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

Question: Can the BWC unilaterally transfer the experience rating of one business to that of another over the objection of the new business?

Employers who pay premiums into the State Fund in Ohio are "experience" rated, *i.e.*, the amount of premiums they pay are based, in part, on their past claims history. In order to combat the practice of "paper" transfers to avoid the impact of large claims, the BWC retains the authority to transfer all or part of an employer's experience rating to a "successor in interest." *R.C. 4123.32(C)*. Recently, the Supreme Court of Ohio considered a case where the alleged "successor in interest" contested a transfer of risk.

The underlying facts are complicated, but *State ex rel. K&D Group, Inc. v. Buehrer*, 135 Ohio St.3d 257, 2013-Ohio-734, originated with the sale of an apartment complex that occurred in 2004. As a result of the transfer, K&D took over management responsibilities at the complex from another company, Mid-American. The responsibilities included managing day-to-day operations and management of leases. There was no dispute that K&D hired Mid-American employees, and utilized the same "manual classifications" (job descriptions) as Mid-American. After an audit of K&D in 2009, the BWC decided to base K&D's group experience, in part, upon Mid-American's claim history which included a large claim. K&D filed a protest, arguing that it was not a "successor in interest" to Mid-American because it did not purchase the property in question or acquire anything in the transaction, and only assumed contractual responsibilities. The BWC's adjudicating committee denied the protest, prompting an appeal *in mandamus* to the Tenth District Court of Appeals, which affirmed. K&D then appealed as of right to the Supreme Court of Ohio.

The Supreme Court reversed, finding that the BWC abused its discretion in transferring a portion of Mid-American's risk to K&D. The Court first rejected K&D's primary argument that it was not a party to the purchase, noting that a "transfer of assets" is not required to be a "successor in interest." The pertinent inquiry is whether there was a transfer of <u>business</u> <u>operations</u> from one business to another. *State ex rel. Lake Erie Const. Co. v. Industrial Comm.*, 62 Ohio St.3d 81. This did not end the inquiry, because the Court also found that there was no evidence that Mid-American <u>voluntarily</u> transferred its business operations to K&D. The Court cited *State ex rel. Valley Roofing v. BWC*, 122 Ohio St.3d 275, which found the purchase of an ongoing concern from a third-party bank <u>not</u> to be a "successor in interest." The Court held the fact that certain employees or contractual obligations were assumed was not determinative, because any new owner would have assumed the same operations.

When selling or acquiring an ongoing concern, consideration should be given to the claims history of the company and the possibility that the BWC may consider a transfer of risk. 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.

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