

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Park Ohio Industries, Inc.,	:	
	:	No. 11AP-887
Relator,	:	
	:	
v.	:	(REGULAR CALENDAR)
	:	
Ohio Bureau of Workers' Compensation,	:	
	:	
Respondent.	:	
	:	

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D E C I S I O N

Rendered on September 27, 2012

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*Fisher & Phillips LLP, Daniel P. O'Brien, Jason M. Baasten,  
and Mark E. Snyder, for relator.*

*Michael DeWine, Attorney General, and Elise Porter, for  
respondent.*

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IN MANDAMUS  
ON OBJECTIONS TO MAGISTRATE'S DECISION

TYACK, J.

{¶ 1} Park Ohio Industries, Inc. ("Park Ohio") filed this action in mandamus, seeking a writ to overturn a requirement that it provide a letter of credit to the Ohio Bureau of Workers' Compensation ("BWC") in order to maintain its standing as a self-insured employer.

{¶ 2} In accord with Loc.R. 13, the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued the appended magistrate's decision which contains detailed

findings of fact and conclusions of law. The magistrate's decision includes a recommendation that we not issue a writ of mandamus.

{¶ 3} Park Ohio has filed objections to the magistrate's decision. The BWC has filed a response. The parties have presented oral argument to the panel of this court assigned to the case. The case is now ready for a full, independent review of the evidence and resolution on the merits.

{¶ 4} Park Ohio has been a self-insured employer for many years. In September 2010, it filed its annual application for renewal of its status as a self-insured employer. Park Ohio was informed that renewal would be allowed, but only upon the condition that it post additional security in the form of a letter of credit for over \$1,000,000.

{¶ 5} The BWC added this condition because Park Ohio's financial records indicated that Park Ohio was struggling financially. Park Ohio had negative retained earnings of \$34,230,000 in 2009 and \$19,043,000 in 2010. Park Ohio experienced a net loss in 2008 of \$119,803,000 and of \$5,209,000 in 2009. Income had rebounded to \$15,187,000 by 2010, but Park Ohio was still functioning under a huge debt load. Interest on debt was \$23,189,999 in 2009 and \$23,792,000 for 2010. Total debt was apparently \$335,041,000. This debt was over seven times the equity figures provided in the financial records.

{¶ 6} Counsel for Park Ohio asserted at oral argument that the huge negatives on the financial records were the result of recent modifications in Generally Accepted Accounting Principles, commonly referred to as GAAP. Counsel did not offer the fact that the changes in GAAP were made so that the corporation's financial reports and audits were more indicative of the financial health of the corporation.

{¶ 7} Park Ohio has set forth two specific objections to the magistrate's decision:

The Magistrate's finding and conclusion that Respondent Ohio Bureau of Workers' Compensation ("BWC") did not engage in improper rulemaking;

The Magistrate's finding and conclusion that Respondent BWC did not abuse its discretion when it required Park Ohio to provide additional security in the form of a letter of credit in the amount of \$1,140,000.

{¶ 8} Neither objection has merit.

{¶ 9} The administrator of the BWC clearly relied on several factors in deciding that Park Ohio needed to post a letter of credit for \$1,140,000. The financial information set forth above was utilized. It speaks for itself, without the use of Z-scores or Risk Calc. A company with the losses experienced by Park Ohio and with the debt load listed is a company which could be viewed as struggling. The BWC had every right to ask for additional security so that the funds with the BWC were not tapped to pay for the costs of injured workers and former workers for Park Ohio. The BWC absolutely did not abuse its discretion in asking for additional security.

{¶ 10} The second objection is overruled.

{¶ 11} The BWC did not use Risk Calc in such a way as to make it a rule. The Risk Calc score was only one of many factors set forth in the administrator of the BWC's analysis. Indeed, the Risk Calc score could be considered a minor factor in the context of an analysis of financial records which showed Park Ohio to be enormously leveraged and laboring under a debt load of over one-third of a billion dollars.

{¶ 12} The first objection is overruled.

{¶ 13} Both objections having been overruled, we adopt the findings of fact and conclusions of law contained in the magistrate's decision. As a result, we deny the request for a writ of mandamus.

*Objections overruled; writ denied.*

SADLER and CONNOR, JJ., concur.

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**APPENDIX**  
**IN THE COURT OF APPEALS OF OHIO**  
**TENTH APPELLATE DISTRICT**

State of Ohio ex rel.	:	
Park Ohio Industries, Inc.,	:	
	:	
Relator,	:	No. 11AP-887
	:	
v.	:	(REGULAR CALENDAR)
	:	
Ohio Bureau of Workers' Compensation,	:	
	:	
Respondent.	:	

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**MAGISTRATE'S DECISION**

Rendered on May 23, 2012

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*Fisher & Phillips LLP, Daniel P. O'Brien, Jason M. Baasten,  
and Mark E. Snyder, for relator.*

*Michael DeWine, Attorney General, and Elise Porter, for  
respondent.*

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**IN MANDAMUS**

{¶ 14} Park Ohio Industries, Inc. ("relator" or "Park Ohio") has filed this original action requesting that this court issue a writ of mandamus ordering respondent Ohio Bureau of Workers' Compensation ("BWC") to vacate its order which granted Park Ohio self-insured status under the workers' compensation system but also required Park Ohio to submit additional security in the form of a letter of credit. Park Ohio argues that the BWC should have granted it self-insured status without requiring Park Ohio to submit additional security.

**Finding of Fact:**

{¶ 15} 1. Park Ohio has operated as a self-insured employer under the Ohio Workers' Compensation system for many years.

{¶ 16} 2. In September 2010, Park Ohio filed its annual application to renew its self-insured status.

{¶ 17} 3. In response, the BWC's self-insured department sent a letter, dated December 14, 2010, informing Park Ohio that, in order for their self-insured status to be renewed, Park Ohio was required to post additional security in a form of a letter of credit. The BWC explained its rationale as follows:

Based on our financial analysis of the employers' 2009 audited financial statements, we are requesting security in the form of a Letter of Credit in the amount of \$1,560,000.00 to be placed in favor of the Bureau of Workers' Compensation as a condition of renewal. The analysis revealed:

- Negative Retained Earnings in 2009 of (34,230,000.00)
- Negative Net Income in 2009 of (5,209,000.00)

The employer is required to provide the Bureau of Workers' Compensation with a letter of credit in the said amount within thirty (30) days of the employers' receipt of this letter.

This figure is arrived by using the standard policy of the department in determining additional security amounts. The standard formula calculates the Letter of Credit amount using the compensation and medical dollars reported on the 2009 SI-40. The calculated amount is the sum of 4 times PTD and Death, 2 times all other compensation and 1.5 times total medical.

{¶ 18} 4. In response, Park Ohio appealed and submitted additional information to the BWC to be considered with respect to its self-insured status and whether or not additional security would be required. In larger part, Park Ohio argued that it had experienced some financial difficulties during the recent economic downturn; however,

Park Ohio submitted evidence in support of its argument that it was financially secure enough to be granted self-insured status without requiring the posting of security.

{¶ 19} 5. The administrator of the BWC issued a decision dated September 14, 2011. The administrator determined that Park Ohio still be required to post additional security but lowered the amount from \$1,650,000 to \$1,140,000. The order explained the decision to continue to require additional security as follows:

Using the 2009 and 2010 10K reports, the Administrator's Designee finds as follows: Negative retained earnings were \$34,230,000.00 in 2009 and \$19,043,000.00 in 2010. The employer experienced a net loss in 2008 of \$119,803,000.00 and in 2009 of \$5,209,000.00. Net income in 2010 was \$15,187,000.00. The employer is highly leveraged because total indebtedness (\$335,041,000.00) is more than seven times equity (\$46,375,000.00). Per Yahoo Finance, negative net tangible assets for 2009 were \$52,755,000.00 and for 2010 were \$47,065,000.00. Interest expense was \$23,189,000.00 for 2009 and \$23,792,000.00 for 2010 and demonstrates several features. Among them, if interest expense were only half, the employer would have had net income for 2009. The interest expense also reflects the high debt service.

Finally, as part of this review, it has been determined by BWC that the Moody's June 2010 bond rating improved to B3. Nevertheless, that improved rating still indicates a high risk of default.

The administrator also explained the BWC's procedures for requesting letters of credit:

Prior to this year, financial statements have been used to evaluate the need for additional security through the use of the Z-score, balance sheet and income statement line-items, and ratios based on these line-items. In 2007, the Ohio General Assembly enacted HB100 to provide comprehensive reform for the governance of BWC. As part of its many mandates, this legislation required the Administrator to commission a consulting firm to perform a comprehensive review of all rating programs used by the Administrator. Uncodified section 512.50(A), eff. September 10, 2007.

BWC engaged Deloitte Consulting, LLC as that firm. Deloitte recommended that BWC change the self-insurance

assessment process to allow for the proactive identification of industries or characteristics of employers that might pose a particularly high risk of future exposure to the SIEGF. *HB100 Comprehensive Report*, Report 1.3, page 2. In 2009, BWC convened a workgroup consisting of BWC specialists in finance, self-insurance, and law, and leaders of the self-insurers community. The workgroup changed the evaluation process by discarding the use of Z-scores and simplifying the formula for calculation of the letter of credit amount. Instead, BWC would use Moody's RiskCalc, and base the amount of the letter of credit on the employer's reported reserves, or other reasonable measure of liability in the event of the employer's default. Moody's RiskCalc is "the premium private firm probability of default (PD) model for the U.S. market." See the RiskCalc pamphlet for RiskCalc USA at [moodyanalytics.com](http://moodyanalytics.com).

{¶ 20} The administrator also discussed the positions Park Ohio made in its position statement. Park Ohio criticized every aspect of the BWC's determination from its lack of consideration of the additional evidence Park Ohio presented, the failure of the BWC to promulgate a rule requiring additional security, the BWC's use of Z-scores and Moody's RiskCalc in making its determinations; and ultimately, after considering all of the materials filed by Park Ohio, the administrator upheld the order of the self-insured review panel.

{¶ 21} 6. Thereafter, Park Ohio filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 22} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28 (1983).

{¶ 23} All employers are required to carry workers' compensation coverage for their employees. R.C. 4123.35 provides for payment to the state insurance fund as well as the standards for considering applications and rules for self-insureds. R.C. 4123.35(A) provides in pertinent part:

Except as provided in this section, every employer mentioned in division (B)(2) of section 4123.01 of the Revised Code, and every publicly owned utility shall pay semiannually in the months of January and July into the state insurance fund the amount of annual premium the administrator of workers' compensation fixes for the employment or occupation of the employer, the amount of which premium to be paid by each employer to be determined by the classifications, rules, and rates made and published by the administrator.

{¶ 24} Some employers who can demonstrate sufficient financial ability may be permitted to be self-insured. As the Supreme Court of Ohio stated, self-insured status is a privilege, and not a right. *St. Paul Fire & Marine Ins. Co. v. Indus. Comm.*, 30 Ohio St.3d 17, 19 (1987).

{¶ 25} R.C. 4123.35 provides further, with regard to self-insured employers, as follows:

(B) Employers who will abide by the rules of the administrator and who may be of sufficient financial ability to render certain the payment of compensation to injured employees or the dependents of killed employees, and the furnishing of medical, surgical, nursing, and hospital attention and services and medicines, and funeral expenses, equal to or greater than is provided for in sections 4123.52, 4123.55 to 4123.62, and 4123.64 to 4123.67 of the Revised Code, and who do not desire to insure the payment thereof or indemnify themselves against loss sustained by the direct payment thereof, upon a finding of such facts by the administrator, may be granted the privilege to pay individually compensation, and furnish medical, surgical, nursing and hospital services and attention and funeral expenses directly to injured employees or the dependents of killed employees, thereby being granted status as a self-insuring employer.

\* \* \*

(1)(a) The employer employs a minimum of five hundred employees in this state;

(b) The employer has operated in this state for a minimum of two years, provided that an employer who has purchased, acquired, or otherwise succeeded to the operation of a



business, or any part thereof, situated in this state that has operated for at least two years in this state, also shall qualify;

(c) Where the employer previously contributed to the state insurance fund or is a successor employer as defined by bureau rules, the amount of the buyout, as defined by bureau rules;

(d) The sufficiency of the employer's assets located in this state to insure the employer's solvency in paying compensation directly;

(e) The financial records, documents, and data, certified by a certified public accountant, necessary to provide the employer's full financial disclosure. The records, documents, and data include, but are not limited to, balance sheets and profit and loss history for the current year and previous four years.

(f) The employer's organizational plan for the administration of the workers' compensation law;

(g) The employer's proposed plan to inform employees of the change from a state fund insurer to a self-insuring employer, the procedures the employer will follow as a self-insuring employer, and the employees' rights to compensation and benefits; and

(h) The employer has either an account in a financial institution in this state, or if the employer maintains an account with a financial institution outside this state, ensures that workers' compensation checks are drawn from the same account as payroll checks or the employer clearly indicates that payment will be honored by a financial institution in this state.

\* \* \*

(E) In addition to the requirements of this section, the administrator shall make and publish rules governing the manner of making application and the nature and extent of the proof required to justify a finding of fact by the administrator as to granting the status of a self-insuring employer.

\* \* \*

(F) The administrator also shall adopt rules establishing a minimum level of performance as a criterion for granting and maintaining the status as a self-insuring employer and fixing time limits beyond which failure of the self-insuring employer to provide for the necessary medical examinations and evaluations may not delay a decision on a claim.

(G) The administrator shall adopt the rules setting forth procedures for auditing the program of self-insuring employers. The bureau shall conduct the audit upon a random basis or whenever the bureau has grounds for believing that a self-insuring employer is not in full compliance with bureau rules or this chapter.

The administrator shall monitor the programs conducted by self-insuring employers, to ensure compliance with bureau requirements.

(H) For the purpose of making determinations as to whether to grant status as a self-insuring employer, the administrator may subscribe to and pay for a credit reporting service that offers financial and other business information about individual employers. The costs in connection with the bureau's subscription or individual reports from the service about an applicant may be included in the application fee charged employers under this section.

\* \* \*

(L) Every self-insuring employer shall certify, in affidavit form subject to the penalty for perjury, to the bureau the amount of the self-insuring employer's paid compensation for the previous calendar year.

{¶ 26} The BWC has promulgated rules as above required. Ohio Adm.Code 4123-19-01 provides the following relevant definitions:

(B) "Self-insuring risks" are hereby defined as those employers who are of sufficient financial ability to carry their own insurance; who do not desire to insure the payment thereof, except as provided in division (B) of section 4123.82 of the Revised Code; who secure authority from the administrator of workers' compensation to pay compensation, etc., directly; who pay into the state insurance fund an assessment as established by a rule of the bureau of workers' compensation adopted in accordance with section 111.15 of the Revised Code; who pay to the bureau a

contribution to the self-insuring employers' guaranty fund pursuant to section 4123.351 of the Revised Code; and who provide an additional security, where required by the bureau, in the amount or form that may be specified by the bureau.

(C) "Self-insurance" is a privilege granted or denied by the administrator of workers' compensation.

{¶ 27} Ohio Adm.Code 4123-19-03 pertains to applications by employers seeking to obtain self-insured status and provides that the BWC may examine any and all financial records maintained by the employer. Ohio Adm.Code 4123-19-03 provides in pertinent part:

(A) All employers granted the privilege to pay compensation directly shall demonstrate sufficient financial strength and administrative ability to assure that all obligations under section 4123.35 of the Revised Code will be met promptly. The administrator of workers' compensation shall deny the privilege to pay compensation, etc., directly, where the employer is unable to demonstrate its ability to promptly meet all the obligations under the rules of the commission and bureau and section 4123.35 of the Revised Code. The administrator shall consider, but shall not be limited to the factors in divisions (B)(1) and (B)(2) of section 4123.35 of the Revised Code where they are applicable in determining the employer's ability to meet all obligations under section 4123.35 of the Revised Code.

The administrator shall review all financial records, documents, and data necessary to provide a full financial disclosure of the employer, certified by a certified public accountant, including but not limited to, the balance sheets and a profit and loss history for the current year and the previous four years. \* \* \*

(1) In determining whether to grant a waiver of the requirement of division (B)(1)(e) of section 4123.35 of the Revised Code for certified financial records, the administrator shall consider the following criteria and conditions.

(a) The administrator shall require reviewed financial statements, including full footnote disclosure to be prepared and submitted in accordance with generally accepted accounting principles. \* \* \*

(b) The administrator may utilize the services of a commercial credit reporting bureau to assist in the evaluation of an applicant's ability to meet its workers' compensation obligations. The cost of this commercial reporting service shall be assumed by the applicant employer.

(c) Notwithstanding the above criteria, the administrator may deem it necessary for an applicant employer to provide additional security to ensure meeting its workers' compensation obligations. The amount of such additional security shall be in the form and amount as determined by the administrator and provided prior to the granting of self-insurance.

{¶ 28} As above indicated, the BWC has broad discretion in making their determination. There is no set standard and the BWC has discretion, in each case, to determine whether or not an employer will be granted self-insured status.

{¶ 29} An employer's privilege to be a self-insured employer might be renewed annually. The employer is required to seek the renewal of the privilege annually. Ohio Adm.Code 4123-19-08 provides:

(A) The privilege of an employer to pay compensation, etc., directly, must be renewed annually. Beginning with the effective date of this rule, prior to renewal of the employer's privilege of self-insurance, the bureau shall re-evaluate the employer's financial strength and administrative ability as described in rule 4123-19-03 of the Administrative Code. The bureau will consider past performance of the self-insuring employer as an additional factor in determining whether to renew the privilege of self-insurance.

\* \* \*

(C) In order to renew its status as a self-insuring employer, the employer shall establish the following to the bureau's satisfaction: that the employer has fulfilled the minimal level of performance standards that an employer is required to meet before being granted permission to pay compensation and benefits directly, \* \* \* that the employer has substantially resolved all outstanding complaints filed with the bureau; and that the employer has achieved a satisfactory rating in its most recent audit report. Upon compliance with these requirements, the administrator may approve the

renewal application. If the application is granted, the bureau will so notify the applicant within thirty days prior to the renewal date. In this notification, the bureau shall specify the contribution to the self-insuring employers' guaranty fund and the amount of the additional security, if required.

\* \* \*

(E) In the event the bureau finds that the minimum criteria set forth in the rules have not been met, the bureau shall give written notice to the applicant that the privilege to pay compensation, etc., directly, will not be renewed. Said notice shall give the employer two weeks to exercise the right to a public hearing before the self-insured review panel, in accordance with the provisions of rule 4123-19-14 of the Administrative Code.

Ohio Adm.Code 4123-19-15 provides for assessments as follows:

(A) The bureau of workers' compensation shall require self-insuring employers to pay a contribution to the self-insuring employers' guaranty fund as provided in this rule. The contributions due from self-insuring employers shall be established at rates as low as possible but such as will ensure sufficient monies to guarantee the payment of any claims against the fund.

(B) The bureau shall maintain a minimum balance of funds in the self-insuring employers' guaranty fund of one and a quarter times the prior year's payments from the fund as determined at the end of each calendar year to ensure sufficient monies to guarantee the payment of any claims against the fund.

{¶ 30} As the above statute and administrative code provisions indicate, all employers are state-fund employers unless the BWC grants the employer the privilege to be a self-insured employer. There is no right to be considered a self-insured employer. Further, even where such status has been granted, the BWC has discretion to either (a) require greater security or (b) deny the application for renewed status.

{¶ 31} Park Ohio's first argument is that the BWC abused its discretion when it improperly ordered Park Ohio to supply additional security. Park Ohio argues that there

is nothing in the Ohio Administrative Code that would permit the BWC to require additional security.

{¶ 32} Park Ohio is incorrect. Specifically, Ohio Adm.Code 4123-19-08(C) provides as follows concerning the renewal of self-insured status:

In order to renew its status as a self-insuring employer, the employer shall establish the following to the bureau's satisfaction: that the employer has fulfilled the minimal level of performance standards that an employer is required to meet before being granted permission to pay compensation and benefits directly, \* \* \* that the employer has substantially resolved all outstanding complaints filed with the bureau; and that the employer has achieved a satisfactory rating in its most recent audit report. Upon compliance with these requirements, the administrator may approve the renewal application. **If the application is granted, the bureau will so notify the applicant within thirty days prior to the renewal date. In this notification, the bureau shall specify the contribution to the self-insuring employers' guaranty fund and the amount of the additional security, if required.**

(Emphasis added.) As the above code provides, the BWC has discretion to require additional security.

{¶ 33} Park Ohio next argues that, because the BWC did not determine that it was a high-risk employer, the BWC was not permitted to access additional security.

{¶ 34} Again, Park Ohio is mistaken. Park Ohio specifically points to Ohio Adm.Code 4123-19-15 which states:

(C) In addition to any contribution required of all self-insuring employers as provided in paragraph (B) of this rule, the contribution to the self-insuring employers' guaranty fund shall be as follows:

\* \* \*

(2) A self-insuring employer identified as a high risk employer by the bureau shall be assessed six per cent of the previous year's paid compensation as reported to the bureau.

The assessment shall not be less than \$5,000 for any twelve-month period of coverage. \* \* \*

(D) As used in this rule, the bureau shall determine whether a self-insuring employer is a "high risk" employer based upon a review of the self-insuring employer's certified financial records submitted with the application for self-insuring employer renewal. The bureau's analysis and determination may include, but is not limited to, a review of the self-insuring employer's equity to debt ratio, return on equity, Z-score, and a Moody's rating, or other nationally recognized financial rating of the long term stability of a company.

{¶ 35} Considering Ohio Adm.Code 4123-19-08(C) in pari materia with Ohio Adm.Code 4123-19-15(C) and (D) demonstrates that the BWC may require additional security whether or not the BWC determines that the employer is a high-risk employer. As indicated by the provisions, a self-insured employer can be required to pay additional security whether or not the BWC finds the employer to be a high-risk employer.

{¶ 36} Park Ohio next argues that the BWC is required to set out the specific period of time for which the payment of the additional security will be in effect. Specifically, Park Ohio points to Ohio Adm.Code 4123-19-03(F) which provides:

The surety bond or additional security furnished by the employer shall be for an amount and period as established by the bureau and may be periodically reviewed and reevaluated by the bureau.

{¶ 37} In making this argument, Park Ohio argues that it "will return to a position of fiscal health as defined by the OBWC and yet the OBWC will not release the surety requirement."

{¶ 38} There is nothing in the record which substantiates Park Ohio's contention. Both the Ohio Revised Code and the Ohio Administrative Code require the self-insured employer to re-apply for continued self-insured status every year. Further, those provisions require the BWC to review and consider each and every renewal application it receives. As the Ohio Revised Code and Ohio Administrative Code are written, the BWC will revisit this issue on a yearly basis and Park Ohio's argument fails.

{¶ 39} Park Ohio next argues that the BWC identified only two issues supporting its original requirements for an additional surety and that the BWC abused its discretion

when it cited the additional reasons that Park Ohio is "highly leveraged" in support of its decision.

{¶ 40} In the present case, the BWC initially determined that Park Ohio should pay additional security based on "Negative Retained Earnings in 2009 of (34,230,000.00) [and] Negative Net Income in 2009 of (5,209,000.00)." Park Ohio argues the BWC abused its discretion when, on appeal, the BWC also determined that the fact that Park Ohio was highly leveraged constituted an additional reason to require the additional security. Park Ohio also challenges the methods whereby the BWC determined that it was highly leveraged.

{¶ 41} On the one hand, Park Ohio argues that the BWC did not consider the additional evidence Park Ohio filed with its appeal while, on the other hand, Park Ohio argues that the BWC abused its discretion when, after reviewing that additional evidence, the BWC concluded that Park Ohio was highly leveraged. Park Ohio also argues that the BWC's determination that it was highly leveraged is a "gross misstatement of the facts."

{¶ 42} Park Ohio argues here that the BWC has misconstrued the evidence which Park Ohio submitted in support of its appeal and that, if the BWC would have considered this evidence correctly, the BWC would have determined that Park Ohio was financially sound.

{¶ 43} Park Ohio is asking this court to re-evaluate the evidence and find that the BWC's determination was wrong.

{¶ 44} Just as credibility and the weight to be given evidence are within the discretion of the Industrial Commission as fact finder, the same is true concerning the BWC: questions of credibility and the weight to be given evidence are clearly within the discretion of the BWC as fact finder. *State ex rel. Litco Wood Prods. v. Admr. Ohio Bur. Workers' Comp.*, 87 Ohio St.3d 42 (1999). In that case, the employer, Litco Wood Products, Inc. ("Litco") requested a writ of mandamus ordering the administrator of the BWC to recalculate its state insurance fund merit rating for certain years. Both this court and the Supreme Court of Ohio denied the writ.

{¶ 45} Litco wanted the BWC to recalculate its state insurance fund merit rating for certain years by using a formula that excluded the claim costs Litco incurred while participating in a Retrospective Rating Plan ("RRP"). The court determined that it was



not an abuse of discretion for the BWC to use these claim costs to assess the relative claims history of employers to determine whether individual employers should be assessed an experience modification for the upcoming year.

{¶ 46} In the present case, Park Ohio argues that the BWC should have used a different formula and should have relied on different facts to make its determination. Whether the BWC used Z-scores or Moody's RiskCalc, was immaterial as both were reasonable measures of liability. Just as in Litco, the BWC's formula and the facts upon which the BWC relied are questions of credibility and weight of the evidence which are within the discretion of the BWC.

{¶ 47} Park Ohio also argues that the BWC engaged in unlawful rule-making when it utilized a new financial analysis to determine that Park Ohio was required to provide additional security. Park Ohio cites *Ohio Nurses Assn., Inc. v. Ohio State Bd. of Nursing Edn. & Nurse Registration*, 44 Ohio St.3d 73 (1989) in support of its argument. In that case, the Ohio State Board of Nursing Education and Nurse Registration ("board") issued a position statement which appeared to have the effect of permitting licensed practical nurses to perform certain nursing procedures, such as administering intravenous fluids, for which there was no prior authority under statute or rule. The board argued that the position paper was merely advisory and did not need to be rule-filed under R.C. Chapter 119 because nothing in the position paper could be enforced pursuant to R.C. 119.01(C) because of the use of permissive rather than mandatory language.

{¶ 48} The Supreme Court of Ohio determined that it was a rule and that the board was required to follow the procedures of rule-making set forth in R.C. Chapter 119. The court stated:

In adopting a "rule," an agency is required to comply with the promulgation procedure set forth in R.C. Chapter 119. See R.C. 119.02. "Rule" is defined in R.C. 119.01(C) as "\* \* \* any rule, regulation, or standard, having a general and uniform operation, adopted, promulgated, and enforced by any agency under the authority of the laws governing such agency, and includes any appendix to a rule. 'Rule' does not include any internal management rule of an agency unless the internal management rule affects private rights." (Emphasis added.)

Upon a careful review of the position paper set forth in footnote one, *supra*, we find that it meets the foregoing statutory definition of "rule" as determined by the General Assembly. As appellants point out, the position paper enlarges the scope of practice for LPNs, and regulates those LPNs qualified to start IVs by requiring a post-licensure course of study. Additionally, it is readily apparent that the position paper is intended to have a uniform application to all LPNs in the state of Ohio.

*Id.* at 75.

{¶ 49} As noted previously, R.C. 4123.35(B)(1) gives the BWC the authority to consider a number of factors in determining whether an employer can meet its obligations. The BWC has broad authority in this area. The BWC is authorized to compel employers to present any and all financial records as part of their analysis. As Ohio Adm.Code 4123-19-03 provides, the BWC is permitted to examine all financial records of an employer and may utilize the services of any commercial credit reporting bureau to assist in their evaluation of an employer. Regardless of the criteria enumerated in Ohio Adm.Code 4123-19-03, the BWC may still require an employer to provide additional security and nothing in the statutes or rules require that the BWC provide an explanation. Further, since 2007, the BWC has been authorized to utilize the Moody's rating. Specifically, Ohio Adm.Code 4123-19-15 provides that, when considering if an employer is high risk, the "bureau's analysis and determination may include, but is not limited to, a review of the self-insuring employer's equity to debt ratio, return on equity, Z-score, and a Moody's rating, or other nationally recognized financial rating of the long term stability of a company." Both the Z-score and Moody's ratings are tools and are utilized in conjunction with a variety of other factors to determine whether or not an employer will be granted the privilege of self-insured status or whether or not the employer will be required to post additional security. Relator's argument that the BWC is basing its decisions exclusively on Moody's rule is not supported by the evidence. Nothing indicates that Moody's rule is being used as a standard "having general and uniform operation." R.C. 119.01(C). Relator has not demonstrated that the BWC has promulgated a rule utilizing Moody's rule.

{¶ 50} The discretion of the BWC is not limited to one particular method of assessing an employer's financial health with regard to self-insured status. The only requirement is that the BWC review all financial records, documents, and data necessary to provide financial disclosure under Ohio Adm.Code 4123-19-01. The BWC does have properly promulgated rules in Ohio Adm.Code 4123-19-03, 4123-19-08, and 4123-19-15. Further, as stated previously, Park Ohio is incorrect when it states that the BWC is precluded from requiring additional security even if the BWC does not find the employer to be a high-risk employer. That authority is granted under Ohio Adm.Code 4123-19-08(C) which states:

If the application is granted, the bureau will so notify the applicant within thirty days prior to the renewal date. In this notification, the bureau shall specify the contribution to the self-insuring employers' guaranty fund and the amount of the additional security, if required.

{¶ 51} Park Ohio also relies on this court's decision in *Mosholder v. Ohio Rehab. Serv. Comm.*, 75 Ohio App.3d 134 (10thDist.1991), in further support of its argument that the BWC did not have a rule which permitted it to require additional security. However, this argument has previously been rejected.

{¶ 52} Park Ohio's final argument is that the BWC did not provide an explanation for its decision. This magistrate disagrees.

Specifically, the administrator's designee stated the finding as follows: Using the 2009 and 2010 10K reports, the Administrator's Designee finds as follows: Negative retained earnings were \$34,230,000.00 in 2009 and \$19,043,000.00 in 2010. The employer experienced a net loss in 2008 of \$119,803,000.00 and in 2009 of \$5,209,000.00. Net income in 2010 was \$15,187,000.00. The employer is highly leveraged because total indebtedness (\$335,041,000.00) is more than seven times equity (\$46,375,000.00). Per Yahoo Finance, negative net tangible assets for 2009 were \$52,755,000.00 and for 2010 were \$47,065,000.00. Interest expense was \$23,189,000.00 for 2009 and \$23,792,000.00 for 2010 and demonstrates several features. Among them, if interest expense were only half, the employer would have had net income for 2009. The interest expense also reflects the high debt service.

Finally, as part of this review, it has been determined by BWC that the Moody's June 2010 bond rating improved to B3. Nevertheless, that improved rating still indicates a high risk of default.

{¶ 53} Park Ohio disagrees with the BWC's decision to require Park Ohio to provide security in the form of a letter of credit in the amount of \$1,140,000. Park Ohio's arguments challenge the BWC's rule-making authority and the method whereby the BWC rendered its decision. These matters are within the sound discretion of the BWC and, absent a showing that the BWC abused its discretion, Park Ohio cannot demonstrate that it has a clear legal right or that the BWC has a clear legal duty to renew its self-insured status without requiring additional security. As such, it is this magistrate's decision that this court should deny Park Ohio's request for a writ of mandamus.

/s/Stephanie Bisca Brooks

STEPHANIE BISCA BROOKS  
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).