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**THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST AND INVOLVES A
SUBSTANTIAL CONSTITUTIONAL QUESTION**

This case presents issues of extraordinary importance to the workers' compensation laws of Ohio and to numerous public and private employers who pay workers' compensation premiums to the Ohio Bureau of Workers' Compensation (hereafter "the BWC"). At issue is whether the BWC has the discretionary authority to interpret R.C. § 4123.32(A) in a manner that affords premium discounts and rebates to many, *but not all*, employers incurring the same premium obligations. This disparate treatment of Ohio's premium paying employers dates back to 1996 when Appellants, and numerous other similarly situated employers, were initially required by the BWC to pay their workers' compensation premiums (without R.C. § 4123.32(A) discounts) in an amount as much as four times what the BWC charged other employers (who received the discounts) *for the very same premium obligations*. In the summary judgment record before the Court of Appeals (hereafter, "the Record") the BWC conceded there exists no factual justification for this disparate treatment. Instead, the BWC has rested its defense on the novel assertion that it is solely within its discretion to define those employers who have the legal status of a R.C. § 4123.32(A) "subscriber" and who therefore qualify for the premium relief authorized by R.C. § 4123.32(A).

As will be demonstrated below, this case is of public and great general interest and involves a substantial constitutional question because: (1) it involves the BWC's distribution of more than 9 billion dollars of State Insurance Fund (hereafter "SIF") surplus held in trust for the benefit of Ohio's employers and their employees; (2) it involves questions of first impression regarding both the legal status and corresponding rights of numerous employers, and the scope of the BWC's discretion to determine their legal status, under the workers' compensation laws of Ohio; (3) it involves enforcement of the legal checks and balances in place, including

Appellants' equal protection rights, to protect employers against discretionary mistakes by the BWC; and (4) the BWC's actions in this case have had, and will continue to have, both million dollar consequences to the affected employers and a chilling effect on the certainty all employers are entitled to regarding their legal status and corresponding rights under the workers' compensation laws of this state.

a. The BWC's distribution of more than 9 billion dollars of excess SIF surplus is a matter of public and great general interest.

The Ohio BWC determines, collects, invests and distributes workers' compensation premiums within the SIF, a trust fund to be administered pursuant to the workers' compensation laws of Ohio for the benefit of Ohio's employers and their employees. R.C. § 4123.30 With assets approaching 25 billion dollars, the BWC began in 1996 to return excess surplus premium to Ohio's premium paying employers as authorized by R.C. § 4123.32(A). In the years that followed, it returned to state fund employers more than 9 billion dollars of excess surplus through premium rebates and premium discounts of up to 75 percent.

But in its fiduciary administration of R.C. § 4123.32(A), the BWC has never voluntarily followed the three Legislative mandates of this law. When it initiated premium discounts without first writing an administrative rule, this Court ordered the BWC to comply with its statutory rule making obligation. *State, ex rel. United Auto Aerospace & Agricultural Implement Workers of America v. Ohio Bureau of Workers' Compensation*, 95 Ohio St. 3d 408, 2002-Ohio-2491. When the BWC violated the second mandate of R.C. § 4123.32(A) - - that only "future premiums" are eligible for the discounts authorized by R.C. § 4123.32(A) - - this Court imposed the "rule of law" on the BWC to limit its application of the discounts to only those premiums the Legislature deemed eligible. *Id.*

This case goes to the third and final legislative mandate of R.C. § 4123.32(A) - - that all “subscriber(s)” to the SIF are eligible for premium discounts. The Supreme Court now has the opportunity to complete its review of the BWC’s stewardship of an unprecedented, multiple billion dollar expenditure of SIF trust funds. Given the consistent history of the BWC’s inability to comply with the Legislative directives of R.C. § 4123.32(A), and to ensure this unique and sizable state administered program conforms to both the intent of the Legislature and Appellants’ constitutional right to equal protection of the law, this Court should not stop short of completing the review and direction it began in *United Auto Aerospace*, Id. This is especially true where, as here, the BWC has conceded in the Record there exists no factual justification for excluding Appellants and hundreds, possibly thousands, of other premium paying employers from the discounts. Appellants’ claims turn instead on the legal question of whether they had the legal status of subscribers or state fund employers for purposes of R.C. § 4123.32(A) and whether the BWC’s practice of denying Appellants this legal status violated their equal protection rights.

- b. This case involves legal issues of first impression in Ohio relevant to both the legal status and corresponding rights of Ohio’s employers, and the extent of the BWC’s authority to define that status under its own administrative regulations.**

The majority opinion of the Court of Appeals correctly stated:

The bureau’s position is that, under R.C. § 4123.32(A), an employer must be a “subscriber” to the fund in order to receive premium rebates, and the term “subscriber” excludes appellants... The bureau thus asserts that it has the *sole* right and obligation to define who is a subscriber to the state fund for purposes of premium rebates... (emphasis added).

The Ohio Revised Code does not explicitly define the terms “subscriber” for the purposes of R.C. § 4123.32(A). Interpretation of this term in relation to the statute is accordingly a question of first impression before this Court. ¶¶ 17 and 19.

While this is the principal issue on which this case turns, there are other significant legal issues of extraordinary importance to Ohio's employers that share this first impression status. For example, the majority of a sharply divided Court of Appeals relied heavily on O.A.C. Rule 4123-17-10 in granting the BWC discretion to define the term "subscriber" irrespective of what the Legislature intended by its use of that term in R.C. § 4123.32(A). But this administrative regulation was not adopted until October of 1999, a full three years *after* the 1996, 1997 and 1998 policy years during which the BWC denied Appellants premium discounts. Moreover, the BWC *never* obtained the advice and consent of the Oversight Commission, as required by Rule 4123-17-10, for its decision to exclude Appellants from the class of premium paying employers (i.e. subscribers) eligible for R.C. § 4123.32(A) premium discounts.

These facts raise significant legal issues of first impression. May the BWC lawfully rely on O.A.C. Rule 4123-17-10 as authority for its decision to deny Appellants the legal status of subscribers when that Rule expressly conditions that discretion on the "advice and consent" of the Oversight Commission, and the BWC admits it bypassed the Oversight Commission on this critical issue? If so, may the BWC apply an administrative regulation to declare *retroactively* the legal status and associated substantive rights of employers under the workers' compensation laws of Ohio? And where, as here, the Legislature delegates to the BWC rule making authority, does that authority encompass the right to define a key legislative term ("subscriber") in a manner inconsistent with what the Legislature intended by its use of that term? Unless resolved by the Supreme Court, all of these questions have had, and will continue to have, a chilling effect on the ability of Ohio's employers to make informed decisions on which they can rely in their dealings with the BWC.

- c. **Enforcement of the legal checks and balances which serve to protect employers against BWC practices that violate**

their clear legal rights, including their constitutional rights, is a matter of public and great general interest.

There are numerous checks and balances that operate to curtail the BWC's discretion in its administration of a multi-billion dollar trust fund. Each of these checks and balances arise from the well-accepted requirement that the BWC must administer the SIF in accordance with the workers' compensation laws of Ohio. They include: (1) the requirement that the BWC conform its practices to the intent of the Legislature *Arth Brass Aluminum Castings, Inc. v. Conrad*, 104 Ohio St. 3d 547, 2004-Ohio-6888; (2) the requirement that the BWC conform its practices to the terms of its own administrative regulations *State, ex rel. H.C.F., Inc. v. Ohio Bureau of Workers' Compensation*, 80 Ohio St. 3d 642, 1998-Ohio-175; (3) the requirement that the BWC operate in a manner consistent with its past practices *Cleveland v. Indus. Comm.*, (1983), 8 Ohio App. 3d 7, 455 N.E. 2d 1085, and; (4) the requirement that the BWC implement statutory directives in a manner that conforms to constitutional equal protection guarantees. *Coldwell Banker Residential Real Estate Serv., Inc. v. Bishop*, (1985), 26 Ohio App. 3d 149, 499 N.E. 2d 1382 Each of these legal requirements will be addressed in the Propositions of Law section of this Memorandum. For now, Appellants urge this Court to conclude that the BWC's implementation of a more than nine billion dollar premium discount program in conformity with these checks and balances is a matter of public and great general interest.

d. The BWC's actions in this case are of public and great general interest because they have had, and will continue to have, both million dollar consequences to the affected employers and a chilling effect on the certainty employers are entitled to regarding their legal status under the Workers' Compensation laws of Ohio.

What are employers to think when the BWC acknowledges their legal status as state fund subscribers on an inconsistent and arbitrary basis as the Record demonstrates occurred in this

case? What are they to believe when the BWC attempts to elevate its discretion above the intent of the Legislature in matters relevant to the legal status of employers that have million dollar consequences on the workers' compensation premiums employers pay? How do you explain to an employer that it must pay its premiums at a rate four times what other employers were charged by the BWC for the very same premium obligations when there is admittedly no factual justification in the Record for this disparate treatment? Can employers trust that the BWC will apply its administrative regulations as written, and be held accountable by our judicial system when it doesn't? These are but a few of the valid concerns Ohio employers will struggle with if this Court does not accept this appeal and restore certainty to the basic principles that the BWC may not exercise its discretion in a manner that violates its past practices, the statutes and administrative regulations that define the legal status of employers and the constitutional guarantees of equal protection of the law.

III. STATEMENT OF THE CASE

This declaratory judgment action was filed as the result of Defendant's refusal to grant Appellants, and numerous other employers, premium rebates/discounts for the workers' compensation premiums they incurred during the BWC's 1996 through 2004 policy years.

As to Appellants Frisch's Restaurants, United Dairy Farmers and J.W. Harris Co., Defendant denied them premium discounts on the sole ground that these Appellants abandoned their legal status as state fund employers or R.C. § 4123.32(A) "subscriber(s)" subsequent to the effective dates of their self-insurance privilege. Defendant admitted in the depositions of its key employees that these Appellants would be entitled to the premium discounts if under the workers' compensation laws of Ohio they continued to have the legal status of state fund employers subsequent to assuming the additional rights and responsibilities of self-insurance.

Appellant, Peck, Hannaford & Briggs was also denied premium discounts on the retrospectively rated annual and final adjustment premiums it incurred for those years it was a group rated state fund employer. Defendant denied Peck, Hannaford & Briggs its premium discounts on the ground that it would be “inequitable” to grant it discounts on its retrospectively rated state fund premium obligations incurred while it was also a group rated state fund employer. Defendant’s original administrative order did not identify this inequity, and the Record before the Court of Appeals demonstrated that no such inequity existed.

A sharply divided Court of Appeals approved of the BWC’s actions and granted it summary judgment. The majority opinion began its analysis by initially relying on judicial deference to the BWC’s discretion and then concluding, without explanation, that the BWC’s disparate treatment of Appellants was reasonable, both in relation to R.C. § 4123.32(A) and Appellants’ constitutional rights to equal protection of the law. The dissent, authored by Justice Deshler, took an altogether different legal approach to ascertaining the legal status of Appellants. According to Justice Deshler, the BWC did not have the authority to implement an interpretation of the term subscriber¹ at odds with the intent of the Legislature. As to that legislative intent, Justice Deshler found it apparent on the face of R.C. § 4123.32(A), and entirely consistent with the nature and scope of the BWC’s premium discount program, that the term subscriber was intended to mean any employer with an ongoing premium obligation such that all similarly situated employers receive corresponding premium discounts or rebates. *Dissent at Paragraph 29.*

This matter is now before the Court pursuant to Appellants’ Notice of Appeal and this Memorandum in Support of Jurisdiction.

¹ The BWC admitted in the Record that the term “subscriber” is used synonymously with “state risk” and “state fund employer.” Consistent with this admission, and the terminology used by the Court of Appeals, this Memorandum will use the terms subscriber or state fund employer.

IV. STATEMENT OF FACTS

a. The BWC's Premium Discount Program.

R.C. § 4123.32 authorizes Defendant to adopt a Rule for the return of an excess of surplus premium to subscribers to the SIF. Without first drafting and adopting a Rule with the advice and consent of the Oversight Commission,² in violation of R.C. § 4123.32(A), Defendant determined that there was an excess of surplus sufficient to warrant its return to state fund employers commencing with the BWC's 1996 policy year and for each year thereafter through 2004. The purpose of the premium dividend program was to pay excess surplus held in the SIF to state fund employers who incurred premiums during the year of the discount. A state fund employer need not have paid premiums that contributed to the excess surplus in order to qualify for the premium discounts. Similarly, a state fund employer who paid premiums that contributed to the excess surplus did not qualify for premium discounts unless it was a premium paying state fund employer during the effective period of the discount. Because Defendant applied a flat percentage discount "across the board" to all workers' compensation premiums incurred during the discount period, the more premium an employer paid, the more excess surplus dollars were returned to that employer. The nature and scope of this premium discount program as described above was all a matter of Record before the Court of Appeals.

For the 1996, 1997 and 1998 policy years, Defendant applied these "across the board" premium discounts to all premiums incurred by state fund employers, except the annual adjustment and final adjustment premiums incurred by retrospectively rated state fund employers. According to Marty Herf, the BWC's Chief Risk Officer at the time, this was simply an "oversight" by Defendant. In 1998, however, Defendant acknowledged that these premiums

² That rule, O.A.C. Rule 4123-17-10, was not adopted until October of 1999.

were qualifying premiums for purposes of any and all R.C. § 4123.32(A) discounts. But not all employers who incurred and paid these retrospectively rated annual and final adjustment premiums benefited by the inclusion of these premiums in the discount program. Appellants and numerous other employers who paid these premiums were excluded on the ground the BWC did not view them as having the legal status of a R.C. § 4123.32(A) subscriber to the SIF.

b. Retrospectively Rated Annual and Final Adjustment Premiums.

Retrospectively rated employers pay a three-part premium, over a period of ten years, for each policy year they apply for and are granted retrospectively rated state fund coverage. They initially pay a semi-annual minimum premium for each of two six-month payroll reporting periods. O.A.C. Rules 4123-17-52(1) The employer also pays the BWC an annual adjustment premium for each of the next ten consecutive years equal to the medical and compensation/indemnity payments incurred by the BWC during those years. O.A.C. Rule 4123-17-52(2) At the end of this ten year “evaluation period”, the retrospectively rated state fund employer pays a final adjustment premium equal to what the BWC determines to be the probable future cost of the claims incurred during the initial retro policy year. Payment of this final adjustment premium closes the initial retro policy year and ends the state fund employer’s premium obligations for claims incurred during that year. O.A.C. Rule 4123-17-52(3)

The retrospectively rated state fund employer retains its obligation to make its annual adjustment and final adjustment premium payments, even if it self-insures its future claims, or elects to participate in a different state fund premium program, at any time during the ten year evaluation period. This explains why the self-insured Appellants continued to pay their full retrospectively rated state fund premium obligations after they become self-insured, and why

Peck, Hannaford & Briggs did the same when it was otherwise participating in a BWC group rating program.

- c. **The BWC's Treatment of Appellants as state fund employers for numerous surplus related purposes, and its inconsistent and unexplained refusal to recognize this same legal status for R.C. § 4123.32(A) purposes.**

Consistent with their continued legal status as state fund employers after the effective date of their self-insurance and/or group rating, Appellants continued to receive benefits from the BWC available only to state fund employers. Indeed, Defendant concedes in the Record that Appellants had all the same rights and responsibilities of a subscriber or state fund employer with respect to their retrospectively rated claims, and the BWC's overall administration of those claims did not change in any respect. After they became self-insured and/or group rated, Appellants continued to be eligible to apply for and receive handicap reimbursement from the state fund "bucket"³ of the surplus account, a benefit reserved solely for state fund employers under the provisions of R.C. § 4123.343 and O.A.C. Rule 4123-3-35(B). Appellants continued to be eligible for surplus reimbursement from the state fund "bucket" of the surplus account for approved vocational related rehabilitation expenses in the retro claims remaining in their ten year evaluation period. Again, only state fund employers are eligible for this benefit pursuant to R.C. § 4121.66. In addition, they continued to be eligible for surplus reimbursement on successful appeals in their retrospectively rated claims. These surplus charges were also charged to the state fund "bucket" of the surplus account, and this too was a right reserved solely for state fund employers under R.C. § 4123.511.

In short, it is undisputed in the Record that subsequent to the effective dates of their self-

³ As distinguished by the BWC from the "self-insured" bucket of the SIF from which the surplus claims of self-insured employers are paid.

insurance or group rating participation, Appellants incurred and paid retrospectively rated annual and final adjustment premiums that qualified for R.C. § 4123.32(A) premium discounts. It is also undisputed that Defendant continued to acknowledge Appellants' legal status as state fund employers, with the rights of that status, with respect to numerous surplus account benefits other than the premium discounts authorized by R.C. § 4123.32(A). And it is also undisputed in the Record that the BWC offered no factual justification for this disparate and inconsistent recognition of Appellants' legal status as state fund employers.

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. 1

The term subscriber as used in R.C. § 4123.32(A) must be interpreted in accordance with Legislative rules of statutory construction. Where the intent of the Legislature can be discerned from those rules, defining the term is not a matter within the discretion of the Ohio Bureau of Workers' Compensation.

Defendant has correctly admitted that Appellants' entitlement to the premium discounts at issue in this case turns on the single issue of "whether, at the time the dividend or rebate is declared, the employer is deemed a subscriber to [the] state fund."⁴ There is no definition of a subscriber in the Workers' Compensation Act (R.C. §§ 4123 et seq.), or the case law that has interpreted the Act. However, "No better method exists to ascertain the correct construction of a statute than to call upon a rule of statutory construction which the enacting body itself has provided." *Wingate v. Hordge* (1979), 60 Ohio St. 2d 55, 58, 396 N.E.2d 770. R.C. § 1.42 provides the initial standard for determining what the Legislature intended by the term "subscriber" as used in R.C. § 4123.32(A). It states: "... Words...that have acquired a...particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." This is a mandatory rule of statutory construction. Defendant's key employees all

⁴ Defendants' Memorandum in Support of Summary Judgment at p. 4.

admitted in the Record that the BWC views the terms “state risk”, “state fund employer” and “subscriber” to the state fund synonymously and uses them interchangeably. The term “state risk” is defined by Defendant’s administrative regulations as “those employers who pay their full premium into the state fund.” O.A.C. 4123-19-01(A) Since Defendant has admitted that the terms “state risk” and “subscriber” are synonymous, Appellants had the legal status of subscribers to the SIF by virtue of their ongoing payment, in full, of their premium obligations and their corresponding compliance with the legal definition of a “state risk.”

The Ohio Supreme Court has made clear that “[The] BWC and the Commission must follow their own rules as written. *State, ex rel. Cincinnati v. Ohio Civ. Rights Comm.* (1981), 2 Ohio App. 3d 287, 288, 2 Ohio B. Rep 317, 319, 441 N.E. 2d 829, 831. They cannot give selective effect to provisions to produce a desired result or otherwise change them without complying with the R.C. Chapter 119 rule-making procedure. *State, ex rel. Reider’s, Inc. v. Indus. Comm.* (1988), 48 Ohio App. 3d 242, 549 N.E. 2d 532.” *State ex rel. H.C.F., Inc. v. Ohio Bureau of Workers’ Comp.*, 80 Ohio St. 3d 642, 647, 1998-Ohio-175, 687 N.E. 2d 763. Here, the BWC effectively extended premium discounts on retrospectively rated annual and final adjustment premiums on the condition that the employer insure its coverage solely through the BWC’s retrospectively rated premium program. Any employer who also assumed self-insured or group rated responsibilities was denied the legal status of a subscriber. This condition has no connection to compliance with either R.C. § 1.42 or the BWC’s obligation to follow Rule 4123-19-01(A) “as written”, and its discretion must therefore be rejected by this Court in favoring of declaring Appellants’ legal status as R.C. § 4123.32(A) subscribers in accordance with well accepted rules of statutory construction designed to determine the intent of the Legislature including, but not limited to, the BWC’s admissions regarding the particular meaning the term

“subscriber” has acquired, R.C. § 1.42 and O.A.C. Rule 4123-19-01(A).

PROPOSITION OF LAW NO. 2

Where the Bureau of Workers’ Compensation practice of denying certain employers the legal status of a R.C. § 4123.32(A) subscriber is inconsistent with its past administrative practices, and where such practice effects disparate treatment among premium paying employers for which the BWC offers no factual justification, its practice is unreasonable and unlawful as a matter of law.

Here, Defendant engaged in the selective and inconsistent recognition of Appellants’ legal status and corresponding rights as state fund employers. Defendant accorded the Appellants state fund employer status, subsequent to their self-insurance, with respect to R.C. § 4123.343 surplus reimbursement for handicap reimbursement claims, R.C. § 4123.511 surplus reimbursement for successful appeals and R.C. § 4121.66 surplus charges for rehabilitation expenses. But it arbitrarily refused to recognize this same legal status for purposes of R.C. § 4123.32(A) premium discounts. This type of selective recognition of rights, with its disparate impact on the Appellants, was expressly declared unconstitutional in *Cleveland v. Indus. Comm.* (1983), 8 Ohio App. 3d 7, 455 N.E.2d 1085. There, the Court emphasized that the BWC has an obligation of consistency in the enforcement of its practices and policies, and it struck down as unconstitutional the Commission’s and BWC’s selective enforcement of a two year limitation on the retroactive collection of under billed premiums. *Id.* at 10 – 11. Here, Defendant engaged in the selective recognition of Plaintiffs’ legal status and corresponding rights as state fund employers. As in *Cleveland*, this Court must enforce Defendant’s legal obligation to implement its policies in a consistent fashion by declaring that Plaintiffs had the status of state fund employers for purposes of R.C. § 4123.32(A).

What is more, equal protection requires that legislation apply equally to all persons within a class, and that reasonable grounds exist for making a distinction between those within

and those without a designated class. *State v. Buckley* (1968), 16 Ohio St. 2d 128, 134, 243 N.E.2d 66, citing *Porter v. Oberlin*, (1965), 1 Ohio St. 2d 143, 151. These constitutional guarantees require that all similarly situated individuals be treated in a similar manner. *State ex rel. Doersam v. Indus. Comm.* (1989), 45 Ohio St. 3d 115, 119, 533 N.E.2d 321. “In other words, laws are to operate equally upon persons who are identified in the same class.” *State ex rel. Patterson v. Indus. Comm.*, 77 Ohio St. 3d 201, 204, 1996-Ohio-263, 672 N.E.2d 1008. And “[i]f a law, while fair on its face, is applied so as...to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, there is a denial of equal protection...” *Elsaesser v. Hamilton Bd. Of Zoning Appeal* (1990), 61 Ohio App. 3d 641, 648, 573 N.E.2d 733, (quoting *Yick Wo v. Hopkins* (1886), 118 U.S. 356, 373-74) (internal quotation marks omitted).

This Court’s equal protection analysis must focus on the effect of Defendant’s practice of applying premium discounts to retrospectively rated annual and final adjustment premiums for state fund employers insuring their coverage solely through the BWC’s retrospectively rated program (“Class I”), but denying the same credits to employers paying the same premiums simply because those employers also had the legal status of a self-insured or group rated employer. (“Class II”). By Defendant’s admission, Plaintiffs, who fall within Class II, often paid the same retro premiums for the same policy years as the members of Class I, but were denied dividend credits with no factual justification for this disparate treatment.

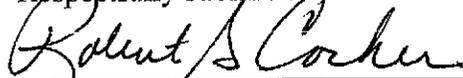
The Defendant implemented a policy of disparate treatment that violated Plaintiffs’ rights to have R.C. § 4123.32(A) operate equally upon all employers who paid retrospectively rated annual and final adjustment premiums. This policy was not grounded upon any real factual distinction between those premium paying employers who were granted discounts and those who

were not, and the policy thus violated the principles set forth in *Doersam*, supra. What is more, the definition of the term “subscriber” as one who pays its full premium into the state fund is consistent with the legal presumption that in enacting R.C. § 4123.32(A), “compliance with the constitutions of the state and of the United States is intended.” R.C. § 1.47(A), Defendant has admitted there exists no factual justification for this disparate treatment, and the Court should construe R.C. § 4123.32(A) so as to avoid this arbitrary and therefore unconstitutional result. The rules of statutory construction “dictate that [courts] adhere to the construction which will save the statute from constitutional infirmity.” *Coldwell Banker Residential Real Estate Serv., Inc. v. Bishop* (1985), 26 Ohio App. 3d 149, 151, 499 N.E.2d 1382.

CONCLUSION

For the foregoing reasons, Appellants urge this Court to accept this appeal for a review and decision on the merits of their claims.

Respectfully submitted,

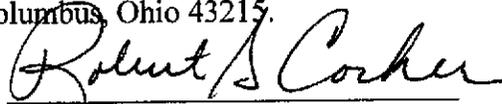


Robert S. Corker, Counsel of Record

COUNSEL FOR FRISCH'S
RESTAURANTS, INC., UNITED
DAIRY FARMERS, INC., J.W.
HARRIS CO., AND PECK &
HANNAFORD & BRIGGS

Certificate of Service

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by certified mail to counsel Appellee, Dawn Rae Grauel, Esq. and Kim M. Hastings, Esq., HAHN LOESER & PARKS LLP, 65 East State Street, Suite 1400, Columbus, Ohio 43215.



Robert S. Corker, Counsel of Record

APPENDIX

COURT OF APPEALS OPINION

COURT OF APPEALS JUDGMENT ENTRY

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Frisch's Restaurants, Inc. et al., :
 :
 Plaintiffs-Appellants, :
 :
 v. : No. 06AP-117
 : (C.P.C. No. 04CVD01-856)
 :
 James G. Conrad, Administrator, Ohio : (REGULAR CALENDAR)
 Bureau of Workers' Compensation, :
 :
 Defendant-Appellee. :
 :

O P I N I O N

Rendered on February 8, 2007

Scheuer, Mackin & Breslin, LLC, Robert S. Corker, Kegler, Brown, Hill & Ritter, and Thomas E. Hill, for appellants.

Hahn, Loeser & Parks, LLP, Richard T. Prasse, Kim M. Hastings, Dawn Rae Grauel, Danny L. Caudill, Marc Dann, Attorney General, and William J. McDonald, for appellee.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} This is an appeal by plaintiffs-appellants, Frisch's Restaurants, Inc. ("Frisch's"), United Dairy Farmers, Inc. ("UDF"), J.W. Harris Co., Inc. ("Harris"), and Peck, Hannaford & Briggs ("PHB"), from a decision of the Franklin County Court of Common Pleas granting summary judgment to defendant-appellee, James G. Conrad,

Administrator of the Ohio Bureau of Workers' Compensation ("Bureau"). During the course of this action Mr. Conrad was succeeded as administrator by William E. Mabe.

{¶2} Appellants' declaratory judgment action seeks to recover workers' compensation premium rebates, also commonly referred to as "dividend credits," that were denied by the bureau. Appellants initially sought certification of the action as a class action pursuant to Civ.R. 23(B)(2); the trial court's denial of certification was affirmed by this court in *Frisch's Restaurants, Inc. v. Conrad*, Franklin App. No. 05AP-412, 2005-Ohio-5426. Upon remand, appellants proceeded in their individual capacities before the trial court, which eventually denied summary judgment for appellants and granted it to appellee. The matter is now before us on appeal from that summary judgment, and appellants bring the following assignments of error:

1. The Trial Court Erred by Granting Defendant's Motion for Summary Judgment against Plaintiffs Frisch's Restaurants, Inc., United Dairy Farmers, Inc. and J.W. Harris Co., Inc. on the ground that these Plaintiffs did not have the legal status of subscribers to the State Insurance Fund subsequent to the effective dates of their self-insurance privilege and thus were not thereafter entitled to premium dividend credits pursuant to O.R.C. § 4123.32(A).
2. The Trial Court Erred By Granting Defendant's Motion for Summary Judgment against Plaintiffs Frisch's Restaurants, Inc., United Dairy Farmers, Inc. and J.W. Harris Co., Inc. on the ground that Defendant has the discretion to interpret what the Legislature intended by the term "Subscribers" as used in O.R.C. § 4123.32(A), that Defendant exercised this discretion reasonably and that Defendant was therefore entitled to judgment as a matter of law.
3. The Trial Court Erred By Granting Defendant's Motion for Summary Judgment against Plaintiff Peck, Hannaford & Briggs, as the trial Court provided no explanation or reasoning for rendering summary judgment against this particular Plaintiff.

4. The Trial Court Erred in Denying Plaintiffs' Motion for Summary Judgment.

{¶3} The substance of this case concerns the manner in which employers participate in Ohio's workers' compensation program and pay premiums for this coverage. Specifically at issue is the system under which the bureau, under certain circumstances, may grant employers premium rebates or reductions reflecting a distribution of an "excess surplus" of premiums, that is, a fund surplus above the amount needed to ensure the solvency of the workers' compensation system for all claimants and employers.

{¶4} The parties agree on the following general characterization of the overall premium system. Employers subject to Ohio workers' compensation coverage may choose coverage through the state fund or may apply, with the approval of the bureau, to be self-insured. Self-insured employers obtain private insurance to cover their workers' compensation requirements. For state-fund employers, the bureau offers four principal options: (1) base-rated coverage, (2) experienced-rated coverage, (3) group-rated coverage, and (4) retrospectively-rated coverage, known as the "Retro program." Base, experience, and group-rated employers pay a semi-annual premium for their workers' compensation coverage in a given year, computed upon one of these three methods of determining claim risk and exposure for the fund. In contrast, employers participating in the Retro program make payments under a more complicated, three-part scheme for any given year of coverage, and coverage under this method invokes a ten-year stream of payments for each covered year. Part one is a semi-annual premium in the coverage year at a substantially reduced rate compared to the base, group, or experience-rated premiums. Part two consists of a series of annual adjustments in subsequent years under which the employer reimburses the bureau for amounts paid for claims related to

the covered year. The third part-payment for the covered year will be a final adjustment paid at the end of the ten-year evaluation period. This final payment covers any claims paid from the fund during the ten-year evaluation period that were not covered by the annual adjustment payments, and in addition estimates a reserve for future fund exposure to claims filed during the covered year.

{¶5} Employers may switch from one insurance option to another within the state fund, or abandon current state-fund coverage to become self-insured. An employer departing the Retro program, however, will continue to pay its annual and final adjustment payments through the remainder of the ten-year period related to each covered year of participation in the Retro program, whether the employer leaves the Retro program to select another state-fund premium option or abandons current-year state-fund coverage to become self-insured.

{¶6} R.C. 4123.32(A) requires the bureau to adopt rules providing for the return of excess surplus premium to fund employers:

The administrator * * * shall adopt rules with respect to the collection, maintenance, and disbursements of the state insurance fund including the following:

(A) A rule providing that in the event there is developed as of any given rate revision date a surplus of earned premium over all losses which, in the judgment of the administrator, is larger than is necessary adequately to safeguard the solvency of the fund, the administrator may return such excess surplus to the subscriber to the fund in either the form of cash refunds or a reduction of premiums, regardless of when the premium obligations have accrued[.]

{¶7} The bureau has accordingly promulgated Ohio Adm.Code 4123-17-10 providing as follows:

* * * Pursuant to sections 4123.29 and 4123.34 of the Revised Code, the administrator is required to keep premiums at the lowest level consistent with the maintenance of a solvent state insurance fund and of a reasonable surplus. Pursuant to section 4123.32 of the Revised Code, in the event there is developed as of any given rate revision date a surplus of earned premium over all losses which, in the judgment of the administrator, is larger than is necessary adequately to safeguard the solvency of the fund, the administrator may return such excess surplus to the subscriber to the fund in either the form of cash refunds or a reduction of premiums, regardless of when the premium obligation has accrued. The administrator, with the advice and consent of the workers' compensation oversight commission, shall have the discretion and authority to determine whether there is an excess surplus of premium; whether to return the excess surplus to employers; the nature of the cash refunds or reduction of premiums; the employers who are subscribers to the state insurance fund who are eligible for the cash refunds or reduction of premiums; the payroll period or periods for which a reduction of premium has accrued and the premium payment for which the reduction of premium applies; the applicable date of the cash refunds or reduction of premiums; and any other issues involving cash refunds or reduction of premiums due to an excess surplus of earned premium.

{¶8} Apparently, the bureau initially declined to apply any R.C. 4123.32(A) premium rebates to any Retro program annual adjustment or final adjustment payments by all Retro program employers. The bureau later modified its position and awarded premium rebates to Retro program employers against annual and final adjustment payments for prior coverage years, but only if the employers were insured through the Retro program for the *current* coverage year—that is, the year in which the rebates were extended. This last restriction is at the heart of appellants' complaint.

{¶9} Appellant Frisch's participated in the Retro program for coverage years 1992 to 1996, when it became self-insured pursuant to a buyout agreement with the fund. Appellant UDF participated in the Retro program from 1989 to 1995, also becoming self-

insured through a buyout agreement. Appellant Harris participated in the Retro program from 1992 to 1996 when it became self-insured pursuant to a buyout agreement.

{¶10} In contrast, appellant PHB participated in the Retro program from 1995 to 1998 and 2000 to 2001, but did not elect to be self-insured through any period between 1995 and 2002 when it was not participating in the Retro program; during these periods when it was not in the Retro program, PHB was a group-rated state-fund subscriber. PHB accordingly received premium rebates during applicable periods on its group-rated premiums. On September 23, 1999, in exchange for a settlement payment of \$218,059.39, PHB released the bureau from all claims for premium rebates against Retro program annual and final adjustment premiums paid for 1996 through 1998, years in which PHB was both paying such premiums for past covered years and insured under the Retro program for the current coverage year. This settlement reflected application of the bureau's change of policy for Retro program employers so situated.

{¶11} Appellants' complaint seeks a declaration that they are entitled to premium rebates for various coverage years between 1995 and 2002, when they were participants in the Retro program in that they made payments for prior coverage years even though their current coverage year risks were not in the Retro program. For those same years, the complaint alleges, the bureau granted premium rebates to state-fund employers, but denied them to appellants Frisch's, UDF, and Harris on the grounds that they no longer had the status of state-fund employers, despite the fact that appellants, having recent coverage years in the Retro program, continued to pay annual and final adjustments during this time for those previous coverage-year obligations. The bureau denied rebates to appellant PHB for its ongoing Retro program annual adjustment and final adjustment

premiums on the different basis that, although PHB remained a state-fund employer for current-year coverage, PHB's decision to switch from Retro to group-rated coverage meant that PHB could receive rebates only for its current-year group-rated premiums because the bureau did not recognize "dual status" employers. PHB was thus denied premium rebates for its annual and final adjustment Retro program payments made during periods when PHB paid group-rated premiums and received corresponding premium rebates for those group-rate premiums.

{¶12} The trial court has upheld the bureau's denial of premium rebates to appellants for the years in question, leading to this appeal.

{¶13} We initially note this matter was decided in the trial court by summary judgment, which under Civ.R. 56(C) may be granted only when there remains no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, that conclusion being adverse to the party opposing the motion. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 629, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64. Additionally, a moving party cannot discharge its burden under Civ.R. 56 simply by making conclusory assertions that the nonmoving party has no evidence to prove its case. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Rather, the moving party must point to some evidence that affirmatively demonstrates that the nonmoving party has no evidence to support his or her claims. *Id.*

{¶14} An appellate court's review of summary judgment is *de novo*. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588; *Patsy Bard v. Society Natl. Bank, nka KeyBank* (Sept. 10, 1998), Franklin App. No. 97APE11-1497. Thus, we conduct an

independent review of the record and stand in the shoes of the trial court. *Jones v. Shelly Co.* (1995), 106 Ohio App.3d 440, 445. As such, we have the authority to overrule a trial court's judgment if the record does not support any of the grounds raised by the movant, even if the trial court failed to consider those grounds. *Bard*.

{¶15} Summary judgment is particularly suitable in cases solely involving determinations of law; since the present declaratory judgment action is submitted on uncontested facts as to the appellants' years and status of participation in Ohio's workers' compensation system, it involves only a determination of their legal rights under the statutes and rules governing that system, and is accordingly particularly well-suited to summary judgment.

{¶16} Appellants' first three assignments of error assert that the trial court erred in agreeing with the bureau that Frisch's, UDF, and Harris did not have the legal status of "subscribers" to the state fund during the years for which they sought premium rebates under R.C. 4123.32(A). Appellants additionally argue that denial of premium rebates to employers in their position while allowing rebates to current-year Retro program employers violates appellants' constitutional right to equal protection under the law by improperly creating two classifications of premium-paying Retro program employers.

{¶17} The bureau's position is that, under R.C. 4123.32(A), an employer must be a "subscriber" to the fund in order to receive premium rebates, and the term "subscriber" excludes appellants. In the bureau's interpretation, the bureau has discretion under its own regulation promulgated pursuant to the statute, Ohio Adm.Code 4123-17-10, to "determine * * * the employers who are subscribers to the state insurance fund who are eligible for the cash refunds or reduction of premiums." The bureau thus asserts that it

has the sole right and obligation to define who is a subscriber to the state fund for purposes of premium rebates, just as the bureau may, in its judgment, determine when an excess surplus exists that warrants issuance of such premium rebates to qualified employers.

{¶18} Pursuant to this discretion, the bureau's position is that the determining factor in defining a subscriber under R.C. 4123.32(A) is the type of workers' compensation coverage, whether state-fund or privately insured, subscribed to by the employer for coverage in the year the premium rebate is declared. Because Frisch's, UDF, and Harris were self-insured for the years 1995 (Frisch's) or 1996 (UDF and Harris) through 2002, the period for which they claim entitlement to premium rebates, the bureau maintains they are not subscribers for purposes of receiving such premium rebates for this period, even if during this time these employers paid a continuing obligation for pre-1995 Retro program covered years.

{¶19} The Ohio Revised Code does not explicitly define the term "subscriber" for purposes of R.C. 4123.32(A). Interpretation of this term in relation to the statute is accordingly a question of first impression before this court. In considering this question, we remain mindful of the basic rule of administrative law that an agency has discretion to promulgate and interpret its own rules, and this court will give an agency due deference for such determinations as long as its actions are reasonable in carrying out the statutory dictates of the legislature: "It is axiomatic that if a statute provides the authority for an administrative agency to perform a specified act, but does not provide the details by which the act should be performed, the agency is to perform the act in a reasonable manner based upon a reasonable construction of the statutory scheme." *Northwestern*

Ohio Bldg. and Constr. Trades Council v. Conrad (2001), 92 Ohio St.3d 282, 287. The legislature may thus, in the normal course of implementation of a complex regulatory scheme, delegate to the bureau's substantial expertise the responsibility of executing in detail the legislative intent. *State ex rel. McLean v. Indus. Comm.* (1986), 25 Ohio St.3d 90.

{¶20} A cardinal rule of statutory interpretation is that words shall be given their plain and ordinary meaning. *Hubbard v. Canton City Bd. of Edu.*, 97 Ohio St.3d 451, 2002-Ohio-6718, at ¶13. "Where the language of a statute is clear and unambiguous, it is the duty of the court to enforce the statute as written, making neither additions to the statute nor subtractions therefrom." *Id.* at ¶14. However, words that have acquired a specialized or particular meaning, by legislative definition or otherwise, must be construed accordingly. R.C. 1.42.

{¶21} Of itself, the term "subscriber" is one of broadest possible interpretation, and the context in which the word appears in R.C. 4123.32(A) does not provide much guidance to establish what specific meaning this might imply in the framework of premium rebate allowance. However, regardless of whether alternative interpretations more satisfactory to appellants might be substituted, we apply the principle of administrative deference under *Northwestern* and consider only the reasonableness of the interpretation applied by the bureau. We find nothing unreasonable in the bureau's interpretation of "subscriber" under R.C. 4123.32(A) to include only employers who are state-fund employers for risks arising in the year the premium rebate is authorized, allowing rebates only for the current state-fund program if more than one type of premium is paid, and denying rebates to employers who are not currently in the Retro program but pay

continuing rebates for past participation in that program. The appellants in this case have not articulated a basis upon which we can find that the bureau, in pursuing its statutory duty to collect premiums according to risk and dispense rebates when and where prudence and solvency allow, has here acted in an inherently unreasonable manner. Nor can we find that the appellants have established that under the general scheme of premium payment, the bureau has no reasonable basis to make the technical distinction between the various types of premiums at issue here, the varying combinations of current and past year risk and coverage under which they are paid, and their respective eligibility for rebates.

{¶22} Turning to appellant's equal protection arguments under Section 2, Article I of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution, we find them also without merit. A statutory classification that involves neither a suspect class nor a fundamental right will not violate these guarantees of equal protection if it bears a rational relationship to a legitimate government interest. *Menefee v. Queen City Metro* (1990), 49 Ohio St. 3d 27, 29, citing *Metropolitan Life Ins. Co. v. Ward* (1985), 470 U.S. 869, 881, 105 S.Ct. 1676. Appellants do not argue that the right to workers' compensation premium rebates is a fundamental one, nor do they argue that they belong to a suspect class historically subject to discrimination. We accordingly apply the rational basis test to this issue.

{¶23} Under this test, a statute does not violate equal protection guarantees merely because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, at ¶8, quoting *Lindsley v. Natural Carbonic Gas Co.* (1911), 220 U.S.

61, 78, 31 S.Ct. 337. The state has a rational interest in maintaining an effective and solvent workers' compensation program. *McCrone*, at ¶10. As we have determined above, the bureau has rationally defined the status of "subscriber" under its governing statutes, and promulgated and interpreted a reasonable regulation pursuant thereto. The classification that results between various premium-paying employers and their entitlement to rebates is not calculated to the satisfaction of appellants and similarly-situated employers, but it does pass the rational basis test and is consistently applied across the defined class. We therefore find no constitutional violation in the bureau's disallowance of premium rebates.

{¶24} We accordingly find that the trial court's grant of summary judgment in favor of the bureau was not in error because there remains no material issue of fact and the bureau is entitled to judgment as a matter of law. Appellants' first, second, and third assignments of error are overruled.

{¶25} Appellants' fourth assignment of error asserts that, in addition to erring in granting summary judgment for the bureau, the trial court erred in failing to grant summary judgment in favor of appellants. Our disposition of the first three assignments of error compels denial of this one, and appellant's fourth assignment of error is overruled.

{¶26} In summary, we overrule appellants' first, second, third, and fourth assignments of error. The trial court judgment granting summary judgment in favor of appellee Ohio Bureau of Workers' Compensation is affirmed.

Judgment affirmed.

TRAVIS, J., concurs.
DESHLER, J., dissents.

DESHLER, J., retired, of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

DESHLER, J., Dissenting

{¶27} Because I am unable to concur with the majority's conclusion with respect to the reasonableness of the bureau's interpretation and application of R.C. 4123.32(A), I must respectfully dissent.

{¶28} I agree with the majority that the current facts do not give rise to a violation of constitutional equal protection guarantees. I further agree that our analysis of the first two assignments of error begins with the legislative intent expressed by use of the word "subscriber" in R.C. 4123.32(A). I part ways here, however, with the majority because I believe the bureau has adopted an arbitrary and unreasonable interpretation of the governing statute. The bureau seems to argue that there is no restraint on its discretion to author and apply its regulations concerning premium rebates. In drafting its administrative regulation authorized under R.C. 4123.32(A), however, the bureau was not at liberty to adopt rules that conflicted with the legislature's express intent that "subscribers" to the fund be eligible for such premium rebates. Moreover, adoption of the bureau's position might have been easier in this case if the bureau had not muddied the waters by granting premium rebates to current Retro program employers for both current-year premiums and past coverage year annual and final adjustments, a position that undermines any assertion that Retro program payments differ in kind from other state-fund program payments that qualify for rebates.

{¶29} The legislature has indeed delegated to the bureau's substantial expertise the responsibility of executing in detail the legislative intent. *State ex rel. McLean v. Indus.*

Comm. (1986), 25 Ohio St.3d 90. In exercising this discretion, however, the bureau is not at liberty to interpret a term employed by the legislature in contradiction to the meaning intended by the legislature in its statute. The bureau invokes an administrative gloss put upon the term "subscriber" by the bureau after the fact, in an attempt to either assimilate or distinguish, as convenience of argument requires, this term from such equally loosely defined terms as "state risk" and "state fund employer." (The bureau's own personnel testified in deposition in this case that these were alternative terms used without significant distinction in the bureau's own internal business.) Considering the statute on its face, however, and in the context of the matters it intends to regulate, I am compelled to find that when the legislature employed the term "subscriber to the fund" in R.C. 4123.32(A) when addressing eligibility for premium rebates (particularly when the phrase "regardless of when the premium obligations have accrued" is appended to the provision), the legislature intended for employers currently affected by any ongoing premium obligations to receive corresponding premium rebates.

{¶30} The most reasonable and consistent reading of the statute is that R.C. 4123.32(A) is not concerned with the year in which risk accrues, covered claims are made, or covered claims are paid; it addresses excess surplus premium and the application thereof to premium-paying employers during the period in question. This is, in fact, entirely consistent with the bureau's decision to apply premium rebates to annual adjustment and final adjustment premiums made by those Retro program employers who continue in the Retro program for the coverage year in which the rebates are declared.

{¶31} As I interpret R.C. 4123.32(A), I would find that the bureau was not at liberty to deny premium rebates to former Retro program employers who continued to pay

annual adjustments and final adjustments through the ten-year period following each covered year, even if the employers were self-insured for the year in which the premium rebates were authorized. I would accordingly sustain the first two assignments of error.

{¶32} In addition, the bureau argues independently that even if R.C. 4123.32(A) authorizes and requires premium rebates for appellants Frisch's, UDF, and Harris, they have waived their right to such rebates under the explicit terms of the buyouts they executed to become self-insured. I find that the language of this waiver does not encompass the future Retro program payments at issue here. This conclusion is buttressed by the fact that the bureau found it necessary to later amend the language of the buyout agreement form at issue by adding to the paragraph concerned an explicit reference to *future* premium payments and waiver of rebates applicable thereto: "The employer * * * also expressly waives it [sic] claim to any future rebates or dividends from the State Insurance Fund for state fund employers payable after the effective date of the employer's self-insurance." (Form exhibit in appellee's memo contra summary judgment; emphasis added.) The need for such clarification at the least compels the conclusion that the waiver language was so ambiguous as to be unenforceable against the employer on the terms now suggested by the bureau, and at most may suggest that future premium payments were never the object of the waiver.

{¶33} Appellants' third assignment of error even more compellingly argues for reversal because it raises the denial of Retro program premium rebates to appellant PHB in this action despite the undisputed fact that PHB for all relevant periods remained a state fund employer for current year coverage, the very criterion that the bureau invoked as lacking in order to deny rebates to the other appellants.

{¶34} PHB did not elect to become self-insured, but after leaving the state-fund Retro program remained a state-fund employer paying group-rated premiums for current years while continuing to pay its ongoing Retro program premiums for prior coverage years. Since PHB did receive premium rebates for its group-rated premiums in those years, the bureau's position is that it would be "inequitable" for PHB to receive premium rebates on the concurrent annual and final adjustment payments for prior Retro program covered years.

{¶35} For the reasons given in my discussion of the first two assignments of error, in conjunction with the even more persuasive circumstance that PHB remained actively insured through the state fund under one program or another for all periods concerned, I would find that PHB was a subscriber for purposes of premium rebates under R.C. 4123.32(A) and may receive premium rebates for all annual and final adjustment payments under the Retro program. There is nothing obviously inequitable in PHB receiving premium rebates for separate premium obligations under different state-fund programs in the same year: the bureau has not asserted that these separate premium obligations (and corresponding benefits) are reduced in light of each other or otherwise would give rise to some unjust enrichment in comparison to other state-fund employers who had not participated in the Retro program in prior years. I would therefore sustain appellants' third assignment of error.

{¶36} Based upon my discussion of the issues raised in appellants' first three assignments of error, I would further find that there remains no genuine issue of material fact and *appellants* are entitled to judgment as a matter of law on the question of whether they must be considered "subscribers" under R.C. 4123.32(A) and are entitled to

premium rebates applied to their annual and final adjustment payments under the Retro program for prior coverage years. I would sustain appellants' fourth assignment of error as well.

{¶37} In summary, I would sustain appellants' four assignments of error, reverse the judgment of the trial court, and remand the matter with instructions to enter summary judgment in favor of appellees. I must respectfully dissent.

FILED
COURT OF APPEALS
IN THE COURT OF APPEALS OF OHIO (FRANKLIN COUNTY)

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CLERK OF COURTS

Frisch's Restaurants, Inc. et al., :
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 Plaintiffs-Appellants, :
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 v. :
 :
 James G. Conrad, Administrator, Ohio :
 Bureau of Workers' Compensation, :
 :
 Defendant-Appellee. :
 :

No. 06AP-117
(C.P.C. No. 04CVD01-856)

(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on February 8, 2007, appellants' assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs assessed against appellants.

KLATT & TRAVIS, JJ.

By William A. Klatt
Judge William A. Klatt