finding under Ohio Adm.Code 4123-17-08(D)(3)(c)(i)(a) is supported by some evidence ends the inquiry here, and relator's request for a writ of mandamus must be denied.

{¶50} Accordingly, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/s/ Kenneth W. Macke

KENNETH W. MACKE
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).