

denied. Relator filed an administrative appeal, which was heard by the administrator's designee, Tracy Valentino ("Valentino"). Valentino upheld the SIRP decision and denied relator's appeal ("Valentino decision"). Relator then filed the present mandamus action.

{¶ 3} This court referred the matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court deny the requested writ.

{¶ 4} Unfortunately, relator did not separately enumerate its objections to the magistrate's decision. However, it appears that relator raises three objections to the magistrate's decision. We will address each of these objections in turn.

{¶ 5} In order to be entitled to a writ of mandamus, a relator must establish a clear legal right to the relief sought, a clear legal duty on the part of the respondent to perform the requested act, and the lack of an adequate remedy in the ordinary course of law. *State ex rel. United Auto., Aerospace & Agricultural Implement Workers of Am. v. Bur. of Workers' Comp.*, 108 Ohio St.3d 432, 2006-Ohio-1327, ¶ 34; *State ex rel. Medcorp, Inc. v. Ryan*, 10th Dist. No. 06AP-1223, 2008-Ohio-2835, ¶ 8. Generally, a clear legal right exists where an administrative agency abuses its discretion by entering an order not supported by any evidence on the record; however, when the record contains some evidence to support the agency's finding, there has been no abuse of discretion and mandamus will not lie. *See State ex rel. Brown v. Indus. Comm.*, 13 Ohio App.3d 178 (10th Dist.1983).

{¶ 6} Relator first objects to the magistrate's conclusion that relator failed to file audited or reviewed financial statements for the "current year" in support of its application for self-insured status. R.C. 4123.35(B)(1) sets forth certain factors that respondent must consider in evaluating an employer's application for self-insured status. One of the factors is "[t]he financial records, documents, and data, certified by a certified public accountant, necessary to provide the employer's full financial disclosure." R.C. 4123.35(B)(1)(e). These records "include, but are not limited to, balance sheets and profit and loss history for the current year and previous four years." R.C. 4123.35(B)(1)(e). The phrase "certified by a certified public accountant" is construed to mean reports that are audited in accordance with generally accepted accounting principles. *See Kenny King*

Corp. v. Mihm, 10th Dist. No. 92AP-1074, 1993 WL 112499, *2 (Apr. 8, 1993) (concluding that "certified by a certified public accountant" meant fully audited reports); Ohio Adm.Code 4123-19-03(A) ("For purposes of this rule, certified financial statements shall be construed by the administrator as audited by a certified public accountant, in accordance with generally accepted accounting principles, and shall include the certified public accountant's audit opinion."). Respondent has the discretion to waive the requirement that an employer submit audited financial statements but, in considering whether to grant a waiver, respondent must require the employer to submit reviewed financial statements that are prepared and submitted in accordance with generally accepted accounting principles. R.C. 4123.35(B)(1); Ohio Adm.Code 4123-19-03(A)(1)(a).

{¶ 7} Relator applied for self-insured status on July 30, 2009. In support of its application, relator filed reviewed financial statements for Mancan, Inc. ("Mancan") from 2004 through 2006, audited financial statements for I-Force, LLC ("I-Force") for 2007 and 2008, and preliminary financial statements for relator from 2009 that were not audited or reviewed. SIRP and Valentino concluded that relator failed to meet the statutory requirement for submitting financial statements. As the magistrate noted, relator failed to meet this requirement in part because it filed unaudited preliminary financial statements for 2009 and, therefore, had not provided sufficient financial information related to the "current year."

{¶ 8} Relator argues that, if "current year" is interpreted to mean the year in which the application for self-insured status is filed, it would be impossible to file audited financial statements for the "current year" because an audited financial statement cannot be issued until year-end records are compiled and a certified public accountant issues a report. Thus, relator appears to argue that "current year" under R.C. 4123.35(B)(1)(e) should be construed to mean the last full calendar year before the application for self-insured status is filed. We disagree with this reading of the statute. In interpreting a statutory provision, words and phrases are "construed according to the rules of grammar and common usage." R.C. 1.42. Within the context of R.C. 4123.35(B)(1)(e), the most reasonable construction of the phrase "current year" is the year in which the application for self-insured status is filed.

{¶ 9} Although relator argues that it is impossible to provide audited or reviewed financial statements for a calendar year until after the end of that year, relator has failed to demonstrate that it was unable to submit audited or reviewed financial statements covering the portion of the year prior to filing its application for self-insured status. Moreover, as the magistrate noted, SIRP considered relator's application on February 17, 2010, and Valentino heard the matter on September 13, 2010. Thus, by the time relator's application was considered, calendar year 2009 was complete and relator could have supplemented its filing to provide an audited or reviewed financial statement for 2009. The magistrate correctly found that relator only submitted unaudited preliminary financial information for 2009 and failed to meet the statutory requirement of providing audited financial statements for the "current year" in which the application was filed.

{¶ 10} Accordingly, relator's objection to this portion of the magistrate's decision is overruled.

{¶ 11} Relator further objects to the magistrate's conclusion that Valentino did not abuse her discretion by refusing to accept the Mancan and I-Force financial statements as financial information for relator. Relator asserts that this was an abuse of discretion because it was "undisputed" that relator and I-Force were both successors to Mancan. (Relator's objections, 5.) As the magistrate noted, relator argued that both I-Force and relator had been recognized as successors to Mancan in a 2008 decision by SIRP. Relator claimed that it submitted "eight different documents to establish that I-Force, LLC, and Daily Services, LLC, were successors to Mancan, Inc." (Relator's brief, 13.) However, seven of the eight documents cited by relator, including the 2008 SIRP decision, were submitted *after* Valentino issued her decision, in support of relator's request for reconsideration of that decision.¹ Thus, relator did not present this evidence to SIRP before it denied relator's application for self-insured status and did not present it to Valentino before she affirmed the SIRP decision. Valentino could not have abused her discretion by failing to consider evidence that was not presented to her before issuing her decision. *See State ex rel. Stoll v. Logan Cty. Bd. of Elections*, 117 Ohio St.3d 76, 2008-

¹ As explained above, respondent rejected relator's request for reconsideration of the Valentino decision based on the conclusion that the Valentino decision constituted the final administrative order and that the applicable administrative rule made no provision for reconsideration of the final order. Respondent advised relator that entry of the final administrative order triggered relator's right to seek a remedy in the courts.

Ohio-333 , ¶ 40; *State ex rel. Schlegel v. Stykemain Pontiac Buick GMC, Ltd.*, 120 Ohio St.3d 43, 2008-Ohio-5303, ¶ 16-17; *State ex rel. United Foundries, Inc. v. Indus. Comm.*, 10th Dist. No. 02AP-922, 2003-Ohio-3942, ¶ 89.

{¶ 12} Further, we note that the remaining document cited in support of the asserted relationship between relator, I-Force, and Mancan was an "agreement and plan of separation" entered into on November 17, 2006, by Mancan, I-Force, and Ryan C. Mason. This document was submitted in support of relator's appeal of the SIRP decision and was part of the record upon which Valentino issued her decision. However, the agreement and plan of separation only addresses the relationship between Mancan and I-Force and contains no references to relator. Therefore, the agreement and plan of separation is insufficient to explain any relationship between relator and Mancan or I-Force.

{¶ 13} Relator has failed to establish that Valentino abused her discretion in concluding that the financial statements for Mancan and I-Force were insufficient to comply with the statutory requirement that an employer provide financial statements for the current year and previous four years in support of its application for self-insured status. Accordingly, relator's objection to this portion of the magistrate's decision is overruled.

{¶ 14} Finally, relator objects to the magistrate's rejection of relator's argument that it was only required to submit two years of financial statements in support of its application for self-insured status. Relator's argument is based on R.C. 4123.35(B)(1)(b), which provides the following factor that respondent must consider in evaluating an application for self-insured status:

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.

{¶ 15} Relator focuses on the meaning of the phrase "also shall qualify" within the context of this statute. Relator asserts that it means that an employer that has operated within the state for two years or has purchased, acquired, or succeeded to the operation of a business that has operated in the state for a minimum of two years "also shall qualify" to

be a self-insured employer, and therefore such an employer is only required to submit two years of financial information in support of its application. In effect, relator argues that this provision supersedes the requirement under R.C. 4135.35(B)(1)(e) that an employer seeking self-insured status must submit financial statements for "the current year and previous four years." However, relator's argument misconstrues the meaning of this statutory provision.

{¶ 16} In interpreting a statute, we presume that the entire statute is intended to be effective. R.C. 1.47(B). The requirement that an employer seeking self-insured status must have operated in the state for a minimum of two years and the requirement that an employer must submit five years of financial records in support of its application for self-insured status were added to the statute in the same legislation. Am.Sub.S.B. No. 307, 141 Laws of Ohio, Part I, 718, 745-51. Therefore, the legislature clearly intended both parts of the legislative amendment to be effective. Under the law, an employer seeking self-insured status must have operated in the state for a minimum of two years *and* must submit financial records relating to the current year and previous four years. Properly read, the phrase "also shall qualify" in R.C. 4135.35(B)(1)(b) relates the status of an employer that purchases, acquires, or otherwise succeeds to the operation of a business operating in Ohio. The statute means that an employer that purchases, acquires, or succeeds to the operation of a business that has operated in Ohio for a minimum of two years "also shall qualify" as an employer that has operated in the state for a minimum of two years. Thus, an employer that has not operated in Ohio for two years, but purchases a business that has operated in the state for a minimum of two years, will not be excluded from eligibility to apply for self-insured status by the fact that the employer itself has not operated in Ohio for two years.

{¶ 17} We agree with the magistrate's conclusion that the phrase "also shall qualify" in R.C. 4135.35(B)(1)(b) does not modify the financial-records requirement under R.C. 4135.35(B)(1)(e). Accordingly, relator's objection to this portion of the magistrate's decision is overruled.

{¶ 18} After an examination of the magistrate's decision and an independent review of the record and relevant law, we conclude that the magistrate has properly determined the issues raised by relator. We therefore overrule relator's objections to the

magistrate's decision and adopt it as our own, including the findings of fact and conclusions of law set forth therein, and we deny relator's request for a writ of mandamus.

Objections overruled; writ denied.

SADLER and CONNOR, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Daily Services, LLC,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-964
	:	
[Steve Buehrer] Administrator [Ohio]	:	(REGULAR CALENDAR)
Bureau of Workers' Compensation,	:	
	:	
Respondent.	:	
	:	

MAGISTRATE'S DECISION

Rendered on November 8, 2011

William W. Johnston, for relator.

Michael DeWine, Attorney General, and *John R. Smart*, for respondent.

IN MANDAMUS

{¶ 19} In this original action, relator, Daily Services, LLC ("Daily Services" or "relator"), requests a writ of mandamus ordering respondent, Steve Buehrer, Administrator of the Ohio Bureau of Workers' Compensation ("bureau"), to vacate an order denying relator's application for self-insured status under R.C. 4123.35, and to enter an order granting the application.

Findings of Fact:

{¶ 20} 1. On July 30, 2009, relator filed an application for self-insured status on a form (SI-6) provided by the bureau. On the form, Daily Services indicated that it is an Ohio corporation incorporated February 14, 2005, and that the nature of its business in Ohio is "temporary staffing." February 24, 2006 is listed as the date Daily Services commenced business in Ohio.

{¶ 21} 2. The application form asks whether the applicant is a subsidiary. Daily Services indicated that it is a 100 percent owned subsidiary of "People Who Work Better, LLC," an Ohio corporation incorporated February 24, 2009.

{¶ 22} 3. The application form also asks the applicant: "Have you ever carried Ohio Workers' Compensation under any other risk number or name before?" In response, relator marked the "Yes" box. Mancan, Inc. ("Mancan") is listed as the company.

{¶ 23} 4. The application form also contains an "Information Update Request." On this part of the application form, three entities are listed, i.e., "People Who Work Better," "Daily Services, LLC," and "I-Force, LLC." "Ryan Mason, President" is listed as the person who completed the form.

{¶ 24} 5. According to relator's "Statement of Facts" as submitted in its brief filed in this action:

Relator, Daily Services, LLC, is an Ohio Corporation, formed on 2/15/2005, to provide temporary services to Ohio Employers. * * * As of June 15, 2010, Daily Services had 12,092 employees active in its database. As of June 15, 2010, Daily Services, LLC, had 1316 employees active and assigned to client locations in Ohio. Daily Services, LLC, also has operations in all forty-eight States in the Continental United States.

I-Force, LLC, Risk #1484986, is an Ohio Corporation, formed on 12/19/2005. * * * I-Force, LLC, currently has no employees but it is an active Ohio Corporation. By agreement with the BWC Adjudicating Committee, I-Force, LLC, was combined into the Daily Services, LLC, policy by Order of the Adjudicating Committee dated October 15, 2009[.] * * *

Ryan Mason is the sole shareholder of Daily Services, LLC, and I-Force, LLC, which are both part of the Ryan Mason Companies. The Ryan Mason Companies are treated by the IRS as one company and it files one Tax Return.

Prior to November 17, 2006, both Daily Services, LLC, and I-Force, LLC, were wholly owned subsidiaries of Mancan, Inc., an Ohio Corporation, partly owned by Ryan Mason's father and partly owned by Ryan Mason. Mancan, Inc. had authority from the BWC to be a Self-Insured Employer beginning in 1994. Ryan Mason was a shareholder in Mancan, Inc. and Mancan, Inc., was a shareholder in Daily Services, LLC and I-Force, LLC, both of which were wholly owned subsidiaries of Mancan, Inc. at that time. Ryan Mason was the President of Mancan from 1996 to 2006. Ryan Mason was also in charge of Mancan's Self-Insured Operation from 1996 to 2006. Daily Services, LLC, and I-Force, LLC, constituted 58% of Mancan's total revenue in 2004 generating \$42,327,648.00. Daily Services and I-Force constituted 57% of Mancan's total revenue in 2005, generating \$47,328,928.00.

Obviously, the revenue generated by Daily Services, LLC, and I-Force, LLC, while wholly owned subsidiaries of Mancan, Inc., generated at least 57% of total revenue, more than supported Mancan's annual renewal by the BWC of its Self-Insured status.

On November 17, 2006, pursuant to a Federal lawsuit filed by Manpower Franchises, LLC, and its parent, Manpower, Inc., against Mancan, Inc., Mancan, Inc., spun-off I-Force, LLC, and Daily Services, LLC. Mancan, Inc. transferred all of its shares in Daily Services, LLC and I-Force, LLC to Ryan Mason. Ryan Mason, in turn, surrendered all of his ownership interest in Mancan, Inc., back to Mancan[.] * * * Even though Mancan, Inc., spun-off, I-Force and Daily Services, which generated 57% of Mancan's revenue, the BWC has continued to renew Mancan, Inc.'s Self-Insured status with no issues.

In accordance with the Agreement and the BWC's definition of a successor, Daily Services, LLC, and I-Force, LLC, are successors to Mancan, Inc. and were treated as such by the BWC Self-Insured Review Panel in its 2008 decision[.] * * *

{¶ 25} 6. Relator's reference in its brief to the "2008 decision" of the bureau's "Self-Insured Review Panel" ("SIRP") is a reference to the following SIRP order regarding the employer I-Force, LLC ("I-Force"). Contained in the stipulated record, that SIRP order states:

This matter was set for conference on July 23, 2008, before the members of the Self-Insured Review Panel. The issue presented concerned the employer's appeal of the denial of its application for self-insurance based on the results of a financial analysis. Specifically, the Self-Insured Underwriting Department raised concerns regarding the employer's failure to provide audited financial statements covering a period of five years, in accordance with the provisions of Ohio Revised Code Section 4123.35.

iforce, LLC (iforce) is a temporary employment agency that operates in the central Ohio area. It was spun off as a wholly owned subsidiary from Mancan, LLC (Mancan) in December of 200[6]. Mancan, formed in 1976, is a staffing company based in Canton, Ohio, and was granted self-insured status for purposes of workers' compensation in 1994. iforce is operated by the son of the majority owner of Mancan. In December of 2006, iforce became a stand-alone company following a stock swap. The company presently employs between thirty-five hundred and five thousand employees.

At the conference, the Panel was advised that iforce is financially sound and possesses the ability to operate a self-insured workers' compensation program. It was spun off from Mancan, which has been a compliant self-insuring employer since 1994, and which continues to operate in northeastern Ohio. The owner of iforce operated the central Ohio office of Mancan beginning in 1993. In support of the application for self-insured status, iforce provided BWC with compiled income statements for the Central Ohio Division of Mancan for 2004 and 2005. The 2006 unconsolidated income statements for iforce were also provided, as well as the 2007 audited financial statements for iforce. The representatives stated the employer has a diverse client base, as well as a good workers' compensation track record. It was pointed out that Mancan and iforce follow the same business model. The employer's representatives requested a waiver of

the requirement for audited financial statements covering a five-year period.

Ohio Revised Code Section 4123.35(B) requires an applicant for self-insured status to provide BWC with audited financial statements covering a five-year period in order to provide full financial disclosure. At its discretion, BWC is permitted to waive the requirement for audited financial statements pursuant to the provisions of Ohio Administrative Code Rule 4123-19-03(A). If BWC chooses to grant this waiver, the applicant is then required to provide BWC with reviewed financial statements, also covering a five-year period, along with additional security in a form and amount determined by BWC. The rule specifies that both audited and reviewed financial statements must be conducted in accordance with generally accepted accounting principles (GAAP).

After a review of the information presented at the conference, including the audited financial statements for 2007, the Panel notes the following. O.R.C. 4123.35(B)(1)(e) states that the audited financial statements provided in support of an application for self-insured status must cover "the current year and previous four years." O.A.C. 4123-19-03(A) uses the same language, stating that audited financial statements provided in support of an application for self-insured status must cover "the current year and the previous four years." While BWC is permitted to waive the requirement for audited financial statements, and to accept reviewed financial statements along with additional security, the statute and the administrative code rule do not contain any language indicating that BWC is permitted to waive the requirement for financial statements covering a five-year period. Without this information, the Panel is unable to gain assurance regarding the employer's long-term financial strength and administrative ability to meet all obligations imposed on those granted the privilege of operating a self-insuring workers' compensation program.

For these reasons, while the Panel is sympathetic to the employer's position, the Panel finds that it lacks the authority to grant a waiver of the requirement to submit financial statements covering a five-year period in order to provide full financial disclosure in support of an application for self-insured status. The Panel finds that it was appropriate for the Self-Insured Department to deny the

employer's application for the privilege of self-insurance, and the employer's appeal is denied.

{¶ 26} 7. Relator's reference in its brief to the "Order of the Adjudicating Committee dated October 15, 2009" (Statement of Facts) is a reference to the following SIRP order issued after an October 15, 2009 SIRP hearing:

Background Facts and Issues Presented: During an Audit, the BWC transferred experience, rights, and obligations from predecessor I-FORCE LLC, Policy #1484986 to successor DAILY SERVICES LLC, Policy #1495057 pursuant to Ohio Administrative Code (O.A.C.) 4123-17-02(B) and (C). Section 4123-17-02 (B)(1) states that "[w]here 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." Section (B)(2) states that "[w]here a legal entity having an established coverage or having had experience in the most recent experience period wholly succeeds one or more legal entities having established coverage or having had experience in the most recent experience period and at least one of the entities involved has a merit rating experience, the experience of all the involved entities shall be combined to establish the rate of the successor." Generally, subsection C requires the BWC to transfer the predecessor's rights and obligations to the successor.

The Employer protested the transfer/combination and requested a hearing before the Adjudicating Committee.

* * *

Employer's Position:

The experience combination was proper. The Bureau properly applied the rules. The two companies started as separate businesses. They had separate contracts and customers. However, I Force was closed and certain employees and contracts were transferred to Daily Services, LLC.

Bureau's Position:

The BWC representative stated the employer's representatives stated that employer ran a temporary agency. The owner of I Force is also the owner of Daily Services[.] The businesses are the same. The clients are the same. The location of the business is the same. The employees of the companies are the same. The employer never notified the Bureau of the transfer of the business when it applied for the new policy.

Findings of Fact and Conclusion of Law:

Based on the testimony at the hearing and the materials submitted with the protest, the Adjudicat[ing] Committee affirms the experience combination. The employer representatives indicated at hearing they were in agreement with the BWC position.

{¶ 27} 8. The record before this court contains the financial statements of Mancan for calendar years 2004, 2005, and 2006 as reviewed by certified accountants "Mayer Hoffman McCann P.C." There is an accountants' review report for calendar years 2004 and 2005 and a separate accountants' review report for calendar year 2006. The accountants' review report for calendar years 2004 and 2005 is dated June 6, 2006 and states:

We have reviewed the accompanying balance sheets of Mancan, Inc. (an "S" corporation) as of December 31, 2005 and 2004, and the related statements of operations, changes in stockholders' equity, and cash flows for the years then ended, in accordance with Statements on Standards for Accounting and Review Services issued by the American Institute of Certified Public Accountants. All information included in these financial statements is the representation of the management of Mancan, Inc.

A review consists principally of inquiries of Company personnel and analytical procedures applied to financial data. It is substantially less in scope than an audit in accordance with U.S. generally accepted auditing standards, the objective of which is the expression of an opinion regarding the financial statements taken as a whole. Accordingly, we do not express such an opinion.

Based on our reviews, with the exception of the matter discussed in the following paragraph, we are not aware of any material modifications that should be made to the accompanying financial statements in order for them to be in conformity with U.S. generally accepted accounting principles.

As disclosed in Note 1 to the financial statements, U.S. generally accepted accounting principles require that goodwill be evaluated for impairment. Management has informed us that the Company has not evaluated its goodwill for impairment. The effect of this departure from U.S. generally accepted accounting principles on financial position, results of operations, and cash flows is not reasonably determinable.

{¶ 28} The accountants' review report dated May 31, 2007 regarding calendar year 2006 states:

We have reviewed the accompanying consolidated balance sheet of Mancan, Inc. (an "S" corporation) and subsidiary as of December 31, 2006, and the related consolidated statements of operations, changes in stockholders' equity, and cash flows for the calendar year then ended, in accordance with Statements on Standards for Accounting and Review Services issued by the American Institute of Certified Public Accountants. All information included in these consolidated financial statements is the representation of the management of Mancan, Inc.

A review consists principally of inquiries of Company personnel and analytical procedures applied to financial data. It is substantially less in scope than an audit in accordance with U.S. generally accepted auditing standards, the objective of which is the expression of an opinion regarding the financial statements taken as a whole. Accordingly, we do not express such an opinion.

Based on our review, with the exception of the matter discussed in the following paragraph, we are not aware of any material modifications that should be made to the accompanying consolidated financial statements in order for them to be in conformity with U.S. generally accepted accounting principles.

As disclosed in Note 1 to the financial statements, U.S. generally accepted accounting principles require that goodwill be evaluated for impairment. Management has informed us that the Company did not evaluate its goodwill for impairment prior to 2006. As disclosed in Note 9 to the consolidated financial statements, the Company's goodwill was evaluated in 2006 and determined to be impaired. The effect of this departure from U.S. generally accepted accounting principles on 2006 results of operations is not reasonably determinable.

{¶ 29} 9. The record before this court contains the audited financial statements of I-Force for calendar years 2007 and 2008. The auditors' report of "Brady, Ware & Schoenfeld, Inc." ("Brady Ware") dated February 18, 2010 states:

We have audited the accompanying balance sheet of **I-FORCE, LLC** (the "Company") as of December 31, 2008, and the related statements of operations and member's equity and cash flows for the year then ended. These financial statements are the responsibility of the management of the Company. Our responsibility is to express an opinion on these financial statements based upon our audit.

We conducted our audit in accordance with auditing standards generally accepted in the United States. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe our audit provides a reasonable basis for our opinion.

As more fully described in Note J to the financial statements, the Company's financial statements do not include the accounts of I-Force Rental Cars, LLC, a variable interest entity, in which the Company is the primary beneficiary. In our opinion, the Company's financial statements should include the accounts of I-Force Rental Cars, LLC to conform with accounting principles generally accepted in the United States. The effects of this departure from generally accepted accounting principles on the financial position, results of

operations, and cash flows of the Company has not been determined.

In addition, the accompanying financial statements have been prepared assuming that the Company will continue as a going concern. As more fully described in Note K to the financial statements, the Company, as of the date of the accompanying financial statements, is in negotiations with the Ohio Bureau of Workers' Compensation (the "Bureau") in an attempt to settle a claim for unfunded workers' compensation insurance premiums. Further, given the uncertainty of the potential outcome of these negotiations, the Company suspended active operations in March 2009. These matters create substantial doubt about the Company's ability to resume operations and continue as a viable going concern. Management's plans regarding these matters is also described in Note K. The financial statements do not include any adjustments that might result from the outcome of this uncertainty.

In our opinion, except for the effects of not including the accounts of I-Force Rental Cars, LLC in the accompanying financial statements and the effect of any adjustments that might result from either the settlement of the claim assessed by the Bureau or the Company's decision not to resume active operations, as discussed in the preceding two paragraphs, the financial statements referred to in the first paragraph present fairly, in all material respects, the financial position of the Company as of December 31, 2008, and the results of its operations and cash flows for the year then ended, in conformity with accounting principles generally accepted in the United States.

The financial statements for the year ended December 31, 2007 were audited by other accountants, and they expressed an unqualified opinion on them in their report dated May 28, 2008, and they have not performed any auditing procedures since that date.

{¶ 30} 10. Following a February 17, 2010 conference before the bureau's SIRP regarding relator's July 30, 2009 application for self-insured status, the SIRP issued a written order denying relator's application. The February 17, 2010 SIRP order explains:

This matter was set for conference on February 17, 2010, before the members of the Self-Insured Review Panel. The issue presented concerned the employer's appeal of the

denial of its application for self-insurance based on results of the financial analysis performed by the Self-Insured Department. Specifically, the Self-Insured Underwriting Department raised concerns regarding the employer's failure to provide audited financial statements covering a period of five years, in accordance with the provisions of Ohio Revised Code Section 4123.35.

At the conference, the representatives advised the Panel that Daily Services, LLC (Daily Services) was formed on March 1, 2009. Daily Services provides temporary employees, operating out of eighteen offices. It also does business under the name Talocity. The company presently employs approximately four thousand individuals in Ohio. The Panel was advised that Daily Services is a successor to iforce, LLC (iforce). The representatives stated that Daily Services was formed after iforce experienced financial difficulties, which were attributed to the economic downturn in the fall of 2008, the impact of increased workers' compensation premiums after being denied participation in a group rating program, and the loss of its operating line of credit. iforce was formed in 2005 by Mancan, LLC (Mancan), a staffing company based in Canton that has operated as a self-insuring employer since 1994. In support of its application for self-insured status, Daily Services submitted the following financial statements: reviewed financial statements for Mancan, LLC for 2004, 2005, and 2006; audited financial statements for iforce, LLC for 2007 and 2008; and preliminary 2009 financial statements for Daily Services, LLC, which have not been subjected to a review or audit. The employer requested a waiver of the requirement for audited financial statements covering a period of five years.

Ohio Revised Code Section 4123.35(B) requires an applicant for self-insured status to provide BWC with audited financial statements covering a five-year period in order to demonstrate the financial strength and administrative ability to meet the obligations imposed by the grant of the privilege. At its discretion, BWC is permitted to waive the requirement for audited financial statements pursuant to the provisions of Ohio Administrative Code Rule 4123-19-03(A). If BWC chooses to grant this waiver, the applicant is then required to provide BWC with reviewed financial statements, also covering a five-year period, along with additional security in a form and amount determined by BWC. The rule specifies that both audited and reviewed financial statements must be

conducted in accordance with generally accepted accounting principles (GAAP).

Ohio Revised Code Section 4123.35(B)(1)(e) states that the audited financial statements provided in support of an application for self-insured status must cover "the **current year and previous four years.**" (Emphasis added) Ohio Administrative Code Rule 4123-19-03(A) supplements the statute, and it provides as follows:

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.** For purposes of this rule, certified financial statements shall be construed by the administrator as audited by a certified public accountant, in accordance with generally accepted accounting principles, and shall include the certified public accountant's audit opinion. (Emphasis added)

The Panel notes that both the statute and the rule require an applicant for self-insured status to provide audited financial statements covering a period of five years. The Panel also notes that the statute and rule do not contain any language indicating that BWC is permitted to waive the requirement for audited financial statements covering a five-year period. The Panel finds that BWC does not have the discretion to grant a waiver of the requirement for audited financial statements covering a five-year period. Without this information, the Panel is unable to gain assurance regarding the employer's long-term financial strength and ability to meet all obligations that arise from the operation of a self-insured workers' compensation program. It is also worthy of note that the applicant provided financial statements from other legal entities, Mancan, LLC and iforce, LLC, in support of its application, and only provided unaudited preliminary financial statements for 2009 for itself.

Additionally, the Panel has the following concerns with this application.

- In answer to the question has the employer ever carried Ohio Workers' Compensation under any other risk number or name before, the applicant indicated

that Daily Services began business on February 24, 2006 by purchasing part of Mancan, policy number 20004055. The application for self-insured status makes no mention of policy number 1484986, for iforce. There is an outstanding balance of \$3.9 million on the iforce policy. iforce was combined into Daily Services on March 23, 2009.

- At the conference, it was indicated that Daily Services was created on March 1, 2009. However, this company first established coverage in the state insurance fund on April 3, 2006, under policy number 1495057. The employer's initial application for coverage indicated that the principal of this business was previously associated with policy number 1466904, also for Daily Services, LLC. Policy number 1466904 was bankrupt combined into the current Daily Services policy number 1495057 on April 3, 2006.
- The current state insurance fund policy for Daily Services shows a lapse in coverage from September 1, 2009, to January 13, 2010 – a total of one hundred thirty-five days. This lapse exceeds the allowable lapses used by BWC in determining an employer's eligibility to participate in other alternative rating plans. As an applicant for the privilege of self-insurance, it would be expected that an employer would meet, at a minimum, the standards required of the large deductible program. This program prohibits participation by employers with cumulative lapses in excess of fifteen days for the five years preceding the application deadline. The employer's representative indicated this lapse is being appealed to the Adjudicating Committee.
- The preliminary 2009 financial statements for Daily Services reflect total assets of \$2.4 million, total liabilities of \$1.6 million, and total equity of \$835,000.00. These financials also indicate that real estate taxes are payable in the amount of \$26,000.00, but there is no real estate included on the balance sheet. At the conference, the employer indicated that all real estate is held by a separate LLC. As a result, Daily Services does not have sufficient assets located in Ohio to ensure its solvency in paying compensation

directly, as is required by Ohio Revised Code Section 4123.35(B)(1)(d).

- The application lists People Who Work Better, LLC as the ultimate domestic parent company of Daily Services, as shown on the corporate chart submitted with the application. However, at the conference, the representatives indicated that this is not the case, and that People Who Work Better, LLC is not the parent company of Daily Services, and cannot provide a parental contract of guaranty on its behalf.

After a review of all of the information provided by the employer, as well as a review of all of the various financial statements, the Panel finds that Daily Services has not demonstrated the financial strength and administrative ability that is required of those granted the privilege of operating a self-insured workers' compensation program. The Panel finds that it is [sic] lacks the authority to waive the requirement for audited financial statements covering a five-year period. The Panel further finds that it was appropriate for the Self-Insured Department to deny the employer's application for the privilege of self-insurance, and the employer's appeal is denied.

{¶ 31} 11. Relator administratively appealed the February 17, 2010 SIRP order to the administrator's designee.

{¶ 32} 12. Following a September 13, 2010 hearing, the administrator's designee upheld the SIRP order. The September 13, 2010 order of the administrator's designee explains:

Pursuant to Ohio Administrative Code Rule 4123-19-14, the Administrator's Designee hereby undertakes consideration of the employer's appeal of the Self-Insured Review Panel order issued February 26, 2010. The issue presented is the denial of the employer's application for self-insurance based on failure to provide audited financial statements covering a period of five years.

{¶ 33} The order of the Self-Insured Review Panel contains a detailed discussion of the proceedings giving rise to the denial of the application, which is hereby adopted by the Administrator's Designee. In particular, the Panel order noted that the employer only provided unaudited preliminary financial statements for 2009 in support of its

application. All of the other financial information provided was for two other legal entities that were not part of the application. Clearly, the employer has not complied with the requirement spelled out in Ohio Revised Code Section 4123.35(B) to provide audited or reviewed financial statements covering a period of five years in order to be considered for the privilege of operating a self-insured workers' compensation program. BWC lacks the authority to waive these requirements. Without audited or reviewed financial statements covering a period of five years and prepared in accordance with generally accepted accounting principles (GAAP), BWC is unable to gain assurance regarding the employer's long-term financial strength and stability.

Additionally, the Administrator's Designee notes that there is no "financial trail" from the entities the employer claims as its predecessors. Thus, the Administrator's Designee is unable to analyze the pertinent financial data necessary to grant self-insured status to this applicant.

For these reasons, the Administrator's Designee upholds the order of the Self-Insured Review Panel. The employer's appeal is denied.

{¶ 34} 13. By letter dated September 24, 2010, relator, through counsel, moved for reconsideration of the September 13, 2010 order of the administrator's designee.

{¶ 35} 14. On October 5, 2010, Paul Gregory, Esq., the bureau's legislative liaison, sent the following e-mail to relator's counsel:

After having reviewed your request with staff at BWC, the following has been determined:

[One] The order (attached) of the Administrator's Designee, Tracy Valentino, dated September 13th, 2010 triggered Daily Services, LLC's right to a court remedy[.] Ohio Administrative Code 4123-19-14 (E) provides that "the administrator may reconsider the decision of the panel["] (here, the "SIRP" or Self-Insured Review Panel). The administrator, through Tracy Valentino, exercised that discretion and reconsidered the panel's decision. Her order, on behalf of the Administrator, *is the final administrative order*. The above rule makes no provision for a reconsideration of the Administrator's Designee order. In administrative hearing matters, the administrator speaks through her orders. In other words, a "motion to reconsider"

the administrator's reconsideration does not exist. I urge each of you to read the aforementioned rule.

[Two] The issuance of a decision on the recently filed "motion" requesting reconsideration of the September 13th, 2010 order would not be consistent with the rule as, once more, this order is the final administrative order[.]

[Three] You may accept this email as reiteration of the conclusion expressed above that Tracy Valentino's order of September 13th, 2010 was the final level of administrative appeal, which triggered your right to proceed in court.

(Emphases sic.)

{¶ 36} 15. By letter dated September 24, 2010 (11 days after the September 13, 2010 hearing before the administrator's designee), Samuel J. Agresti, CPA, Director of the accounting firm of Brady Ware of Columbus, Ohio, informed Daily Services President, Ryan Mason, as follows:

In response to your recent inquiries, I would advise the following:

With regard to the 2009 financial report for the Ryan Mason Companies, it was prepared according to U.S. GAAP because of the two contingent liabilities, i.e. lien releases and application for Self-Insurance. Under U.S. GAAP, the 2009 report had to be issued in "draft" status earlier this summer, pending removal of erroneously filed liens by the Ohio Bureau of Workers' Compensation. Without the removal of these liens, U.S. GAAP would require additional disclosures regarding these liens. Also, we understood there was a pending application for Self-Insurance for which you were awaiting a decision. We feel this response would have a material effect on the financials, and the outcome should be disclosed in the footnotes of the financial statements in accordance with U.S. GAAP. Subject to the outcome of these two items noted above, the audit is complete and can be issued in final form according to U.S. GAAP.

With regard to the financial reports of MANCAN, Inc., I direct your attention to page 7, Note 1, paragraph two, and page 11, Note 11, of the 2006 financial report of MANCAN Inc. which explains the relationship between MANCAN, Inc. and its wholly-owned subsidiaries, I-Force, LLC, and Daily

Services, LLC. Both I-Force and Daily Services are part of the Ryan Mason Companies, and the Application for Self-Insurance was filed on behalf of Daily Services.

According to my previous conversations with the CPA for MANCAN, Inc., Jeff Walters, fifty seven percent (57%) and fifty eight percent (58%) of the revenues of MANCAN, Inc. for the years ended December 31, 2005 and 2004, respectively, were attributable to its' I-Force subsidiary. This subsidiary was previously known as the "COLUMBUS OPERATION" and is listed as such in the financial reports of 2004 and 2005.

The financial reports of MANCAN, Inc. for 2004, 2005, and 2006, were submitted with the initial Self-Insurance Application to show the actual financial status of I-Force in those years, until the Court ordered spin-off between MANCAN, Inc. and the Ryan Mason Companies, including I-Force, LLC, occurred on December 17, 2005.

The 2004, 2005, and 2006 statements of MANCAN, Inc. which were submitted, were previously reviewed and approved by the Ohio Bureau of Workers' Compensation Self-Insured Department under the periodic renewal of MANCAN's Self-Insured status. As is demonstrated by those financial reports, Ryan Mason's operation formed a significant portion of MANCAN, Inc.'s financial status. Accordingly, the financial report of MANCAN, Inc. was not "unrelated" to the Application for Self-Insurance by Daily Services, LLC. They show a significant financial history with gross revenue of \$42,327,648.00 in 2004, and gross revenue of \$47,328,928.00 in 2005, generated exclusively by the Ryan Mason aspects of MANCAN, Inc.

{¶ 37} 16. Apparently, as evidenced by the September 24, 2010 Agresti letter, the "2009 financial report for the Ryan Mason Companies" was not submitted to either SIRP at the February 17, 2010 conference or to the administrator's designee at the September 13, 2010 hearing. Moreover, neither the "draft" report nor the completed audit for 2009 are contained in the record before this court. Apparently, the September 24, 2010 Agresti letter was submitted by relator in support of his September 24, 2010 request for reconsideration.

{¶ 38} 17. On October 7, 2010, relator filed this mandamus action.

{¶ 39} 18. Pursuant to the magistrate's scheduling order, the parties, through counsel, filed an agreed stipulation of evidence on December 16, 2010. Briefs were thereafter submitted.

{¶ 40} 19. Following oral argument to the magistrate, the parties jointly moved to file a supplemental stipulated record and a revised table of contents. The parties also jointly moved for leave to file post-hearing briefs. The magistrate granted the motions. Thereafter, the parties filed a supplemental stipulated record on June 2, 2011 and then filed their post-hearing briefs. A revised table of contents for the agreed stipulated evidence was also filed June 2, 2011.

Conclusions of Law:

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

{¶ 42} R.C. 4123.35(B) states in part:

(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, * * * 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. * * *

All employers granted status as self-insuring employers shall demonstrate sufficient financial and administrative ability to assure that all obligations under this section are promptly met. The administrator shall deny the privilege where the employer is unable to demonstrate the employer's ability to promptly meet all the obligations imposed on the employer by this section.

(1) The administrator shall consider, but is not limited to, the following factors, where applicable, in determining the employer's ability to meet all of the obligations imposed on the employer by this section:

(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;
* * *

(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.

* * *

The administrator may waive the requirements of divisions (B)(1)(a) and (b) of this section and the requirement of division (B)(1)(e) of this section that the financial records, documents, and data be certified by a certified public accountant. The administrator shall adopt rules establishing the criteria that an employer shall meet in order for the administrator to waive the requirement of division (B)(1)(e) of this section. Such rules may require additional security of that employer pursuant to division (E) of section 4123.351 of the Revised Code.

Supplementing the statute, Ohio Adm.Code 4123-19-03 provides:

(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 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. For purposes of this rule, certified financial statements shall be construed by the administrator as audited by a certified public accountant, in accordance

with generally accepted accounting principles, and shall include the certified public accountant's audit opinion.

(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. For the purposes of this rule, "reviewed financial statements" shall mean financial statements that have been subject to procedures performed by a certified public accountant in accordance with AICPA Professional Standards, specifically, Statements on Standards for Accounting and Review Services, Section 100, Paragraph .24 through .38, December 1978.

{¶ 43} Among the reasons given by SIRP and the administrator's designee for denial of relator's application, was relator's failure to meet the R.C. 4123.35(B)(1)(e) factor that the applicant provide CPA certified financial records "for the current year and previous four years." Ohio Adm.Code 4123-19-03(A) also provides that the applicant provide audited financial records "for the current year and the previous four years." As SIRP correctly notes in its order, the bureau has the discretion to waive the requirement for audited financial statements and to accept instead financial statements that are only reviewed in accordance with the American Institute of Certified Public Accountants Professional Standards. However, the bureau cannot waive the requirement that the applicant submit financial statements for the previous five years. That is, the bureau has no discretion to accept less than five years of financial statements.

{¶ 44} Explaining the deficiency, SIRP again states:

* * * It is also worthy of note that the applicant provided financial statements from other legal entities, Mancan, LLC and iforce, LLC, in support of its application, and only provided unaudited preliminary financial statements for 2009 for itself.

{¶ 45} In a similar fashion, the administrator's designee explained the deficiency:

* * * In particular, the Panel order noted that the employer only provided unaudited preliminary financial statements for 2009 in support of its application. All of the other financial information provided was for two other legal entities that were not part of the application. Clearly, the employer has not complied with the requirement spelled out in Ohio Revised Code Section 4123.35(B) to provide audited or reviewed financial statements covering a period of five years in order to be considered for the privilege of operating a self-insured workers' compensation program. * * *

{¶ 46} Significantly, relator does not claim here that it met the R.C. 4123.35(B)(1)(e) factor that financial statements be provided for the "current year." Relator filed its application on July 30, 2009 and, thereafter, SIRP heard the matter on February 17, 2010. The administrator's designee heard the matter on September 13, 2010. No one disputes that calendar year 2009 is the "current year" for which relator was required to submit either audited or reviewed financial statements. While the June 29, 2010 Agresti letter indicates that the "2009 financial report for the Ryan Mason Companies" had been completed, that report was not submitted to SIRP or to the administrator's designee. Apparently, however, the June 29, 2010 Agresti letter was submitted in support of relator's September 24, 2010 request for reconsideration of the order of the administrator's designee.

{¶ 47} Thus, for the "current year," SIRP and the administrator's designee only had "unaudited preliminary financial statements for 2009" as stated by SIRP and the administrator's designee.

{¶ 48} Moreover, both SIRP and the administrator's designee found that the Mancan and I-Force financial statements could not be accepted as the financial statements of Daily Services to meet the five-year requirement. While relator argues that the administrator's designee abused her discretion in refusing to accept the Mancan and I-Force financial statements, relator cites to no authority to support its proposition. Based upon the record before this court, the administrator's designee was well within her discretion in refusing to accept the Mancan and I-Force financial statements as the statements of Daily Services.

{¶ 49} Relator posits an additional argument premised upon the statute. Again, R.C. 4123.35(B)(1)(b) provides:

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[.]

{¶ 50} According to relator, R.C. 4123.35(B)(1)(b) must be viewed as allowing relator to provide only two years of financial statements because relator has allegedly operated in this state for at least two years and has allegedly succeeded to the operation of a business that has operated for at least two years in this state.

{¶ 51} Relator's argument misconstrues the statute. Clearly, R.C. 4123.35(B)(1)(b) does not relate to the financial records requirement of R.C. 4123.35(B)(1)(e). Thus, relator's argument lacks merit.

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

/s/ Kenneth W. Macke

KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).