

[Cite as *State ex rel. RKI, Inc. v. Ryan*, 2011-Ohio-1026.]

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

The State of Ohio ex rel. RKI, Inc.,	:	
Relator,	:	
v.	:	No. 09AP-1026
Marsha Ryan, Administrator, Ohio Bureau of Workers' Compensation,	:	(REGULAR CALENDAR)
Respondent.	:	
	:	

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D E C I S I O N

Rendered on March 8, 2011

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*Meyers, Roman, Friedberg & Lewis*, and *Steve P. Dlott*, for relator.

*Michael DeWine*, Attorney General, and *Gerald H. Waterman*, for respondent.

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IN MANDAMUS

SADLER, J.

{¶1} Relator, RKI, Inc., commenced this original action requesting this court to issue a writ of mandamus ordering respondent Administrator, Ohio Bureau of Workers' Compensation, to vacate the May 22, 2009 supplemental order of the administrator's designee that affirmed the adjudicating committee order assigning National Council of Compensation Insurance ("NCCI") Code 3113 and to enter a new order that instead assigns NCCI Code 3629 for the reporting of relator's payroll.

{¶2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who considered the action on its merits and issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate discussed this court's previous order in *State ex rel. RKI, Inc. v. Ryan*, 10th Dist. No. 08AP-106, 2008-Ohio-4900, in which we granted a writ ordering the Ohio Bureau of Workers' Compensation ("BWC") to "vacate its order reclassifying relator and to enter a new order consistent with this court's decision and the requirements set forth in *State ex rel. Ochs v. Indus. Comm.*, 85 Ohio St.3d 674, 1999-Ohio-294." (Sept. 25, 2008 order.) A supplemental order was subsequently issued by the BWC on May 22, 2009. The magistrate determined that the relator's objection pertaining to the testimony of the BWC's regional auditing supervisor, C.D. Goellnitz, was without merit and further determined that the supplemental order complied with this court's previous writ. Therefore, the magistrate recommended the court deny relator's request for a writ of mandamus.

{¶3} No objections have been filed to the magistrate's decision.

{¶4} Finding no error of law or other defect in the magistrate's decision, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law therein. In accordance with the magistrate's decision, the requested writ of mandamus is denied.

*Writ of mandamus denied.*

BRYANT, P.J., and TYACK, J., concur.

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**A P P E N D I X**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State of Ohio ex rel. RKI, Inc.,	:	
	:	
Relator,	:	
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v.	:	No. 09AP-1026
	:	
Marsha Ryan, Administrator, Ohio	:	(REGULAR CALENDAR)
Bureau of Workers' Compensation,	:	
	:	
Respondent.	:	
	:	

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

Rendered on December 7, 2010

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*Meyers, Roman, Friedberg & Lewis, and Steve P. Dlott, for relator.*

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

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IN MANDAMUS

{¶5} In this original action, relator, RKI, Inc. ("RKI" or "relator"), requests a writ of mandamus ordering respondent, Administrator, Ohio Bureau of Workers' Compensation ("administrator" or "bureau"), to vacate the May 22, 2009 supplemental order of the administrator's designee that affirms the adjudicating committee order

assigning National Council of Compensation Insurance ("NCCI") Code 3113 and to enter a new order that instead assigns NCCI Code 3629 for the reporting of relator's payroll.

Findings of Fact:

{¶6} 1. In December 1999, bureau auditor Ed Grau conducted an audit prompting the bureau to assign Code 3629 "Precision Machined Parts Mfg Noc." In a bureau letter dated January 18, 2000, RKI was informed that the assignment was effective July 1, 1997.

{¶7} 2. In November 2006, bureau auditor Harry Yoder conducted an on-site audit for the two-year period beginning July 1, 2004 through June 30, 2006. In his report dated December 19, 2006, Yoder discontinued the assignment of Code 3629 and substituted Code 3113 "Tool Mfg. – Not Drop or Machine Forged – NOC." Yoder's report explains:

Corporation is a roll forming mills machine manufacturer & a manufacturer of roll forming machine parts. The roll forming machine parts are precision machined parts that are used in roll forming mill machines. Machinists use CNC machines, polishers, and lathe to manufacture the roll forming parts that are held to tolerances of .001 inches or closer. At the same location, the company's machine assembler manufacture the roll forming mills machines. All parts for the roll forming machines are purchased. The roll forming parts that the company manufactures are used in the machines. The roll forming parts that go into the roll forming machines amount to about 2% of the total manufacturing of the roll forming parts with the other 98% of the parts being sold to customers. Employee segregation is maintained between employees who manufacture the roll forming machine & parts. The employees who manufacture the roll forming machine also install & service/repair the machines at customers' locations. Delivery is by common carrier. Traveling salespersons promote the company's business.

The office staff performs the office administration, accounting, engineering & human resources. \* \* \*

Audit was generated from Kay Spicer, because she thought that this company had employees with a PEO named employers choice plus. However the correct company with the PEO is R.K Inc and not this company. Per Kay Spicer, manual 3113 is the correct manual for manufacturing the roll machine parts, therefore manual 3629 is being discontinued. \* \* \* A prior audit was performed on the company by auditor, Ed Grau on 12/8/99, and he determined that manual 3629 was correct for the roll forming machine parts manufacturing, but he wasn't aware of the fact that the parts are tools & not machine parts. In addition, the company had not purchased the machine manufacturing operation, when he performed his audit, therefore the change in manuals are being made prospective. \* \* \*

(Sic passim.)

{¶8} 3. By letter dated January 5, 2007, RKI Executive Vice-President/Owner

Dennis Langer initiated a protest of the 2006 audit:

During a previous BWC audit it was determined that our shop employees were to be reclassified as manual classification 3629 – Precision Machined Parts Mfg (see attached BWC letter dated 01/18/2000). It is our opinion that 3629 accurately reflects our operations due to the machining of final tolerances of .001 or closer. RKI Inc. produces custom-designed precision machined parts which are ultimately assembled on our customer's equipment.

\* \* \*

We are requesting that the audit findings be voided and RKI Inc.'s manual classifications remain the same as ruled per the January 18, 2000 audit.

{¶9} 4. In an internal memorandum dated January 31, 2007, bureau regional auditing supervisor C. D. Goellnitz ("Goellnitz") wrote to Paul Watson, secretary of the adjudicating committee. Captioned "Statement of Facts," the memorandum states:

An audit was conducted on subject employer for the period of July 1, 2004 through June 30, 2006.

The audit found the risk to be improperly classified. Since it appears that the assignment of manual 3629 was made in error by the BWC in 2000 the audit was made no findings with adjustment of classifications made effective 7/1/06.

It appears that the risk is currently involved in two operations. They manufacture precision tooling used in the roll forming industry or the tube and pipe industry (Manual 3113). The other operation consists of the design, engineering, manufacturing or rebuilding of machinery used in roll forming. These operations were rated as 3507 and 3724.

Bureau rule 4123-17-08 requires the BWC to follow the NCCI classification system. The rule states that it is the business of the employer within the state that is classified, not the separate employments occupations or operations within the business.

Manual 3629 is an NOC classification. Its' description is listed as precision machine parts mfg. NOC. Within the scopes it states. Code 3629 operations are designated as "not otherwise classified" (NOC). These NOC operations shall apply to an insured only when no other classification more specifically describes the insured's operations. It goes on to list 15 Classification which are somewhat related to the nature of 3629 which need to be to consider before placing the operations under 3629. Included in this list is tool manufacturing.

It is auditing position that the risk business involves the making of tooling and related equipment and following rule 4123-17-08 feels that Manuals 3113, 3507 and 3724 best describe the operations being performed and thus are the correct manuals for the employers operations.

(Sic passim.)

{¶10} 5. Following an April 12, 2007 hearing, the bureau's three member adjudicating committee issued an order denying relator's protest:

**The facts of this case are as follows:** BWC audited the employer for the period from July 1, 2004 to June 30, 2006. The auditor found that the bureau had improperly assigned M3629 (PRECISION MACHINED PARTS MFG.) and changed that classification to M3113 (TOOL MFG.—NOT DROP OR MACHINE FORGED-NOC) effective July 1, 2007.

The employer is protesting the change to 3113 for the rolling mills.

\* \* \*

The employer's representative indicated that the employer is disputing the reclassification of its operations from Code 3629 to Code 3113. The employer makes parts for the rolling mills. The representative stated that the use of Codes 3507 (CONSTRUCTION OR AGRICULTURAL MACHINERY MFG.) and 3724 (MACHINERY OR EQUIPMENT ERECTION OR REPAIR NOC & DRIVERS) are not in dispute at this time. The representative stated that the employer makes precision parts for rolling mills and therefore Code 3629 should apply. The representative emphasized that the employer was not a tool and dies shop and does not manufacture any tools. The employer's representative stated that 3629 was not assigned in error, but was properly assigned. The employer's representative stated that the employer manufactures custom parts for its customers.

The bureau's representative stated the bureau had made a mistake in originally assigning Code 3629 to the employer's operations and therefore assigned 3113 prospectively. The BWC representative noted that the employer's brochure describing its products was carefully reviewed by BWC personnel. The representative stated that the bureau is required to follow NCCI classifications. The representative stated that there are specific criteria under 3629, including that the operations not be described by any other classification. The BWC representative stated that the employer is manufacturing tools for use in production, rather than parts.

Based upon the information submitted and the testimony elicited at the hearing, it is the decision of the Adjudicating Committee to deny the employer's protest. While the

Committee admits reasonable minds could differ concerning whether Code 3629 or 3113 is the proper classification for this employer's operations, the Committee defers to the expertise of the auditor.

(Emphases sic.)

{¶11} 6. Relator administratively appealed the April 12, 2007 adjudicating committee order to the administrator's designee pursuant to R.C. 4123.291.

{¶12} 7. On November 13, 2007, the administrator's designee heard relator's appeal. The hearing was recorded and transcribed for the record.

{¶13} 8. On December 6, 2007, the administrator's designee mailed an order affirming the adjudicating committee's order:

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

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.

{¶14} 9. Thereafter, relator filed in this court a mandamus action (case No. 08AP-106), which was assigned to a magistrate.

{¶15} 10. On June 18, 2008, the magistrate, in case No. 08AP-106, issued her magistrate's decision to which objections were filed by the bureau (BWC).

{¶16} 11. On September 25, 2008, this court issued its decision in *State ex rel. RKI, Inc. v. Ryan*, 10th Dist. No. 08AP-106, 2008-Ohio-4900, ¶2-6:

\* \* \* BWC filed objections to the magistrate's decision, asserting that the magistrate erred in concluding (1) that the BWC's order did not provide an explanation why the manual classification was being changed, and (2) that BWC should be ordered to change relator's classification back to Code 3629.

We agree with the magistrate that BWC must explain its decisions. *State ex rel. Ochs v. Indus. Comm.*, 85 Ohio St.3d 674, 675, 1999-Ohio-294. Here, the BWC order describes relator's position and the auditor's position. As the order indicates, the auditor stated that a code change was necessary because the auditor who originally assigned Code 3629 to relator's operations did so in error. In the auditor's view, Code 3629 would only be appropriate if the operations were not described in any other classification. But, here, relator "is manufacturing tools for use in production, rather than parts." Without providing its own analysis, BWC then defers to the auditor's reasoning.

We do not agree with the magistrate's conclusion that the order is completely lacking in explanation or that no reasons exist to change relator's classification. Instead, we conclude that the order lacks the succinct explanation the Supreme Court of Ohio has required. Specifically, while the order appropriately describes the evidence relied upon, it fails to briefly explain the reasoning for its decision. Importantly, it does not identify the criteria applicable to Code 3113 or explain why the evidence supports reclassification consistent with those criteria. As we determined in *State ex rel. Craftsmen Basement Finishing Sys., Inc. v. Mabe*, Franklin App. No. 06AP-1201, 2007-Ohio-5919, ¶4, "[t]his failure is particularly significant because the bureau's order acknowledges that the reclassification was a close call." On these grounds, we overrule BWC's first objection.

Nevertheless, we agree with BWC's assertion that, having concluded that BWC failed to meet the *Ochs* standard, the appropriate remedy is to grant a limited writ requiring BWC to comply with *Ochs*. See *Craftsmen Basement Finishing* at ¶5 (granting limited writ for purpose of entering a new order). Therefore, we sustain BWC's second objection.

Following an independent review of this matter, we overrule in part and sustain in part BWC's objections. We adopt the magistrate's findings of fact as our own and adopt the conclusions of law consistent with this decision. We grant a writ of mandamus ordering BWC to vacate its order reclassifying relator and to enter a new order consistent with this decision and the requirements set forth in *Ochs*.

{¶17} 12. This court's judgment entry filed September 25, 2008 states:

For the reasons stated in the decision of this court rendered herein on September 25, 2008, the objections to the decision of the magistrate are overruled in part and sustained in part, and it is the judgment and order of this court that a writ of mandamus issue against respondent Ohio Bureau of Workers' Compensation to vacate its order reclassifying relator and to enter a new order consistent with this court's decision and the requirements set forth in *State ex rel. Ochs v. Indus. Comm.*, 85 Ohio St.3d 674, 1999-Ohio-294. \* \* \*

{¶18} 13. Pursuant to this court's writ of mandamus, the administrator's designee mailed, on June 3, 2009, a so-called "Supplement Order" dated May 22, 2009.

The order states:

\* \* \* The Court determined that the Bureau's Adjudicating Committee order in this matter was deficient in that it did not adequately explain the basis for the Bureau's decision to deny the employer's protest. The case was remanded to the Bureau for the issuance of an order which explains the basis of the Bureau's decision.

\* \* \*

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

Ohio Revised Code 4123.29(A)(1) requires that the Bureau "[c]lassify occupations and industries with respect to their degree of hazard and determine the risks of the different classes according to the categories the national council on compensation insurance establishes that are applicable to employers in this state."

The National Council of Compensation Insurance (NCCI) Scopes Manual categorizes manual code 3629 as a "not otherwise classified" classification. This generally means that it is a classification of last resort to be used only if there is no other category which describes an employer's operation. The NCCI Scopes Manual specifically states that manual 3629 applies to an employer's operation only when "... [t]he machines parts manufactured by the risk are not described by another classification". The NCCI Scopes Manual entry for manual code 3629 directly refers to manual code 3113 as

a potential alternative for manual code 3629. However, manual code 3113 is also generally categorized as a "not otherwise classified" classification.

The most succinct description of the employer's operation is found on page 13 of the Transcript of the November 13, 2007 Proceedings in this matter, lines 14-18: "This is what this employer's—what we view is their main business. They are making these parts, tools, dies, whatever you want to call them, to take a piece of metal and shape it to a specification of the customer."

The NCCI Scopes Manual entry for manual code 3113 states that it "is applied to insureds that manufacture tools, dies, jigs and machine fixtures..."

Based on the foregoing and the record and decision below, the Administrator's designee concludes that the employer's operations are best described by NCCI manual code 3113. Therefore, the Administrator's designee affirms the Adjudicating Committee's findings and decision.

{¶19} 14. On November 2, 2009, relator, RKI, Inc., filed this mandamus action.

#### Conclusions of Law:

{¶20} Two main issues are presented: (1) whether reliance on Goellnitz's hearing testimony constitutes an abuse of discretion by the administrator's designee, and (2) whether the supplemental order of the administrator's designee complies with this court's writ of mandamus.

{¶21} The magistrate finds: (1) reliance on Goellnitz's testimony did not constitute an abuse of discretion, and (2) the supplemental order of the administrator's designee complies with this court's writ of mandamus.

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

{¶23} Analysis begins with some observations regarding the two NCCI manual classification codes at issue. Thus, the official NCCI descriptions of Codes 3113 and 3629 are set forth in pertinent part:

3113

PHRASEOLOGY TOOL MFG.—NOT DROP OR MACHINE FORGED—NOC

SCOPE Code 3113, a "not otherwise classified" classification, is applied to insureds that manufacture tools, dies, jigs and machine fixtures which are not drop or machine forged. Forging refers to the heating of metal in a furnace or hearth and beating or hammering the heated metal into the desired shape. Hammering or shaping contemplated by Code 3113 involves shaping by hand without the use of drop hammers or other machinery. Refer to Code 3114 for operations that involve the use of large drop hammers or rams, which may use air or hydraulic or steam pressure to exert the desired hammering force. Code 3113 contemplates risks that manufacture tools, dies, jigs and machine fixtures for others. It is not applicable to insureds that have separate departments which manufacture these products for use by the insured in the manufacture of products classified to codes other than Code 3113. After forging the products contemplated by Code 3113, the Code 3113 risk will use typical machine shop equipment to finish the forged goods. The process may involve cutting, turning, shaping, heat-treating, drilling, milling, grinding, tapping and finishing by assembling, polishing, buffing, painting or plating. Code 3113 contemplates but is not limited to the manufacture of plumbers' hand tools, small machine tools (such as cutters, end mills, taps, reams, and counter sinks), twist drills, chisel bits, wrenches, watchmakers' tools, gauges (not air or steam gauges), levels and similar non-forged tools. Additionally, the manufacture of non-forged metal molds for the plastic industry is assigned to Code 3113. Certain Code 3113 operations are designated as "not otherwise classified" (NOC). These NOC operations shall apply to an insured only when no other classification more specifically describes the insured's operations. \* \* \*

\* \* \*

## 3629

PHRASEOLOGY PRECISION MACHINED PARTS MFG. NOC. Applies only to risks where the plans or specifications require that not less than 50% of all machining operations performed by the risk shall be held to final tolerances of .001 inches or closer. Shall not be assigned to a risk engaged in operations described by another classification unless the operations subject to 3629 are conducted as a separate and distinct business.

SCOPE Code 3629, a "not otherwise classified" classification, applies to a risk which meets the following three conditions:

[One] The machined parts manufactured by the risk are not described by another classification. Examples of operations described by another classification are indicated in the NOC summary below.

[Two] Fifty percent or more of all machining operations performed by the risk are held to tolerances of .001 inches or closer. This 50% criterion is intended to recognize that very few insureds within the precision machined parts manufacturing industry are engaged solely in precision machining and that a precision machine shop may engage in general machining work as described by Code 3632—Machine Shop NOC, as well as Code 3629 activities.

[Three] If a risk is engaged in a multiple operation enterprise and one of the enterprises would ordinarily be assigned to Code 3629, the enterprise must be conducted as a separate and distinct business for Code 3629 to be applicable to it.

It should also be emphasized that this classification is intended to apply to precision machined parts manufacturing, not precision machine manufacturing.

As the machining operations assigned to Code 3629 involve close tolerances, the operations usually will require employees who are highly skilled toolmakers.

Additionally, Code 3629 risks will generally engage in significant amounts of both inspection and quality control work.

Code 3629 operations are designated as "not otherwise classified" (NOC). These NOC operations shall apply to an insured only when no other classification more specifically describes the insured's operations. The following is a representative list of classifications somewhat related in nature to Code 3629 operations that are not assigned to Code 3629:

\* \* \*

3113 Tool Mfg.—Not Drop or Machine Forged.

{¶24} The magistrate observes that Code 3629 captioned "Precision Machined Parts Mfg. NOC." repeatedly refers to "machined parts" throughout its description.

{¶25} On the other hand, Code 3113 captioned "Tool Mfg.—Not Drop or Machine Forged—NOC" states in its description that it "is applied to insureds that manufacture tools, dies, jigs and machine fixtures." It can be further observed that Code 3113 does not use the word "parts" anywhere in its description.

{¶26} Can tools or dies also be considered "machined parts" within the meaning of Code 3629? Relator argues: "RKI cannot be described as a manufacturer of 'parts' and a manufacturer of 'tools, dies, jugs [sic] and machine fixtures.' " (Relator's brief, at 9; emphasis sic.) To the extent that relator suggests that "tools and dies" cannot also be "machined parts," or that the terms are mutually exclusive, relator is incorrect.

{¶27} At the November 13, 2007 hearing, Goellnitz testified that, in his view, relator should not be assigned Code 3629, because relator cannot meet the first of the three conditions set forth in Code 3629, which, as earlier noted, requires that "[t]he machined parts manufactured by the risk are not described by another classification."

{¶28} In that regard, Goellnitz testified:

Where we have the problem and what this hearing is really going to get around is whether or not this operation they have falls under another classification.

Now, basically, to make sure the Administrator's designee and everyone understands, what we are talking about here are the toolings or the dies used in a large machine that basically take a piece of metal that is fed into it, it rolls through or is pulled through a series of these tools, dies, parts, whatever you want to call them, and it makes and bends that material into a product per a customer's specification. \* \* \* This is what this employer's - - what we view is their main business. They are making these parts, tools, dies, whatever you want to call them, to take a piece of metal and shape it to a specification of the customer. \* \* \*

So our concern is over the fact that this company is making tools that are used in these heavy, large, industrial pieces of equipment. They're interchangeable, meaning that basically you can change the tooling on a machine and make a different form to come out.

\* \* \*

It is our position that these tools are defined under 3113 because these are not drop-forged, and that's the distinction between 3113 and 3114 is they're not being drop-forged. If the description is in another classification, NCCI says you can't use 3629; and that's the first test that we fail, and that is the Bureau's position on why we're saying that 3629 is not applicable to this employer's operation. What we're saying is he's making toolings that are used in these industrial machines, and tooling is clearly spelled out in the scopes as being the first line under code 3113. I realize that there's other things listed under 3113 that would imply more of a hand tool type operation, but the real scope of this is that, when you look at it, the tool and die industry or the tool and die trade or the toolmakers fall under 3113 or they fall under 3114, depending if it's drop forged or not, and since this is not a drop forge operation, we feel it's clearly spelled out under 3113. And that is the Bureau's position. \* \* \*

{¶29} Relator makes two arguments regarding Goellnitz's testimony: (1) that the record fails to support Goellnitz's statement that relator manufactures tools and dies,

and (2) that it was improper for Goellnitz to lump parts, tools, and dies together because "parts" is a term from Code 3629 while "tools" and "dies" are terms from Code 3113.

{¶30} Turning to the first of relator's arguments, relator points out that, at the November 13, 2007 hearing, Langer testified that relator "is a manufacturer of machined parts used to form metal for roll forming companies." Langer further testified that relator "uses CNC machining to manufacture these parts to very high tolerances." Langer also testified that relator has "a separate and distinct business to manufacture these parts."

{¶31} Relator then asserts that the administrator's designee "disregarded uncontroverted testimony \* \* \* regarding the actual nature of relator's business operations." (Relator's brief, at 7.) In making these assertions, relator ignores pertinent evidence in the record.

{¶32} To begin, it does not appear that Langer was ever himself questioned as to whether relator manufactures tools and dies. However, there is indeed other evidence in the record upon which it can be determined that relator does manufacture the tools and dies that Langer refers to as "machined parts." That Langer himself never admitted that his company manufactures tools and dies does not, as relator suggests, bind the administrator's designee to Langer's testimony.

{¶33} Perhaps the earliest evidence in the record indicating that relator manufactures tools is found in Yoder's December 19, 2006 audit report. There, Yoder states that Ed Grau (who performed an audit in December 1999) "wasn't aware of the fact that the parts are tools & not machine parts."

{¶34} Then, in his January 31, 2007 memorandum to Watson, Goellnitz wrote: "They manufacture precision tooling used in the roll forming industry or the tube and pipe industry."

{¶35} Even relator's own sales brochure supports Goellnitz's belief that relator manufactures tooling. The sales brochure states in part:

Like so many global companies, we have expanded our reach to every corner of the world. Today, the Roll-Kraft name can be found on tooling and mills in more than 50 countries. Along the way, we have expanded our product offerings and in 1999, acquired Ardcor, a well-known manufacturer of cold roll forming lines and equipment. This strategic acquisition has positioned Roll-Kraft as the premier tooling and equipment manufacturer in the industry.

{¶36} Moreover, Goellnitz himself met Langer at relator's facility as Langer so testified. Presumably, Goellnitz familiarized himself with relator's manufacturing operations.

{¶37} In short, that Langer himself never conceded at the hearing that his company manufactures tools and dies does not, as relator suggests, render Goellnitz's testimony unreliable or inconsistent. The administrator's designee, like any administrative fact finder, may draw reasonable inferences and rely on his or her own common sense in evaluating the evidence. See *State ex rel. Supreme Bumpers, Inc. v. Indus. Comm.*, 98 Ohio St.3d 134, 2002-Ohio-7089, ¶69.

{¶38} As earlier noted, the second issue regarding Goellnitz's testimony is whether it was improper for Goellnitz to lump parts, tools, and dies together. As earlier noted, "parts" is a term from Code 3629, while "tools" and "dies" are terms from Code 3113. Relator suggests that Goellnitz and the administrator's designee failed to

understand the distinctions of the two codes. Or as relator puts it, reliance upon Goellnitz's statement lumping together parts, tools, and dies "demonstrates the bureau's refusal to abide by those Code sections' carefully drawn distinctions." (Relator's brief, at 8.) Relator's assertion or argument lacks merit.

{¶39} When Goellnitz refers to parts, tools, and dies as "whatever you want to call them," he is apparently recognizing Langer's position that what he manufactures should be called parts. (Relator's brief, at 8.) Rather than indicating a failure to understand the distinctions of the two codes, Goellnitz's statement ("whatever you want to call them") is actually an indication that Goellnitz indeed understood the issue as well as Langer's position.

{¶40} In short, relator's second argument also lacks merit.

{¶41} As earlier noted, the second issue presented is whether the supplemental order of the administrator's designee complies with this court's writ of mandamus. As earlier noted, this court issued a writ of mandamus ordering respondent administrator to "enter a new order consistent with this court's decision and the requirements set forth in *State ex rel. Ochs v. Indus. Comm.*, 85 Ohio St.3d 674, 1999-Ohio-294."

{¶42} While relator contends that the May 22, 2009 supplemental order of the administrator's designee fails to provide a brief explanation for holding that Code 3113 applies to relator's business rather than Code 3629, it is difficult to see how relator can make this claim particularly when it is determined that Goellnitz's testimony provided the some evidence supporting the final decision of the administrator's designee. Relator's claim that the supplemental order of May 22, 2009 fails to comply with this court's writ appears to be intertwined with its challenge to the reliance upon Goellnitz's testimony.

{¶43} In compliance with this court's writ, the administrator's designee identifies the first of the three conditions set forth under Code 3629 as the condition relator fails to meet in order to win assignment of that code. The order then provides a brief explanation as to why the employer's operations are best described by NCCI Code 3113. In short, the administrator has complied with this court's writ of mandamus.

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

*/S/ Kenneth W. Macke*

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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).