[Cite as *State ex rel. V & A Risk Servs. v. Ohio Bur. of Workers' Comp.*, 2012-Ohio-3583.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. V & A Risk Services et al.,	:	
Relators-Appellees,	:	
		No. 11AP-742
v.	:	(C.P.C. No. 08CVH-06-8080)
State of Ohio Bureau of Workers' Compensation et al.,	:	(REGULAR CALENDAR)
Respondents-Appellants.	:	

D E C I S I O N

Rendered on August 9, 2012

Stefanski & Associates LLC, and *Janice T. O'Halloran*, for appellees.

Michael DeWine, Attorney General, *Gerald H. Waterman*, and *Elise Porter*, for appellants.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶ 1} Respondents-appellants, the Ohio Bureau of Workers' Compensation and its administrator, Stephen Buehrer (collectively, "BWC"), appeal the Franklin County Court of Common Pleas' entry of summary judgment in favor of relators-appellees, V & A Risk Services ("V&A") and Safety Council of Northwest Ohio (collectively, "relators"), in this mandamus action. For the following reasons, we affirm.

I. BACKGROUND

{¶ 2} As part of its duty to administer a workers' compensation system, BWC classifies occupations or industries according to their degree of hazard and determines the risks of different classes according to the national council on compensation insurance categories for risk. *See* R.C. 4123.29(A)(1). After assessing risk for each occupation or industry, BWC sets premium rates for workers' compensation insurance based on the risks of the classes and each employer's individual risk experience. "An employer's premium rates shall be the manual basic rates as provided under rules 4123-17-02, 4123-17-06, and 4123-17-34 of the Administrative Code for each of its classifications except as modified by its experience rating." Ohio Adm.Code 4123-17-03(A). An employer's experience rating is based on the employer's actual and expected losses from workers' compensation claims arising in the oldest four of the previous five calendar years. *See* Ohio Adm.Code 4123-17-03.

{¶ 3} In addition to insuring employers individually, BWC also offers to insure employers under a plan that groups employers and pools their risk within a group, subject to certain conditions. *See* R.C. 4123.29(A)(4)(a). For purposes of group rating, BWC considers an employer group as a single employing entity. R.C. 4123.29(A)(4)(c). Employers in an employer group generally enjoy reduced premium rates compared to what they would pay if not in a group.

{¶ 4} Private sponsoring organizations create and administer employer groups, but BWC approves or disapproves each group upon application. *See* Ohio Adm.Code 4123-17-62. A group must reapply for group coverage each policy year, which begins July 1, and must identify each individual employer in the group. Ohio Adm.Code 4123-17-62(A) and (C). BWC rules limit the ability to remove an employer from a group after the application deadline. The applicable, former version of Ohio Adm.Code 4123-17-62(G) permitted a group administrator to notify BWC of its desire to remove an employer from the group, as a result of gross misrepresentation, after the group application deadline, but before April 1, preceding the start of the policy year.

{¶ 5} Noxious Vegetation Control, Inc. ("NOVCO"), which has operated as an Ohio employer since 1960, is in the business of buying and selling chemicals and clearing rights of way for public utilities. Clarence E. Wissinger, an officer of NOVCO, testified that, as a result of its high workers' compensation premiums, NOVCO could not obtain profitable contracts with public utilities unless it utilized leased labor. Therefore, effective July 1, 2004, NOVCO terminated all 72 employees it utilized to perform labor for clearing rights of way under its public utilities contracts. Wissinger testified that Total Utility Clearance, Inc. ("Total") was created in 2004 for the sole purpose of supplying employee labor to NOVCO. Total and NOVCO share common ownership, but each separately reports payroll and pays workers' compensation premiums. Total hired 59 of the employees terminated by NOVCO and exclusively leases those employees to NOVCO to perform NOVCO's right-of-way jobs. NOVCO provides Total's only source of revenue. Wissinger, who is also an officer of Total, described NOVCO's payments to Total for labor as "just a wash-through; so payroll, workers' comp, et cetera." (Aug. 21, 2007, Tr. 16.) Total, itself, has no contracts with public utilities for clearing rights of way and owns no equipment for performing that work.

{¶ 6} The Safety Council of Northwest Ohio is a BWC-approved sponsor of an employer group plan called BWC Industry Group 4, Construction #58 (the "group"). V&A is the designated third-party plan administrator for the group. In 2004, Total became a member of the group after executing V&A's Group Rating Agreement. In the Group Rating Agreement, Total certified that it did not operate as an employee leasing company or a professional employer organization ("PEO"), and it agreed to notify V&A of any material change in its operations.

{¶ 7} Pursuant to R.C. 4123.32, BWC may adopt rules covering the rates to be applied where one employer takes over the occupation or industry of another. The BWC administrator may require that, if an employer transfers a business, in whole or in part, the successor in interest shall assume the employer's account and shall continue the payment of all workers' compensation contributions, in proportion to the extent of the transfer. Former R.C. 4123.32(D), 2002 S.B. No. 223. Pursuant to this statutory authority, BWC adopted Ohio Adm.Code 4123-17-02(B)(3), which states as follows:

> 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.

{¶ 8} Ohio Adm.Code 4123-17-66 governs termination and transfer of group experience and sets forth rules concerning transfers of experience rating where either the predecessor or successor employer is a member of an employer group. Ohio Adm.Code 4123-17-66(H) states, in part, as follows:

> Where a legal entity succeeds in the operation of a portion of a business of another legal entity and the successor entity is a member of a group for experience rating, the successor entity shall remain a member of the group for experience rating and the experience of the predecessor shall be included with the experience of the group for the purpose of experience rating.

Thus, a transfer of experience to a group member, as a result of its succession of another's business operations, affects the experience rating of the group.

{¶ 9} In 2006, BWC conducted an audit of NOVCO and concluded that Total was a partial successor to NOVCO. As a result of its audit, BWC transferred a portion of NOVCO's experience to Total and made the transfer retroactive to 2004.[1] Consequently, the group's premiums were re-rated, resulting in a premium increase for the group, as a whole, in excess of $1.4 million.

{¶ 10} Total objected to the transfer and requested a hearing before BWC's Adjudicating Committee. At the hearing, NOVCO and Total's counsel stated that the issue was "[w]hether or not the audit findings were correct, that Total is a succeeding interest to NOVCO." (Aug. 21, 2007, Tr. 24.) The parties stipulated that, should BWC uphold the transfer, Total would agree to its removal from the group. Therefore,

[1] BWC's authority to retroactively increase an employer's premiums is limited to 24 months preceding the current payroll period unless it determines that the employer misrepresented payroll or failed to submit payroll for any period, in which case it may make adjustments for the entire period the employer misrepresented payroll or failed to submit payroll. Ohio Adm.Code 4123-17-17(C) and 4123-17-28(C)(1).

without waiving the right to contest the Adjudicating Committee's decision, relators' counsel offered no argument regarding the merits of the appeal, but simply asserted that Total grossly misrepresented the nature of its business on its group application and that, had V&A known the true nature of Total's business, it would not have included Total in the group.

{¶ 11} The Adjudicating Committee explicitly found that "Total is not a successor employer to Novco." It stated, as follows:

> [W]hat BWC must examine under [R.C. 4123.32 and Ohio Adm.Code 4123-17-02] is not the transfer of employees. BWC must ask what business Novco is in, and whether Total succeeded Novco in operating the business in whole or in part. Novco sells chemicals and clears rights-of-way. Those functions did not transfer to Total. Novco continues performing both functions, and Total performs neither. Total does not have the equipment to perform those functions. Total is solely in the business of leasing employees to Novco. Novco has never been in the business of leasing employees to another employer. Thus, under the definitions contained in the statute and rule, Total is not a successor employer to Novco.

Nevertheless, the Adjudicating Committee upheld the transfer of a portion of NOVCO's experience because it viewed the relationship between NOVCO and Total as "a form of labor leasing involving a completely captive new employer." The committee rejected the parties' stipulation as to Total's removal from the group and held that BWC lacked authority to remove an employer from a group after the April 1 deadline in Ohio Adm.Code 4123-17-62.

{¶ 12} Total appealed the Adjudicating Committee's order to the BWC Administrator's Designee pursuant to R.C. 4123.291(B). On appeal, counsel for NOVCO and Total argued that BWC exceeded its authority by transferring NOVCO's experience to Total where Total did not succeed NOVCO with respect to any part of NOVCO's business. NOVCO and Total argued that a transfer of employees is distinguishable from a transfer of an occupation or industry from one business to another. Counsel for relators agreed that the audit did not support a finding of successorship, but also argued that the transfer was unfounded because Total operated as an unregistered PEO and

that, as such, the payroll and experience rating should have remained with NOVCO. Despite the Adjudicating Committee's contrary conclusion, BWC responded that Total took over a portion of NOVCO's operations and was, therefore, a successor under R.C. 4123.32 and Ohio Adm.Code 4123-17-02, thus permitting the transfer of experience from NOVCO to Total.

{¶ 13} The Administrator's Designee adopted the Adjudicating Committee's statement of facts and affirmed the committee's decision, findings, and rationale. Thus, the Administrator's Designee agreed that Total was not a successor employer to NOVCO, but nevertheless affirmed the transfer of experience. In an Amended Order, the Administrator's Designee also found that the evidence did not demonstrate that Total is an unregistered PEO.

{¶ 14} On June 4, 2008, relators filed a complaint for declaratory judgment against BWC in the Franklin County Court of Common Pleas. The trial court granted summary judgment in favor of relators, and both BWC and relators appealed. This court reversed and remanded to the trial court after concluding that relators' sole vehicle to challenge BWC's discretionary decision was a mandamus action, and not an action for declaratory judgment. *See V & A Risk Servs. v. Ohio Bur. of Workers' Comp.*, 10th Dist. No. 09AP-919, 2010-Ohio-6118.

{¶ 15} On remand, relators filed an amended complaint for relief in mandamus. Mandamus is "a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." R.C. 2731.01. Relators prayed for a writ, directing BWC as follows:

> 1) To vacate its prior orders * * * and issue an order finding that common ownership of separate entities is not a determining factor to establish a PEO under OAC 4123-17-15[; and]
>
> 2) To vacate its prior orders and issue an order finding Total operated as a PEO pursuant to OAC 4123-17-15; and

> 3) To vacate its prior orders and issue an order that under OAC 4123-17-15, NOVCO must directly report and pay premiums for Total from 2004 through 2008; and
>
> 4) To vacate its prior order and issue an order directing Total be removed from the group for rating years 2004[-]2008 and to issue an order that the premium rate increases for the group members be rescinded; and
>
> 5) That this court issue an order finding that [BWC's] policies and practices which preclude removal from a group rated plan of an employer who misrepresented business operations to the group discovered after [BWC's] specified deadlines, violates the group's right to a remedy guaranteed by the Ohio Constitution and violates the constitutional right to freedom of contract; and
>
> 6) For all such other and further relief as [the] court deems equitable and just.

The parties filed a stipulation of evidence and again moved for summary judgment.

{¶ 16} On September 12, 2011, the trial court granted relators' motion for summary judgment. The trial court reiterated the substance of its prior summary judgment decision, which it incorporated by reference. The court held that BWC abused its discretion by finding that Total was not operating as an unregistered PEO and by transferring NOVCO's experience to Total. The trial court did not address the other issues raised in relators' mandamus complaint.

II. ASSIGNMENT OF ERROR

{¶ 17} BWC now raises the following, single assignment of error:

> The court below erred in finding that [BWC] abused its discretion and acted contrary to law in transferring part of the risk experience of [NOVCO] to the account of its partial successor, [Total].

III. DISCUSSION

{¶ 18} When an administrative agency makes a discretionary decision that is not subject to direct appeal, a writ of mandamus is the sole vehicle to challenge the decision. *Ohio Academy of Nursing Homes v. Ohio Dept. of Job & Family Servs.*, 114 Ohio St.3d

14, 2007-Ohio-2620, ¶ 23. To be entitled to a writ of mandamus, the relator must have a clear legal right to the relief prayed for, the respondent must be under a clear legal duty to perform the act requested, and the relator must have no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28, 29 (1983). A clear legal right to the relief requested in mandamus exists where the agency abuses its discretion by entering an order that is not supported by some evidence. *State ex rel. Kolcinko v. Ohio Police & Fire Pension Fund*, 131 Ohio St.3d 111, 2012-Ohio-46, ¶ 2. Mandamus will not lie to substitute a court's discretion for that of an administrative official unless the administrative official's refusal to perform the act constitutes an abuse of discretion.[2] *State ex rel. Bd. of Edn. of Dayton v. State Dept. of Edn.*, 67 Ohio St.2d 126, 128 (1981); *Ohio Academy of Nursing Homes* at ¶ 26.

{¶ 19} In *State ex rel. Avalon Precision Casting Co. v. Indus. Comm.*, 109 Ohio St.3d 237, 2006-Ohio-2287, ¶ 9, the Supreme Court addressed the standard of review in a direct appeal from an original mandamus action, as follows:

> "The appropriate standard guiding our review is whether there is * * * 'some evidence' in the record to support the [industrial] commission's decision. * * * If so, then the commission will not be deemed to have abused its discretion, and the granting of a writ of mandamus to correct an abuse of discretion is not warranted." *State ex rel. Secreto v. Indus. Comm.* [80 Ohio St.3d 581, 582-83 (1997)]. This court's role is not to "micromanage the commission as it carries out the business of compensating for industrial/occupational injuries and illness." *State ex rel. Mobley v. Indus. Comm.* [78 Ohio St.3d 579, 584 (1997)]. "Where a commission order is adequately explained and based on some evidence, even evidence that may be persuasively contradicted by other evidence of record, the order will not be disturbed as manifesting an abuse of discretion." Id.

[2] Relators assert that mandamus lies only to cure a "gross abuse of discretion." Although the Supreme Court of Ohio once held that a public officer's exercise of official judgment and discretion "will not be controlled or directed by mandamus" absent "bad faith, fraud and gross abuse of discretion," *see State ex rel. Ins. Co. v. Moore*, 42 Ohio St. 103, 108 (1884), more recent decisions of the Supreme Court, cited herein, require only an abuse of discretion.

Where, however, an underlying, stipulated record presents a question of law, appellate courts review a writ of mandamus issued by a trial court de novo. *Cincinnati Entertainment Assoc., Ltd. v. Hamilton Cty. Bd. of Commrs.*, 141 Ohio App.3d 803, 810 (1st Dist.2001).

{¶ 20} BWC raises two distinct arguments in support of its position that the trial court erred by granting judgment in favor of relators. First, BWC argues that relators are not entitled to a writ of mandamus because they have adequate remedies at law. Second, BWC argues that it acted within its discretion to transfer risk experience from NOVCO to Total. BWC also argues that its actions did not deprive relators of a remedy, as guaranteed by the Ohio Constitution, an issue the trial court did not address. For ease of discussion, we first address BWC's argument that it acted within its discretion by transferring NOVCO's experience rating to Total.

{¶ 21} BWC was undisputedly authorized to audit NOVCO and Total's books and records and to adjust premium rates as a result of its audit, if warranted. In its answer to relators' interrogatories, BWC stated that its audit revealed that NOVCO transferred some of its operations, including brush control and tree trimming, to Total and that Total provided the employees' W-2 forms. BWC transferred a portion of NOVCO's experience rating to Total, pursuant to Ohio Adm.Code 4123-17-02(B)(3), based on its determination that Total succeeded in the operation of a portion of NOVCO's business. The question of whether Total succeeded a portion of NOVCO's business operations was the primary focus of the administrative proceedings, and both the Adjudicating Committee and the Administrator's Designee concluded that Total was *not* a successor under R.C. 4123.32 and Ohio Adm.Code 4123-17-02.

{¶ 22} BWC has a duty to explain its administrative decisions for the benefit of the parties and reviewing courts. *State ex rel. Ochs v. Indus. Comm.*, 85 Ohio St.3d 674, 676 (1999). The Adjudicating Committee adequately explained its determination that Total was not a successor in interest to NOVCO by referencing the applicable statute and rule and reasoning that Total performs neither of the business functions that NOVCO performed prior to Total's creation and that NOVCO continues to perform. In contrast, neither the Adjudicating Committee nor the Administrator's Designee explained the

decision to affirm the transfer of a portion of NOVCO's experience to Total, despite the absence of successorship, beyond the Adjudicating Committee's description of NOVCO's arrangement with Total as "a form of labor leasing involving a completely captive new employer." Neither the Adjudicating Committee nor the Administrator's Designee identified any statute or rule permitting the transfer of risk experience absent a finding of a successorship.

{¶ 23} Courts generally must give due deference to an administrative interpretation formulated by an agency that has accumulated substantial expertise and that has responsibility for implementing a legislative command. *Frisch's Restaurants, Inc. v. Ryan*, 121 Ohio St.3d 18, 2009-Ohio-2, ¶ 16. Deference to an administrative agency's interpretation of its rules, however, is not unfettered. An appellate court need not defer to an agency's interpretation when it is unreasonable and fails to apply the plain language of a statute or rule. *Id.*; *HCMC, Inc. v. Ohio Dept. of Job & Family Servs.*, 179 Ohio App.3d 707, 2008-Ohio-6223, ¶ 25 (10th Dist.).

{¶ 24} The Adjudicating Committee and the Administrator's Designee's interpretation of R.C. 4123.32 and Ohio Adm.Code 4123-17-02 is reasonable with respect to the successor issue, and some evidence supports the administrative resolution of that issue. A successor in interest, for purposes of workers' compensation, is "a transferee of a business in whole or in part." *State ex rel. Lake Erie Constr. Co. v. Indus. Comm.*, 62 Ohio St.3d 81, 83-84 (1991). Additionally, the statutory authority for the adoption of Ohio Adm.Code 4123-17-02 permits rules to be applied "where one employer takes over the occupation or industry of another." R.C. 4123.32(C). Based on that language, BWC could reasonably determine that a transferee must take over one or more of a predecessor's business functions and not just support functions like human resources or accounting. Thus, the Adjudicating Committee's focus on "what business Novco is in, and whether Total succeeded Novco in operating the business" is reasonable, and we must defer to that interpretation, despite BWC's contrary argument here that Total is a successor in interest.

{¶ 25} In the trial court, the focus of this case shifted from the question of whether Total succeeded a portion of NOVCO's business operations to the question of

whether Total operated as an unregistered PEO. Ohio Adm.Code 4123-17-15(A)(1) defines a PEO as follows:

> "Professional employer organization" or "PEO" means a sole proprietor, partnership, association, limited liability company, or corporation that enters into an agreement with one or more client employers for the purpose of coemploying all or part of the client employer's workforce at the client employer's work site. "Professional employer organization" or "PEO" does not include a temporary service agency.

A PEO assumes responsibility for the payment of wages, taxes, and workers' compensation premiums for shared employees, as established by its PEO agreement. Ohio Adm.Code 4123-17-15(B)(2). A PEO must also maintain workers' compensation coverage, pay all workers' compensation premiums, and manage all workers' compensation claims, filings, and related procedures associated with a shared employee. Ohio Adm.Code. 4123-17-15(B)(6).

{¶ 26} Ohio Adm.Code 4123-17-15(C)(2) provides as follows:

> Where a client employer enters into a PEO agreement * * * [t]he PEO shall be considered the succeeding employer, solely for purpose of workers' compensation experience, and shall be subject to rule 4123-17-02 of the Administrative Code, basic or manual rate, whereby all or part of the experience of the client employer is transferred to the PEO policy for rate making [purposes].

A PEO that operates in Ohio must register with BWC annually. Ohio Adm.Code 4123-17-15(G); R.C. 4125.05(A).

{¶ 27} The thrust of relators' argument is that Total operated as an unregistered PEO, and BWC abused its discretion by concluding otherwise. Ohio Adm.Code 4123-17-15(A)(1) defines a PEO as a business entity that enters into an agreement with a client employer to coemploy at least part of the client's workforce at the client's work site. " 'Coemploy' means the sharing of the responsibilities and liabilities of being an employer." Ohio Adm.Code 4123-17-15(A)(3). Relators maintain that Total entered into an agreement with NOVCO, a client employer, to lease back NOVCO's labor workforce for work at NOVCO's job sites. Wissinger characterized the relationship between

NOVCO and Total as one of coemployment, as NOVCO retained the right to tell Total that it no longer wanted certain employees. Although Total leased the employees exclusively to NOVCO to perform work at NOVCO's job sites, Total issued the employees' W-2 forms. For these reasons, relators argue that Total satisfied the statutory definition of a PEO.

{¶ 28} It is undisputed that Total did not comply with at least some of the requirements of a PEO under Ohio Adm.Code 4123-17-15. For example, Total did not register as a PEO with BWC as required by Ohio Adm.Code 4123-17-15(G). Where a PEO fails to comply with the requirements of Ohio Adm.Code 4123-17-15, including the registration requirement, "the payroll of the shared employees shall be reported by the client employer under its workers' compensation risk number for workers' compensation premium and claims purposes, unless prohibited by federal law." Ohio Adm.Code 4123-17-15(E). In that situation, "[c]laims that are filed by the client employer's shared employees shall be charged to the experience of the client employer." Ohio Adm.Code 4123-17-15(E). Given Total's lack of compliance, relators maintain that, pursuant to Ohio Adm.Code 4123-17-15(E), NOVCO was required to report the shared employees' payroll and pay the related workers' compensation premiums. Accordingly, they assert that BWC was not entitled to transfer NOVCO's experience rating to Total. Relators reason that recognizing Total as an unregistered PEO affords BWC the ability to effectively enforce its regulations by collecting the premiums related to the shared employees from NOVCO while also providing a remedy to the group by removing NOVCO's transferred experience from the group even if Total itself could not be removed.

{¶ 29} The Administrator's Designee disposed of relators' PEO argument in two sentences. He stated as follows: "the evidence adduced at hearing does not demonstrate that [Total] is an unregistered PEO. [NOVCO] and [Total] have common ownership and there is no indication that [Total] held itself out to be a PEO." Relators correctly note that Ohio Adm.Code 4123-17-15 does not expressly prohibit common ownership of a PEO and a client employer or expressly require that a PEO hold itself out as such.

{¶ 30} Like all statutorily created agencies, BWC can exercise only those powers conferred upon it by the General Assembly. *See State ex rel. Cincinnati v. Ohio Civ. Rights Comm.*, 2 Ohio App.3d 287, 288 (10th Dist.1981). It must conform its operations to the procedures set out in the statutes or rules adopted pursuant to statutory authority. *Id*. Additionally, BWC must follow its rules, as written. *State ex rel. H.C.F., Inc. v. Ohio Bur. of Workers' Comp.*, 80 Ohio St.3d 642, 647 (1998). It may not give selective effect to provisions to produce a desired result or change its rules without complying with the rule-making procedures in R.C. Chapter 119. *Id*.

{¶ 31} Although Ohio Adm.Code 4123-17-15 does not expressly prohibit common ownership, BWC emphasizes the common ownership of NOVCO and Total and ties the issue of ownership to the regulatory language by reference to the requirement that a PEO must share employees with a "client employer." Ohio Adm.Code 4123-17-15(A)(2) defines "client employer," in pertinent part, as an entity "that enters into a PEO agreement and is assigned shared employees by the PEO." BWC argues that NOVCO cannot be a client of Total because of the companies' common ownership. BWC interprets "client" to imply an arms-length transaction between unrelated companies and, therefore, defines PEO narrowly to include only those relationships. Relators maintain that BWC's interpretation is unreasonable and an abuse of discretion.

{¶ 32} The trial court refused to defer to BWC's interpretation of Ohio Adm.Code 4123-17-15, calling BWC's interpretation arbitrary, "completely out of line with reality," and "not in line with common usage or the law." To be entitled to deference, an agency's interpretation of its governing statutes or rules must be consistent with the plain language of the applicable statutes or rules. *Athens Cty. Bd. of Commrs. v. Schregardus*, 83 Ohio App.3d 861, 868 (10th Dist.1992). Contrary to BWC's interpretation, the trial court was unable to find any common definition of "client" that required an arms-length transaction between unrelated entities. Neither did our review uncover such a requirement in the common definitions of that term. For example, *Webster's Encyclopedic Unabridged Dictionary of the English Language* 276 (1997) defines "client," in part, as "a customer." *Random House Dictionary of the English Language* 386 (1987) defines "client" as "a person or group that uses the professional

advice or services of a lawyer, accountant, advertising agency, architect, etc." or "a customer." *Blacks Law Dictionary* 289 (9th Ed.2009) defines "client" as "[a] person or entity that employs a professional for advice or help in that professional's line of work." None of the cited definitions includes a requirement of unrelated parties or an arms-length transaction.

{¶ 33} When "two or more corporations [are] controlled by the same, or substantially the same, owners," the corporations are "sister corporation[s]." *Black's Law Dictionary* at 394. "[T]he common shareholder ownership of sister corporations does not provide one sister corporation with the inherent ability to exercise control over the other." *Minno v. Pro-Fab, Inc.*, 121 Ohio St.3d 464, 2009-Ohio-1247, ¶ 12. The separate legal identities of related corporations must be respected even where directors and officers serve in various capacities in multiple entities. *CSAHA/UHHS-Canton, Inc. v. Aultman Health Found.*, 5th Dist. No. 2010CA00303, 2012-Ohio-897, ¶ 110. There is no legal prohibition against sister corporations contracting with each other. *See, e.g., Edgar Spring, Inc. v. Winters*, 5th Dist. No. 91AP-110087 (Nov. 13, 1992) (acknowledging that one sister corporation purchased material from another sister corporation). Moreover, other courts have expressly recognized one sister corporation as a customer of another. *See State v. N. Atlantic Refining Ltd.*, 160 N.H. 275, 999 A.2d 396 (2010) (identifying North Atlantic's sole gasoline customer as its sister company); *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 917 F.2d 1413 (6th Cir.1990) ("NOAP claims damages because of the alleged wrongful injuries to sister corporation Langenderfer, its principal customer.").

{¶ 34} BWC argues that cases involving corporate liability of sister corporations are inapplicable in the workers' compensation context. BWC cites *Lake Erie Constr. Co.*, which centered on the meaning of "successor in interest." In that case, BWC argued that the applicable workers' compensation-related statute and rule defined "successor in interest" as a transferee of a business in whole or in part, whereas the appellant urged the court to adopt a common-law definition of the term. The Supreme Court rejected the appellant's argument, and the court's application of the plain language of the statute and the rule negated the "need to look beyond [those] provisions." *Id.* at 84.

{¶ 35} Even were we to agree with BWC's contention that, pursuant to *Lake Erie Constr. Co.*, corporate transfers for purposes of workers' compensation do not follow the rules of corporate law, relators here are not attempting to apply the rules of corporate law. Relators concede, as the Supreme Court held in *Lake Erie Constr. Co.*, that the plain language of the statute and rule controls. They simply contend that BWC failed to apply the plain language by requiring additional qualifications not stated in the rule. Specifically, they contest BWC's interpretation that "client," as used in Ohio Adm.Code 4123-17-15, cannot be used in the context of sister corporations because of the absence of arms-length agreements between unrelated entities. Case law regarding relationships between sister corporations is relevant to the determination of BWC's argument, and nothing in *Lake Erie Constr. Co.* precludes consideration of that authority.

{¶ 36} The Twelfth District Court of Appeals recently applied the definition of PEO in the context of sister corporations in *Roberts v. RMB Ents., Inc.*, 197 Ohio App.3d 435, 2011-Ohio-6223 (12th Dist.). RMB Enterprises, Inc. ("RMB"), a business that operated a steel storage warehouse, contracted to provide AK Steel Corp. ("AK") with intraplant hauling services. Bowling Transportation, Inc. ("BTI"), an over-the-road steel hauler that shared common owners with RMB, leased employees to RMB to provide RMB's hauling services for AK. The Twelfth District held that BTI did not qualify as a PEO. The court stated, at ¶ 16, as follows:

> The trial court found, and we agree, that "it was not the intent of the legislature, when it passed [Am.Sub.H.B. No. 183, enacting R.C. Chapter 4125, regarding PEOs], to make the statute applicable to a sister corporation, who does not specialize in leasing employees to other employers, and who, for purpose[s] of convenience and consolidation of human resources functions, performs the human resource function of the sister company."

The court cited the Legislative Service Commission's final bill analysis of Am.Sub.H.B. No. 183, which stated that the General Assembly intended for the provisions regarding PEOs to apply to "'employers that *specialize* in "leasing" employees to other employers.'" (Emphasis sic.) *Id.* at ¶ 14. The court did not premise its determination upon the common ownership of RMB and BTI. Instead, the court based its conclusion

on the undisputed facts that BTI's sole business was over-the-road hauling and that BTI had never specialized in leasing its employees to client employers. *Id*. at ¶ 15. Thus, *Roberts* does not support BWC's argument that NOVCO and Total's common ownership precludes a finding that Total operated as a PEO.

{¶ 37} *Roberts* is also otherwise distinguishable on its facts. In *Roberts*, the court focused on the fact that BTI's business was over-the-road hauling and not leasing employees to other employers. BTI simply leased some of its hauling employees to RMB to perform RMB's hauling obligations for convenience and consolidation of human resource functions, even though its own business was hauling. In contrast, Total's sole business was the leasing of employees to NOVCO. Total was specifically created for that purpose, which provided its sole source of revenue, and it did not engage in any of the business activity that the leased employees performed for NOVCO. In this way, Total satisfies the Twelfth District's requirement that an entity must specialize in leasing employees to other employers to qualify as a PEO.

{¶ 38} NOVCO and Total are separate legal entities, despite their common ownership, and both report payroll and pay workers' compensation premiums. There is no evidence that NOVCO exercised control over Total or that the entities did not observe corporate formalities. The entities are sister companies, and, like the trial court, we conclude that BWC abused its discretion by determining that NOVCO could not be a "client" of Total for purposes of the regulatory definition of PEO. BWC's imposition of a requirement that a client relationship demands two unrelated parties unreasonably adds a prerequisite to the definition of PEO that the plain meaning of the rule does not support. Accordingly, we do not defer to BWC's interpretation in that regard.

{¶ 39} In its reply brief before this court, BWC additionally argues that Total does not qualify as a PEO because the record contains no evidence of a written PEO contract between Total and NOVCO, as required by Ohio Adm.Code 4123-17-15(A). " 'PEO agreement' " is defined as "a written contract to coemploy employees between a [PEO] and a client employer with a duration of not less than twelve months" and that "is intended to be, or is, ongoing rather than temporary in nature." Ohio Adm.Code 4123-17-15(A)(6). Although the record contains no evidence of a written contract between

NOVCO and Total, the evidence establishes that Total was created for the sole purpose of leasing employees to NOVCO, that Total did lease employees to NOVCO, and that NOVCO paid Total for the leased employees. The Administrator's Designee did not rely upon the absence of a written agreement as a reason for holding that Total was not an unregistered PEO, and BWC did not raise this issue in either the administrative proceedings or in the trial court. "It is well settled that a litigant's failure to raise an issue before the trial court waives the litigant's right to raise that issue on appeal." *Gentile v. Ristas*, 160 Ohio App.3d 765, 2005-Ohio-2197, ¶ 74 (10th Dist.), citing *Hood v. Rose*, 153 Ohio App.3d 199, 2003-Ohio-3268, ¶ 10 (4th Dist.). *See also State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 81 (1997). Accordingly, we decline to address this issue on appeal.

{¶ 40} BWC also argues that relators' interpretation of Ohio Adm.Code 4123-17-15, regarding PEOs, conflicts with Ohio Adm.Code 4123-17-66(H), regarding transfer of experience. Although BWC's counsel admitted, at oral argument, that a single entity may be both a successor under Ohio Adm.Code 4123-17-66(H), and a PEO under Ohio Adm.Code 4123-17-15, BWC argues that finding Total an unregistered PEO would create a conflict on the particular facts of this case. In that scenario, Ohio Adm.Code 4123-17-15(E) would dictate that the experience rating remain with NOVCO, but BWC maintains that Total's status as a successor dictates that NOVCO's experience must transfer to Total pursuant to Ohio Adm.Code 4123-17-66(H). We disagree. Despite BWC's continuing argument to the contrary, the Adjudicating Committee expressly found that Total was not a successor to any part of NOVCO's business under the applicable statute and administrative rule, and the Administrator's Designee affirmed that finding. In light of that finding and our deference to it, Ohio Adm.Code 4123-17-66(H) does not apply, and there is no conflict.

{¶ 41} We acknowledge BWC's reliance on the National Association of Professional Employer Organization's ("NAPEO") description of PEOs as entities that " 'enter into a co-employment arrangement typically involving all of the client's existing worksite employees in a long-term relationship, and sponsor benefit plans for the workers and provide human resources services to the worksite employer.' " The NAPEO

website explains that, if a PEO relationship terminates, the employees continue as employees of the client. In contrast, BWC argues that, if the leasing arrangement between Total and NOVCO terminates, the shared employees would not remain employees of NOVCO because NOVCO terminated their employment in 2004. The Ohio statutes and administrative rules applicable to PEOs, however, do not include the limitations suggested by NAPEO, and BWC is required to apply the statutes and administrative rules, as written. The only limitation as to the type of relationship that may qualify as a PEO under the Ohio administrative definition is the exclusion of temporary employment agencies, a limitation that is not applicable here. For these reasons, we agree with the trial court that BWC abused its discretion by concluding that Total was not functioning as an unregistered PEO and by transferring NOVCO's experience rating to Total.

{¶ 42} We now turn to BWC's second argument against mandamus, that relators possessed adequate remedies at law. Relief in mandamus is unavailable where the relator has a plain and adequate remedy in the ordinary course of the law. *Berger*, 6 Ohio St.3d at 30. For a remedy at law to be adequate, it must be complete in its nature, beneficial, and speedy. *State ex rel. Liberty Mills, Inc. v. Locker*, 22 Ohio St.3d 102, 104 (1986), citing *State ex rel. Merydith Constr. Co. v. Dean*, 95 Ohio St. 108, 123 (1916). BWC specifically contends that relators had adequate remedies by way of a statutory ability to remove Total from the group and by way of a breach of contract action against Total, based on Total's misrepresentation of its business on its application for group membership.

{¶ 43} BWC first contends that Ohio Adm.Code 4123-17-62(G) provided relators an adequate remedy at law. Under the applicable version of that rule, relators had a limited timeframe in which they could have requested Total's removal from the group for gross misrepresentation. Specifically, the rule permitted a sponsoring organization to request removal of an employee between the application deadline (the last business day in February) and April 1 preceding the start of a coverage year. The rule, in essence, provided relators one month to discover Total's misrepresentation and to request Total's

removal. The rule does not provide for automatic removal of an employer but, instead, requires BWC's consent before removal may occur.

{¶ 44} Generally, a relator's failure to meet a deadline applicable to another remedy does not render the other remedy inadequate. *See State ex rel. Pontillo v. Pub. Emp. Retirement Sys. Bd.*, 98 Ohio St.3d 500, 2003-Ohio-2120, ¶ 34 (member's failure to timely submit additional, objective medical evidence to challenge a board's decision did not render that remedy inadequate); *State ex rel. Ullmann v. Hayes*, 103 Ohio St.3d 405, 2004-Ohio-5469, ¶ 9 (where relator could have requested documents that allegedly gave rise to a claim of fraud during administrative appeal process, administrative proceedings and statutory appeal therefrom provided an adequate remedy by which she could have raised her fraud claim). The Supreme Court of Ohio has expressly held that failure to timely pursue a right of appeal does not make that remedy inadequate. *State ex rel. Nichols v. Cuyahoga Cty. Bd. of Mental Retardation & Dev. Disabilities*, 72 Ohio St.3d 205, 209 (1995); *State ex rel. Cartmell v. Dorrian*, 11 Ohio St.3d 177, 178 (1984). "If that were the case, this criterion for a writ of mandamus would be met whenever the opportunity to pursue another adequate remedy expired. Would-be appellants could thwart the appellate process simply by ignoring it." *Id*.

{¶ 45} Relators argue that Ohio Adm.Code 4123-17-62(G) does not provide a remedy for group members' misrepresentations discovered after the April 1 deadline. Unlike a litigant that fails to comply with a known deadline for preserving a known right, relators here could not have requested to remove Total from the group because they were unaware of Total's misrepresentation until long after the regulatory deadline had passed. Total certified in its group application that it was not a labor leasor or a PEO, and relators did not learn of Total's misrepresentation until 2007, as a result of BWC's audit. At that time, Ohio Adm.Code 4123-17-62 offered no opportunity for relators to remove Total from the group, even though Total agreed to removal if BWC affirmed the transfer. Additionally, relators' ability or inability to remove Total from the group does not address the issue of whether BWC abused its discretion by transferring NOVCO's experience to Total. Accordingly, Ohio Adm.Code 4123-17-62 did not offer relators an adequate remedy at law, so as to preclude relief in mandamus.

{¶ 46} BWC also argues that relators had an adequate remedy at law through a breach of contract action against Total. In its group application, Total certified that it was neither a labor leasor nor a PEO, and it agreed to notify V&A of any material change in its operations. The contract between V&A and Total also stated that Total would be responsible for all claims and damages resulting from a falsification or misrepresentation to relators. Accordingly, BWC argues that relators have the ability to obtain relief in the ordinary course of law by suing Total for breach of contract, based on Total's misrepresentation of its business.

{¶ 47} In some instances, the availability of a breach of contract action will preclude relief in mandamus. *See State ex rel. Wright v. Weyandt*, 50 Ohio St.2d 194, 199 (1977) (a contract action for specific performance of a release agreement with relators' former employer was an adequate remedy at law and precluded relators' action for a writ of mandamus, compelling their former employer to reinstate relators, based on the release agreement); *State ex rel. Russell v. Duncan*, 64 Ohio St.3d 538, 538-39 (1992) (breach of contract action was an adequate remedy at law to enforce private rights between private parties). "A breach of contract action is not a plain and adequate remedy in the ordinary course of law that precludes issuance of a writ of mandamus if relator is being damaged not solely by a breach of contract, but also by a failure of public officers to perform official acts that they are under a clear legal duty to perform." *State ex rel. The V Cos. v. Marshall*, 81 Ohio St.3d 467, 472 (1998).

{¶ 48} In *State ex rel. Bossa v. Giles*, 64 Ohio St.2d 273 (1980), the Supreme Court held that a writ of mandamus was appropriate to compel the administrator of the Bureau of Employment Services to credit relator for vacation leave during periods she was considered an intermittent employee. The Supreme Court held that, contrary to the agency's interpretation, the applicable statute and administrative rule compelled the administrator to credit the relator with the requested leave. The court rejected the agency's argument that the relator had an adequate remedy at law through an action in the Court of Claims of Ohio. In its decision, at 276, the court quoted *State ex rel. Montrie Nursing Home, Inc. v. Aggrey*, 54 Ohio St.2d 394, 397 (1978), in which it held that mandamus was not barred by an alternative remedy where the relator was " 'not

being damaged due to a breach of contract but due to the failure of a public officer to perform an official act which he is under a clear legal duty to perform.' "

{¶ 49} As with an ability to remove Total from the group, a breach of contract action against Total does not address the question of whether BWC abused its discretion by transferring NOVCO's experience to Total. Relators maintain that they have been harmed by BWC actions that were unsupported by law and contrary to the authority granted BWC by the applicable statutes and administrative rules. The question of whether Total breached its contract with V&A is separate from, and does not address, the issues raised by Total's mandamus complaint. Accordingly, a breach of contract action would not provide relators with a complete remedy. We therefore conclude that relators did not have an adequate remedy in the ordinary course of law to contest BWC's application of the relevant statutes and administrative rules in this case.

IV. CONCLUSION

{¶ 50} Having concluded that BWC abused its discretion by transferring NOVCO's experience rating to Total and that relators had no adequate remedy in the ordinary course of law, we overrule BWC's assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER and DORRIAN, JJ., concur.