

From: Don Drinko
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Gallagher Sharp Shop Talk: Workers' Compensation

Question: Is an Experience Rating Used to Determine Premiums Transferrable to a Sister Company?

As part of its duty to administer a workers' compensation system, the BWC classifies occupations or industries according to their degree of hazard and determines the risks of different classes according to the National Council on Compensation Insurance categories for risk. Recently, the Ohio Court of Appeals, Tenth Appellate District, was presented with the question of whether the BWC exceeded its discretion in finding successor liability in the transfer of risk for a company that was determined to be a sister company.

In *State of Ohio ex rel. V & A Risk Services v. BWC*, 2012-Ohio-3583, the BWC conducted an audit of two companies, NOVCO, which was in the business of buying and selling chemicals and clearing the rights of way for public utilities, and Total Utility Clearance, Inc. ("Total") which was in the business of supplying NOVCO with labor. NOVCO originated in 1960 and in 2004 terminated all 72 employees utilized to perform labor for clearing the rights of way. Total was then created and hired 59 of the terminated employees to perform NOVCO's right of way jobs. NOVCO was Total's only source of revenue and no profit or losses were made.

Pursuant to R.C. 4123.32, the BWC may require that if an employer transfers a business, in whole or in part, the successor in interest shall assume the employer's account and is therefore liable for the past experience rating of the previous employer. In 2006, the BWC conducted an audit of NOVCO and Total and transferred NOVCO's experience to Total retroactive to 2004, resulting in a premium increase in excess of \$1.4 million. On administrative appeal, the Adjudicating Committee found that Total was not the successor employer to NOVCO, but upheld the transfer of a portion of NOVCO's experience rating because it viewed the relationship between NOVCO and Total as one involving a completely captive new employer. The transfer of experience rating was upheld on further administrative appeals.

Total filed a declaratory judgment against the BWC, and after other appellate proceedings, the case was remanded causing Total to amend its complaint to seek relief in *mandamus*. The trial court found that the BWC abused its discretion by transferring NOVCO's experience rating to Total, and the BWC appealed. The Tenth District affirmed, finding that while the BWC was authorized to audit NOVCO and Total's records, the Adjudicating Committee and the Administrator's Designee, both upheld the transfer of experience despite the absence of successorship. The court stated that NOVCO and Total are separate legal entities and sister companies and that the BWC's requirements added prerequisites not set out in the statute. Ultimately, the court agreed with the trial court that the BWC abused its discretion by transferring NOVCO's experience to Total.

The above case is very complex and involved other issues, however, it is a reminder on how an employer's experience rating's impact on premiums can have an effect on profitability. This case was decided on August 9, 2012, and the BWC still has time to appeal to the Supreme Court

of Ohio. If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, you can contact me or Adam Sadowski from our Toledo office.

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