

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. RFFG, LLC, :
Relator, :
v. : No. 11AP-647
Ohio Bureau of Workers' Compensation, : (REGULAR CALENDAR)
Respondent. :

D E C I S I O N

Rendered on January 29, 2013

*Fisher & Phillips LLP, Daniel P. O'Brien, Mark E. Snyder,
and Nicole H. Farley, for relator.*

*Michael DeWine, Attorney General, and Stephen D. Plymale,
for respondent.*

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

TYACK, J.

{¶ 1} RFFG, LLC ("RFFG"), has filed this action in mandamus, seeking a writ to compel the Ohio Bureau of Workers' Compensation ("BWC") to overturn BWC's finding that RFFG was the successor in interest to Ameritemps, Inc. ("Ameritemps") and therefore subject to the risk expenses of Ameritemps for purposes of contribution rates for workers' compensation.

{¶ 2} The case was referred to a magistrate, in accord with Loc.R. 13(M). The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued a magistrate's decision, appended hereto, which contains detailed findings of fact and

conclusions of law. The magistrate's decision includes a recommendation that we deny the request for a writ of mandamus.

{¶ 3} RFFG has filed objections to the magistrate's decision. The case is now before the court for a full, independent review.

{¶ 4} Ameritemps was purchased by WTS Acquisition Corporation ("WTS") and subsequently transferred to RFFG. The purchase included a purchase of equipment, leases, contracts, general intangibles, customer lists and goodwill. RFFG continued to do business under the Ameritemps name.

{¶ 5} RFFG notified the BWC of the purchases. BWC in turn notified RFFG that RFFG would be considered the successor employer to Ameritemps for workers' compensation purposes.

{¶ 6} RFFG did not want to assume all the risks associated with Ameritemps and argued that it had changed significant portions of how and where Ameritemps had formerly done business. However, RFFG initially refused to provide any documents except the asset purchase agreement via which WTS had acquired Ameritemps. As a result, the allegations of significant changes in the way business was being done initially were allegations only.

{¶ 7} RFFG's protest of the finding that it was a successor to Ameritemps resulted in a hearing before the adjudicating committee of the BWC. No testimony was taken at the hearing. Subsequent to the hearing, RFFG provided some documentation to support its arguments. The documentation did not completely reveal which former clients of Ameritemps were no longer being served, so the BWC had very little basis for determining if the business had changed significantly. The documents provided were only part of the documents requests. As a result, the BWC did not change its finding that RFFG was a successor to Ameritemps.

{¶ 8} In the objections to our magistrate's decision, counsel for RFFG sets forth three issues:

The Magistrate's finding and conclusion that Respondent RFFG did not provide Respondent Bureau of Workers' Compensation ("BWC" or "Respondent") the information it requested prior to the Adjudicating Committee's Order on the transfer of experience;

The Magistrate's finding and conclusion that Respondent BWC did not abuse its discretion when it ordered a whole transfer of experience from Ameritemps to RFFG; and

The Magistrate's finding and conclusion that Respondent BWC did not abuse its discretion by inadequately explain[ing] it's Adjudicating Committee Order, particularly after the requested information was provided to the BWC, and in light of recent BWC precedent.

{¶ 9} As to the first objection, the information provided to BWC did not really address the key issue of the risks involved in the ongoing business. The fact that only 4 of 12 offices remained open did not inform the BWC of the alleged changes in the business. The fact that core employees and senior management were replaced likewise is uninformative. A reduction in the number of business clients, without information of which business clients were involved and what services were provided to the remaining clients does not tell the BWC whether the risk of injury has changed. The redaction "for confidentiality purposes" of lists provided by counsel may have deprived the BWC of needed information.

{¶ 10} The magistrate acknowledges that some information provided by RFFG is present in the record before us. Key information as to the risks for workers in the ongoing business was not provided. RFFG/Ameritemps may employ fewer people, but the risks associated with the work done may well be unchanged. What RFFG/Ameritemps pays BWC will be reduced if fewer people are employed but the rate per employee does not need to change just because fewer or different people may be employed doing the same tasks.

{¶ 11} The first and second objections are overruled.

{¶ 12} For similar reasons, the third objection is overruled.

{¶ 13} The adjudicating committee had only allegations as to the change of the tasks performed on behalf of the ongoing clientele, no real proof of a significant change in the risk to employees. The information provided via the U-118 and purchase agreement clearly showed WTS and RFFG were a successor to Ameritemps. RFFG did not demonstrate that the risks changed, only that fewer and/or different people were performing the functions previously performed by Ameritemps.

{¶ 14} All three 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 DORRIAN, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. RFFG, LLC,	:	
	:	
Relator,	:	
	:	
v.	:	No. 11AP-647
	:	
Ohio Bureau of Workers' Compensation,	:	(REGULAR CALENDAR)
	:	
Respondent.	:	

MAGISTRATE'S DECISION

Rendered on September 28, 2012

*Fisher & Phillips LLP, Daniel P. O'Brien, Mark E. Snyder,
and Nicole H. Farley, for relator.*

*Michael DeWine, Attorney General, and Stephen D. Plymale,
for respondent.*

IN MANDAMUS

{¶ 15} Relator, RFFG, LLC ("RFFG"), 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 final order which transferred to RFFG the risk experience of Ameritemps, Inc. ("Ameritemps"), a temporary employment agency acquired by RFFG's parent company WTS Acquisition Corporation ("WTS"), and subsequently transferred to RFFG on the basis that RFFG was the successor in interest to Ameritemps.

Findings of Fact:

{¶ 16} 1. On December 18, 2008 WTS purchased Ameritemps.

{¶ 17} 2. Pursuant to Article 2.1(b), the purchased assets included, but were not limited to the following:

(i) Equipment.

(ii) Leases.

(iii) Contracts. Seller's right, title and interest in and to the contracts and agreements of Seller identified on Schedule 2.1(b)(iii) (such identified contracts being the "Assumed Contracts").

(iv) Intellectual Property/General Intangibles.

* * *

(vi) Transferred Customers List. Customer list and the rights to do business with the clients and customers of Seller relating to the Business listed on Schedule 2.1(b)(vi) hereto.

(vii) Goodwill. All goodwill of the Business.

{¶ 18} 3. Thereafter, WTS transferred the assets into its wholly owned subsidiary, RFFG.

{¶ 19} 4. RFFG began operating as Ameritemps out of former Ameritemps' business locations and using Ameritemps' signage, trademark name, and web page.

{¶ 20} 5. On or about February 27, 2009, Ronald E. Heineman, as president of RFFG, signed and filed a "Notification of Business Acquisition/Merger or Purchase/Sale" ("U-118") with the BWC. RFFG is listed as a succeeding employer for Ameritemps' policy of Workers' Compensation with the BWC. According to the information contained on the U-118, there was a purchase agreement; RFFG acquired/purchased Ameritemps on January 1, 2009; acquired/purchased the assets and/or ownership interest (all or portion) of Ameritemps; RFFG acquired/purchased the right to use Ameritemps' business name; and RFFG acquired part of the business, specifically:

RFFG purchased select vehicles, select personal property, select office leases and select locations.

In addition RFFG purchased the rights to contract with certain clients of the former Ameritemps.

The business remained in continuous operation; RFFG used some but not all of Ameritemps' locations to continue operations; RFFG hired some Ameritemps employees depending on the clients that were kept and RFFG changed senior management and some operational management positions; RFFG acquired/purchased machinery and equipment from Ameritemps, specifically, vehicles and office equipment; RFFG acquired/purchased Ameritemps' contracts/customers; and RFFG indicated that it would conduct business in the same or similar manner as Ameritemps except for the change in senior management which would result in significant operational change.

{¶ 21} 6. In a letter dated December 15, 2009, the BWC notified RFFG that it had been determined that they were the successor employer to Ameritemps for Ohio workers' compensation purposes. Specifically, that letter informed RFFG of the following:

We received notification of a business acquisition/merger or purchase/sale, and have determined you are the successor employer for Ohio workers' compensation purposes.

As the successor employer for the entire operation, you are responsible for all existing and future financial rights and obligations of the former employer. BWC will base your workers' compensation rate(s) on the former employer's experience or the combined experience of all employers involved in the transaction if you had established coverage prior to acquiring the business. As a result, BWC will recalculate your premium rates, which may result in a rate change.

If you have questions about this notice or wish to speak with a customer service representative about your policy, please call 1-800-OhioBWC. We appreciate your prompt attention to this matter.

{¶ 22} 7. Thereafter, RFFG filed an application for an adjudication hearing with the BWC. RFFG disagreed with the BWC's decision finding RFFG to be a successor employer:

RFFG, LLC for good cause, protests any and all successorship liability transfer and/or combine by the BWC as it relates to Ameritemps, Inc. RFFG is not subject to

O.R.C. 4123.32 and/or O.A.C. 4123-17-02 as it has not succeeded Ameritemps, Inc. in the operation of its business. Therefore RFFG requests any and all transfer and/or combine of any experience and/or liability associated with Ameritemps be undone. Subject to and without waiving the above argument, if RFFG is a successor, it is only a successor in part and not in whole. RFFG does not maintain the same offices, business contracts, clients[,] employees or the same management as Ameritemps. As such RFFG protests the transfer and requests any and all actions by the BWC based upon a finding of a succession in whole or in-part be undone. RFFG requests a hearing before the Adjudicating Committee.

{¶ 23} 8. RFFG filed a position statement in support of its protest. RFFG argued that the BWC's decision that it was the successor employer to Ameritemps was an error arguing that RFFG maintained different offices, changed upper level management, had a different risk philosophy, and RFFG dropped many of Ameritemps' former clients. RFFG indicated that it was focusing on the healthcare industry, light manufacturing, and packaging clients and that RFFG had decided not to do business with clients of Ameritemps that had bad safety and loss control problems. RFFG's main argument focused on the fact that:

Temporary Service companies are unique in that their workers' compensation risk is determined less by its internal loss control program and the loss control programs of its clients. RFFG made a conscious business decision to acquire certain assets, including certain client contracts. However, RFFG then took on a new senior management team, a new safety compliance manager, and most importantly, new client protocols that eliminated doing business with the construction industry and heavy manufacturing clients and refocused its services in the health care, light manufacturing and packaging industries.

RFFG works with a fraction of the clients that Ameritemps had serviced. This new approach has demonstrated that this is not even close to the same exposure and same risk that Ameritemps had pre-asset purchase. The change in management and management philosophy can be objectively demonstrated by the extreme reduction in losses.

{¶ 24} 9. Aside from including a copy of the Asset Purchase Agreement, RFFG did not provide any additional documentation in support of its protest.

{¶ 25} 10. RFFG's protest was heard before the Adjudicating Committee on September 1, 2010. Although the testimony was unsworn, it was recorded. According to the transcript, after the BWC received the U-118 form, the BWC had tried to confirm the information from both Ameritemps and RFFG. Apparently, the BWC did not get a response to its inquiry. According to counsel for former Ameritemps, they were prepared to provide the BWC with the requested information, specifically, the contract information concerning client lists and assets purchased; however, according to Ameritemps' president, Joe Granata, RFFG had threatened litigation if Ameritemps supplied confidential information to the BWC. Counsel for RFFG denied the allegation but did acknowledge that RFFG did not provide the BWC with a list of the locations out of which RFFG was operating nor the client list. Instead, counsel argued that the general rules utilized by the BWC to determine whether or not an employer is a successor employer should not be applied here where RFFG was committed to serving very different clients and thereby exposing itself to a significantly lesser risk. Jerry Nalipa, the former chief financial officer of Ameritemps who is currently employed by RFFG, indicated that RFFG was moving away from heavy manufacturing type jobs and focusing more on healthcare employers. Further, he noted that RFFG was implementing more drug testing and pre-employment background testing in order to ensure that it employed a higher quality of employees. Nalipa stated further that RFFG was "currently doing business with approximately 200 of the 1,300 clients that Ameritemps" did business with. At the end of the hearing, counsel for RFFG recommended that the BWC take 2008 and compare it to 2009 so that the BWC could appreciate the changes RFFG had made to Ameritemps' business and promised to provide the BWC with all the information that was necessary by the end of the week.

{¶ 26} 11. In a letter dated September 10, 2010, counsel for RFFG responded to the BWC's request for information. RFFG did not produce a list of employees and assets it acquired and did not produce a list of former Ameritemps' clients with which RFFG was currently doing business. Instead, RFFG provided a "list of assets that were not taken as

part of the agreement," a "core employee list that shows the employees before and after the transaction" and a "list of locations, both before and after the asset purchase."

{¶ 27} 12. The Adjudicating Committee issued its order following the September 1, 2010 hearing and denied RFFG's protest. That order set forth RFFG's position as follows:

{¶ 28} The employer's representative stated the clients and the employees have changed in this temporary service agency. The clients are the main factor to determine risk. In this case the business has changed substantially. There are numerous new clients. The company did keep the name "Ameritemp[s]" but only for marketing purposes. The business model has changed. They use weekly pay not daily pay employees. The employer now does drug testing and is part of the Drug Free Workplace Program. Now only four of the twelve offices are in operation. The company hired a new safety manager. There is now new management in the company. The safety record of the new company is much better than the predecessor. The company didn't purchase all the accounts, and only paid fees to the predecessor for the accounts it retained. Some of the offices were not purchased because they were closed by the predecessor. About 40 internal employees were rehired by the new company. At first, the employer retained a significant number of the former "Ameritemp[s]" employees and clients. However, over time many of the employees and clients were let go. There was a "no compete" clause in the contract.

{¶ 29} 13. The order set forth the BWC's position as follows:

The BWC representative stated the U118 form stated that there was a partial transfer. However, after further review it was determined that this was a full combination of experience. All former location[s] of Ameritemps were purchased by RFFG. Equipment was part of the purchased. No information was provided about excluded assets. All employees were transferred.

{¶ 30} 14. Thereafter, the Adjudicating Committee provided findings of fact and conclusions of law:

Based on the testimony at the hearing and the materials submitted with the protest, the Adjudication Committee DENIES the successor's protest of the transfer/Combination. The BWC correctly transferred and/or combined the predecessor's experience and/or rights and/or obligations to the Employer under the Code. The Committee properly

applied the rule. Although the operations might have changed over time, it is clear that a snap shot of the two business[es] from December 31 to January 4th, indicate that a significant number of both clients and employees were retained by the successor. The business name remained the same, the business locations remained the same, the clients significantly remained the same and the employees significantly remained the same. There was a "no compete" clause in the contract. All these factors indicate that this was a full purchase of the operations of the business and the transfer was appropriate.

(Emphasis sic.)

{¶ 31} 15. RFFG timely appealed the order of the Adjudicating Committee; however, in a final order dated January 18, 2011, the Administrator's Designee adopted the statement of facts contained in the order of the Adjudicating Committee and, based on the testimony and other evidence presented at the hearing, affirmed the Adjudicating Committee's findings, decision, and rationale and denied RFFG's appeal.

{¶ 32} 16. Thereafter, RFFG filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 33} 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).

{¶ 34} RFFG argues that it did not wholly succeed Ameritemps for purposes of workers' compensation and that, if it did succeed Ameritemps at all, it was only a partial successor. RFFG asserts that the evidence in this case clearly establishes that the BWC's order is an error and further argues that the BWC did not properly explain its decision.

{¶ 35} It is this magistrate's decision that the BWC order transferring the experience, rights, and obligations from Ameritemps to its successor, RFFG, does not constitute an abuse of discretion and that the BWC's explanation for its decision was

adequate. Based upon the evidence which was submitted and RFFG's failure to produce evidence supporting its arguments, the BWC did not abuse its discretion.

{¶ 36} R.C. 4123.32 provides, in pertinent part, as follows:

The administrator of workers' compensation, with the advice and consent of the bureau of workers' compensation board of directors, shall adopt rules with respect to the collection, maintenance, and disbursements of the state insurance fund including all of the following:

* * *

(C) Such special rules as the administrator considers necessary to safeguard the fund and that are just in the circumstances, covering the rates to be applied where one employer takes over the occupation or industry of another or where an employer first makes application for state insurance, and the administrator may require that if any employer transfers a business in whole or in part or otherwise reorganizes the business, the successor in interest shall assume, in proportion to the extent of the transfer, as determined by the administrator, the employer's account and shall continue the payment of all contributions due under this chapter.

Ohio Adm.Code 4123-17-02(B) provides:

Succeeding employers—experience.

(1) Where one legal entity, not having coverage in the most recent experience period, wholly succeeds another legal entity in the operation of a business, his or its rate shall be based on the predecessor's experience within the most recent experience period.

* * *

(3) 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.

{¶ 37} Further, Ohio Adm.Code 4123-17-02(C) provides that, where one employer succeeds another in a portion of a business in whole or in part, the successor shall assume the predecessor's obligation under the Workers' Compensation Law and the transfer may be retroactive to the date of succession.

{¶ 38} For workers' compensation purposes, a "successor in interest * * * is simply a transferee of a business in whole or in part." *State ex rel. Lake Erie Contr. Co. v. Indus. Comm.*, 62 Ohio St.3d 81, 82 (1991). *See also State ex rel. Valley Roofing, L.L.C. v. Ohio Bur. of Workers' Comp.*, 122 Ohio St.3d 275, 2009-Ohio-2684.

{¶ 39} RFFG argues that the BWC's Adjudicating Committee and the Administrator's Designee "recounted its own selective findings of fact, characterized by non-specific quantity statements such as 'significant,' culminating in an opinion there was a 'full purchase of the operation' in order to apply a whole transfer to Relator." (Relator's brief, at 8.) RFFG continues by stating that the testimony before the Adjudicating Committee was sufficient evidence that it did not wholly succeed Ameritemps.

{¶ 40} While RFFG argues that the evidence clearly establishes that it did not wholly succeed nor did it partially succeed Ameritemps, the fact remains that RFFG failed to provide the BWC with the information the BWC requested. Further, although RFFG argues that the testimony that it provided at the Adjudicating Committee hearing should be considered sufficient, the BWC, like the commission, is the exclusive evaluator of the evidence and questions of credibility and the weight to be given evidence are clearly within the BWC's discretion as fact finder. *State ex rel. Teece v. Indus. Comm.*, 68 Ohio St.2d 165 (1981).

{¶ 41} Generally speaking, cases involving the issue of whether or not an employer is a succeeding employer for purposes of workers' compensation are difficult. However, in the present case, RFFG's failure to present evidence renders this court's decision in mandamus relatively easy.

{¶ 42} At oral argument, the magistrate asked relator's counsel if there was any evidence, aside from the unsworn testimony presented at the hearing, to substantiate relator's argument that: (1) only four of twelve Ameritemps' offices remained open; (2) the majority of core employees of Ameritemps were removed and replaced with new employees; (3) senior management changed; and (4) RFFG was only doing business with

approximately 200 of the 1,300 businesses with which Ameritemps did business. Counsel acknowledged that no other evidence was provided.

{¶ 43} The BWC cited the evidence upon which it relied and provided a brief explanation for its order. There is no language in the purchase agreement from which the BWC could have concluded that a whole transfer did not occur. To the extent that the purchase agreement references certain schedules which might more accurately identify the purchased assets, none of those schedules were submitted.¹ RFFG could have submitted evidence concerning the number of former Ameritemps' employees it retained; could have demonstrated that its senior management was new; could have demonstrated that it was now servicing primarily healthcare employers; and could have provided the BWC with a list of Ameritemps' clients and compared it to a list of RFFG's clients; RFFG failed to do so. Based on what little evidence the BWC had, the magistrate finds that the BWC did not abuse its discretion.

{¶ 44} Based on the foregoing, it is this magistrate's decision that RFFG has not demonstrated the BWC abused its discretion when it determined that RFFG was a successor employer to Ameritemps and this court should deny RFFG's request for a writ of mandamus.

/S/ MAGISTRATE
STEPHANIE BISCA BROOKS

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).

¹ Schedule 2.1(b)(i) equipment; Schedules 2.1(b)(ii)(A) and 2.1(b)(ii)(B) leases; Schedule 2.1(b)(iii) contracts; Schedule 2.1(b)(iv) intellectual property; and Schedule 2.1(b)(vi) transferred customer list.