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

QUESTION: When can it be said that an employer "wholly succeeds" another, so as to necessitate assumption of the predecessor's rights and liabilities under the Workers' Compensation Act?

Liability of successor corporations for workers' compensation obligations is governed by the Ohio Administrative Code. The OAC sets forth a system of appeals and hearings by which the BWC considers whether a successor corporation should retain liability. For transactions occurring after July, 2010, OAC 4123-17-02(C) requires the merger of risks when the transaction is undertaken for "the purpose of escaping financial obligations" under Act. Prior to 2010, successor liability rested on a different question: whether an entity "wholly succeeded" the business of its predecessor, a question which spoke to the nature of the underlying transaction. Recently, the Supreme Court of Ohio considered an appeal from the Tenth District arising from a pre-2010 merger, and the question of whether the risks of two separate, but related, companies should be merged because one company "wholly succeeded" another.

State ex. rel. Daily Servs., L.L.C. v Morrison, Slip Opinion No. 2018-Ohio-2151, concerned two staff agencies, one of which provided short-term staffing ("STS") and the other long-term staffing ("LTS"). The companies were jointly owned and located in adjacent buildings, but each had its own workers' compensation policy. In March, 2009, the LTS ceased business operations suddenly without paying outstanding BWC obligations. The STS continued making some tax payments on behalf of the LTS, assumed some LTS staff, and renegotiated contracts of some LTS customers. It also acquired the right to use the name of the LTS in its business. At that point, the BWC invoiced the STS for outstanding premiums owed by the LTS, prompting an appeal from the STS that it was not a successor corporation. The matter was referred to the Adjudicating Committee, who ultimately concluded that a voluntary merger of business operations had occurred and that the risks of the two companies should be merged. The STS pursued a final appeal with the BWC designee, who determined that the adjudicating committee applied the proper standard and that a "whole succession" had occurred. The STS sought a *writ of mandamus* in the Tenth Appellate District, who referred the matter to a magistrate then concluded that the facts did <u>not</u> support a finding that the STS had "wholly succeeded" the LTS. The Tenth District adopted the magistrate's findings over the objections of the BWC, and ordered the BWC to reverse its merger. This prompted an appeal to the Supreme Court of Ohio.

The Supreme Court reversed, finding "some evidence" existed to support the BWC's finding that the STS "wholly succeeded" the LTS. Citing OAC 4123-17-02 (C), the Court noted it was deciding this matter on an "abuse of discretion" standard, and that it need only find "some evidence" that supported the merger of risks. While the STS did not assume every employee, customer, or contract held by the STS, the Court found that it had cherry-picked the best customers and had assumed all obligations vital to maintaining that business. Business functions, employees, leases, and contracts were assumed by the STS, who also acquired the right to use the LTS name. While the evidence was not conclusive, there was clearly sufficient evidence before the Adjudicating Committee to conclude that a "whole succession" had occurred. In a

pointed dissent, Justice Kennedy argued that the plain language of the statute required a voluntary transfer of the entire business operation, which clearly did not take place here. While the best employees and customers were kept, this amounted to only 30% of the prior company's business and payroll. There was also no asset purchase agreement or assignment of contractual rights.

As anyone who has ever been before the Adjudicating Committee can attest, *Daily Services, L.L.C.* reflects the true nature of these proceedings. Decisions to merge risks are invariably slanted towards the findings desired by the BWC, and it is not unusual to see cases where it is determined that a new business organized days, weeks, months, or even years after the closure of the original business were still determined to have been successor corporations. Great care should be taken before these transactions are considered.

If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, please feel free to contact me.

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