

[Cite as *V & A Risk Servs. v. Ohio Bur. of Workers' Comp.*, 2010-Ohio-6118.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

V & A Risk Services et al.,	:	
Plaintiffs-Appellees,	:	
v.	:	No. 09AP-919 (C.P.C. No. 08CVH06-8080)
State of Ohio, Bureau of Workers' Compensation et al.,	:	(REGULAR CALENDAR)
Defendants-Appellants.	:	
V & A Risk Services et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 10AP-393 (C.P.C. No. 08CVH06-8080)
State of Ohio, Bureau of Workers' Compensation et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

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D E C I S I O N

Rendered on December 14, 2010

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*Stefanski & Associates LLC, and Janice T. O'Halloran*, for plaintiffs V & A Risk Services and Safety Counsel of Northwest Ohio.

*Wiles, Boyle, Burkholder, Bringardner Co., L.P.A., J. Miles Gibson, Michael L. Close and Dale D. Cook*, for defendants Total Utility Clearance and Noxious Vegetation Control, Inc.

*Richard Cordray*, Attorney General, *Gerald H. Waterman* and *Elise Porter*, for defendants Bureau of Workers' Compensation and *Marsha Ryan*, Administrator.

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APPEALS from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Defendants, Ohio Bureau of Worker's Compensation and its administrator (collectively "BWC"), and plaintiffs, V&A Risk Services and Safety Council of Northwest Ohio (collectively "V&A"), filed these consolidated appeals seeking reversal of judgments by the Franklin County Court of Common Pleas.

{¶2} The following facts are germane to this appeal. V&A administers a workers' compensation risk group. This risk group consists of numerous employers that have joined together to spread the risk regarding their workers' compensation insurance, as well as to obtain discounts on premiums. The dispute between the parties involves the BWC's transfer of risk to an employer within the group, which resulted in a charge of 1.4 million dollars being levied against V&A.

{¶3} V&A disagreed with the BWC's decision and filed a complaint in declaratory judgment. In its second amended complaint, V&A requested that the trial court declare that the BWC improperly classified one of the employers as a professional employer organization. V&A also alleged that the BWC failed to provide V&A with an adequate remedy.

{¶4} The parties moved for summary judgment. Before addressing the parties' arguments, however, it addressed a procedural argument raised by the BWC. The trial court explained:

The Bureau argues in its motion that the decision to not classify Total as a professional employer organization (hereinafter "PEO") is a discretionary function of the Bureau and therefore, cannot be challenged via a declaratory judgment action. It argues that its decision can only be challenged via an action in mandamus. The Bureau cites numerous cases to support this contention. In response, Plaintiffs cite numerous cases to supporting the contention that they can challenge the Bureau's decision via a

declaratory judgment action. Ultimately, the Bureau's argument is of little consequence.

Regardless of how the Court looks at the case before it, via the lens of a declaratory judgment action or that of a mandamus action, its decision remains the same. Since this is so, the Court is going to assume that the Bureau is correct in its assertion and review this matter under the standard for a mandamus action. Due to the fact that all of the issues in this case have been thoroughly briefed, the Court sees no reason to require Plaintiffs to jump through procedural hoops by forcing them to file yet another Amended Complaint in mandamus.

(Aug. 18, 2009 Decision, at 4-5.) The trial court then proceeded to review the matter under the standard for a mandamus action and granted summary judgment in favor of V&A.

{¶5} In case No. 09AP-919, the BWC raises the following two assignments of error:

**Assignment of error 1:**

The court below erred in exercising jurisdiction over this case, because the challenged act here is a discretionary and non-appealable decision of the Ohio Bureau of Workers' Compensation, and the case is one for declaratory judgment rather than mandamus.

**Assignment of error 2:**

The court below erred in finding that the Ohio Bureau of Workers' Compensation abused its discretion in transferring part of the risk experience of Noxious Vegetation Control, Inc. to the account of its partial successor Total Utility Clearance, Inc.

{¶6} In case No. 10AP-393, V&A raises the following two assignments of error:

I. THE TRIAL COURT ERRED IN ITS FAILURE TO COMPLY WITH ORC 2335.39 AND IN ITS REFUSAL TO GRANT ATTORNEYS' FEES SINCE V & A IS AN ELIGIBLE PREVAILING PARTY AGAINST THE STATE.

## II. THE TRIAL COURT ERRED IN ITS REFUSAL TO AWARD ATTORNEYS' FEES UNDER ORC 2721.16.

{¶7} Because disposition of the BWC's first assignment of error resolves both appeals, we will begin with that analysis.

{¶8} In its first assignment of error, the BWC argues that "the challenged act here is a discretionary decision of the [BWC], and because it is not appealable, V&A's sole vehicle to challenge the decision is through an action for mandamus, not one for declaratory judgment." (BWC's brief at 13.) Upon review, we find there is merit to this argument insofar as how the trial court dealt with the issue.

{¶9} In an attempt to short circuit what the trial court believed was form over substance, the trial court assumed that the BWC was correct (that V&A's complaint should have been brought as an action in mandamus) and proceeded to review the matter under that standard. While we can appreciate the common sense approach taken by the trial court, the decision, as it stands, however, does not contain any analysis for this court to provide a meaningful appellate review. In other words, we can review the analysis undertaken by the court, but we cannot review a conclusion based on an assumption.

{¶10} Further, assuming without deciding that V&A's action should have been brought as an action in mandamus, proceeding to review the matter as such was not proper because V&A's complaint did not comply with R.C. 2731.04. Cf. *Blankenship v. Blackwell*, 103 Ohio St.3d 567, 2004-Ohio-5596, ¶36 ("If, however, a respondent in a mandamus action raises [an] R.C. 2731.04 defect and relators fail to seek leave to amend their complaint to comply with R.C. 2731.04, the mandamus action must be dismissed"); *Litigade, Inc. v. Custodian of Records for Lakewood Police Dept.*, 75 Ohio St.3d 508,

1996-Ohio-205; *State ex rel. Huntington Ins. Agency v. Duryee*, 73 Ohio St.3d 530, 532-33, 1995-Ohio-337.

{¶11} Accordingly, we sustain the BWC's first assignment of error, rendering moot its second assignment of error, as well as V&A's two assignments of error. The judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings in accordance with law and consistent with this decision.

*Judgment reversed; cause remanded.*

SADLER and CONNOR, JJ., concur.

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