

IN THE SUPREME COURT OF OHIO

FRISCH'S RESTAURANTS, INC., et al., : Case No. 2007-0544
: :
Plaintiffs-Appellants, : On Appeal from the Franklin County
: Court of Appeals, Tenth Appellate
v. : District
: :
JAMES G. CONRAD [TINA KIELMEYER], : Court of Appeals Case No. 06-AP-117
ADMINISTRATOR : :
OHIO BUREAU OF WORKERS' : :
COMPENSATION, : :
: :
Defendant-Appellee. : :

**APPELLEE'S MEMORANDUM IN OPPOSITION TO
MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANTS FRISCH'S RESTAURANTS, INC., UNITED DAIRY
FARMERS, INC., J.W. HARRIS CO., INC. AND PECK, HANNAFORD & BRIGGS**

Dawn Rae Grauel (0074208) (COUNSEL OF
RECORD)
HAHN LOESER + PARKS LLP
65 East State Street, Suite 1400
Columbus, Ohio 43215
Phone: (614) 221-0240
Telefax: (614) 221-5909
Email: drgrauel@hahnlaw.com

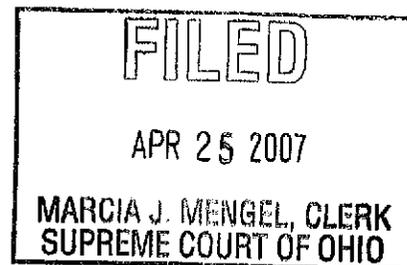
Richard T. Prasse (0024819)
HAHN LOESER + PARKS LLP
200 Public Square, Suite 3300
Cleveland, Ohio 44114
Phone: (216) 621-0150
Telefax: (216) 241-2824
Email: rtpresse@hahnlaw.com

[caption continued on next page]

Robert S. Corker (0021284) (COUNSEL
OF RECORD)
SCHEUER MACKIN & BRESLIN, LLC
11025 Reed Hartman Highway
Cincinnati, OH 45242
Phone: (513) 984-2040
Telefax: (513) 984-6590
Email: rcorker@smblaw.net

Thomas E. Hill (0012182)
KEGLER BROWN HILL & RITTER
65 East State Street, Suite 1800
Columbus, OH 43215
Phone: (614) 462-5400
Telefax: (614) 464-2634
Email: thill@keglerbrown.com

Attorneys for Appellants



Gerald H. Waterman (0020243)
Assistant Attorney General
Workers' Compensation Section
150 E. Gay Street, 22nd Floor
Columbus, OH 43215-3130
Phone: (614) 466-6696
E-mail: gwaterman@ag.state.oh.us

Attorneys for Appellee

TABLE OF CONTENTS

I. THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST 1

 A. These four dissatisfied employers do not present a matter of public and great general interest. 1

 B. The definition of “subscriber” does not create a question of great public interest. 2

 C. Appellants’ constitutional and other legal rights have been protected by the judicial system’s checks through the Trial Court and Court of Appeals review – Appellants’ unhappiness is not a matter of public and great general interest. 3

 D. The effect of the Bureau’s reasonable exercise of its administrative discretion on these four dissatisfied employers is not of public and great general interest. 4

II. STATEMENT OF THE CASE AND BACKGROUND FACTS 5

 A. Statement of the Case..... 5

 B. Statement of Facts..... 5

 1. The Retro Program..... 5

 2. Self-Insurance 6

 3. Premium Rebates 6

 4. Appellants’ Coverage History..... 7

III. ARGUMENT IN SUPPORT OF APPELLEES’ PROPOSITIONS OF LAW 8

 A. Proposition of Law No. 1: The Bureau’s determination that Appellants were not subscribers eligible to receive premium rebates is reasonable. 8

 1. The Bureau’s interpretation of R.C. 4123.23(A) is reasonable 9

 2. The Bureau’s interpretation of Ohio Adm. Code 4123-17-10 is reasonable 10

 B. Proposition of Law No. 2: The Bureau acted constitutionally..... 11

IV. CONCLUSION..... 12

V. CERTIFICATE OF SERVICE 13

I. THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST

Defendant-Appellee Administrator of the Bureau of Workers Compensation¹ (“Bureau”) respectfully requests that this Honorable Court decline jurisdiction to hear the appeal of Plaintiffs-Appellants Frisch’s Restaurants, Inc. (“Frisch’s”), United Dairy Farmers, Inc. (“UDF”), J.W. Harris Co., Inc. (“Harris”), and Peck, Hannaford & Briggs (“PH&B”) (collectively “Appellants”).

A. These four dissatisfied employers do not present a matter of public and great general interest.

Appellants are four employers, each of which participated in the Bureau’s retrospectively-rated workers compensation coverage program (the “Retro program”) through the State Insurance Fund (the “State Fund”). At different times, each of the Appellants terminated their participation in the Retro program, changing their workers compensation coverage to another program. After Appellants decided to terminate their participation in the Retro program, the Bureau issued premium rebates to State Fund subscribers as authorized by R.C. 4123.32(A). Because Appellants were no longer Retro program subscribers, they did not receive premium rebates on their remaining payments required by the Retro program.

Although Appellants argue that this case presents a matter of public and great general interest because it involves the distribution of more than 9 billion dollars from the State Fund surplus, the simple fact is that the surplus has already been distributed to Ohio’s employers who were deemed eligible to receive the surplus. Appellants did not receive a portion of that surplus in the form of premium rebates on their Retro program annual and final adjustments because

¹ The Defendant when filed was administrator James G. Conrad. The current interim administrator is Tina Kielmeyer.

they were not subscribers to the Retro program for the year the premium rebates were declared. Instead, they were either self-insured or covered by the Bureau's group rated plan. Both the Trial Court and the Court of Appeals found that the Bureau acted reasonably in denying premium rebates to the Appellants on this basis.

B. The definition of "subscriber" does not create a question of great public interest.

Appellants challenge whether the Bureau has the authority to define the legislative term "subscriber," claiming it is inconsistent with the General Assembly's intention. (Appellant's Brief at 4). Appellants' claimed knowledge of what was intended by "subscriber" is not supported by the statute or the record. To the contrary, the Court of Appeals rightly ruled that the Bureau's interpretation of this undefined term was entitled to administrative deference.²

Appellants also argue that this case is of great public and general interest because the Bureau interpreted R.C. 4123.32(A) "in a matter that affords premium discounts and rebates to many, but not all, employers incurring the same premium obligations." (Appellants' Brief at 1). This assertion wrongly assumes that Appellants incurred the same premium obligations as the employers who received the premium rebates. In fact, unlike the employers who received premium discounts, the record in this case reveals that Appellants did *not* pay any semi-annual premiums for Retro program coverage in the year that premium discounts were issued. The record shows the Bureau's reasoning: All employers who derived their current year's coverage through a State Fund coverage program were deemed subscribers who were then eligible to receive rebates for the program chosen for that year's coverage. Accordingly, Appellants' allegation that the Bureau treated similarly situated employers differently is wrong.

² The Decision and Opinion of the Court of Appeals at p. 10 (Franklin Cty.) (Feb. 8, 2007).

In addition, Appellants ask whether the Bureau may lawfully rely on O.A.C. Rule 4123-17-10 to deny Appellants the status of subscriber, questioning the role of the Bureau's Oversight Commission. (Appellants' Brief at 4). However, none of the Oversight Commission resolutions in the record grants refunds to "all" subscribers "without exception" as suggested by Appellants. In fact, every resolution directed the Bureau to grant refunds or rebates to subscribers for premiums or payments "due on payroll reports." (See Appellants' Court of Appeals Brief Appendix at pp. 49-64). Here, the annual and final adjustments paid by Appellants were never "due on payroll reports." Thus, the Bureau was faithful to its authority.³

C. Appellants' constitutional and other legal rights have been protected by the judicial system's checks through the Trial Court and Court of Appeals review – Appellants' unhappiness is not a matter of public and great general interest.

Appellants argue that this case presents a matter of public and great general interest because it involves an analysis whether the Bureau's actions in this case conform to "checks and balances" and whether Bureau's actions implemented "statutory directives in a manner that conforms to constitutional, equal protection guarantees." (Appellants' Brief at 4-5). Apparently, Appellants believe that the judicial check on the executive only happens by the Supreme Court taking jurisdiction, ignoring the Trial Court and Court of Appeals' role as an essential part of that the judicial check on the Bureau's exercise of power. Just because Appellants do not like the result, it does not mean that a question of public and great general interest has been presented.

³ Appellant's Retro program premium adjustment payments were not calculated by using a payroll report like other premiums are calculated; instead these payments were actual or estimated reimbursements for payments already made by the Bureau to claimants or medical providers. (Trial Decision and Entry at p. 2).

Indeed, Appellants' argument could be made to support jurisdiction for any challenge of a lower court's decision.

The fact that the General Assembly provided the benefits of R.C. 4123.343, 4123.511 and 4121.66 expressly to self-insured employers *and* state fund employers does nothing to help Appellants make their case. These statutes do not accord state fund status – or “dual status” – to self-insured employers. “Dual status” is simply a creation of Appellants, not the Bureau or the General Assembly. Furthermore, if R.C. 4123.32(A) were supposed to apply to both self-insured and state fund employers, the General Assembly simply could have referenced both, just as it did in R.C. 4123.343, 4123.511 and 4121.66.

D. The effect of the Bureau's reasonable exercise of its administrative discretion on these four dissatisfied employers is not of public and great general interest.

Appellants also maintain that unless their arguments are addressed by this Court, there will be a “chilling effect” on the ability of employers to make informed decisions about their dealings with the Bureau. The Court should not be distracted by Appellants' word choice. There is no record evidence (nor any record citation in support by Appellants) that the Bureau's exercise of discretion in the matter has had any “chilling” effect on any Appellant's ability to make informed decisions related to workers' compensation. Here, Appellants Frisch's, UDF and Harris decided to leave the Retro program before the Bureau ever issued its first premium rebate on July 1, 1996. (See Complaint at ¶¶ 5, 6, and 7; Plaintiffs' Motion for Summary Judgment at Exhibit G). Thus, Appellants' choice was made based upon the factors that existed at the time, not today's desire for jurisdiction.

Appellants fail to address the Bureau's reasoning: Premium rebates were paid to subscribers (those employers with State Fund coverage) for the current year's coverage choice in effect when the rebates were paid. As a result, similarly situated employers were treated

similarly. This creates no “uncertainty” for employers. Thus, the Bureau created certainty without “chilling” employer decision-making.

II. STATEMENT OF THE CASE AND BACKGROUND FACTS

A. Statement of the Case

Plaintiffs-Appellants ask the Supreme Court to hear their appeal of the Court of Appeals’ affirmation of the Trial Court’s denial of their Motion for Summary Judgment and the Trial Court’s granting of Defendant-Appellee’s Motion for Summary Judgment. On January 9, 2006, the Trial Court issued its Decision and Entry denying Plaintiffs’ Motion for Summary Judgment and granting the Bureau’s Motion for Summary Judgment. (“Decision and Entry”). Appellants appealed, and on February 8, 2007, a unanimous Court of Appeals held that the Bureau did not violate Appellant’s constitutional rights and a majority of that court affirmed the Trial Court’s decision that the Bureau acted reasonably and did not abuse its discretion.

B. Statement of Facts

For employers who insure their workers’ compensation risk through the State Fund, the Bureau offers employers a variety of options which include: 1) base rated coverage; 2) experience rated coverage; 3) group rated coverage; and 4) retrospectively rated coverage (the “Retro program”). (Complaint at ¶ 15). Base, experience and group rated employers pay a semi-annual premium for their workers’ compensation coverage, similar to traditional insurance policies. (Complaint at ¶ 16).

1. The Retro Program

Employers choosing to participate in the Retro program have a three-part premium obligation for their workers’ compensation coverage for a given year (the “Covered Year”). Part one is the minimum semi-annual payments paid only for the Covered Year; these are payroll based premiums which are significantly reduced compared to the base, group or experience rated

semi-annual premiums. (Deposition of Vicky Pickens at pp. 79-80, 94). Part two of the three-part obligation consists of ten annual adjustment payments, reimbursing the Bureau for any amounts the Bureau paid in the previous year for claims from the Covered Year. (*Id.*). The third obligation is the final adjustment paid at the end of the ten-year evaluation period for those ten year old claims. This final adjustment covers Bureau payments for injuries sustained during the Covered Year that were not covered by the annual adjustment payments and estimates a reserve for the remaining future costs of claims filed during the Covered Year. (Deposition of David Jacobs at pp. 9-10).

2. Self-Insurance

As an alternative to State Fund coverage, employers may apply to the Bureau to be self-insured. If approved, employers are required to execute an Agreement Between Employer and the Ohio Bureau of Workers' Compensation Regarding Amount of Self-Insured Buy Out ("Buy Out Agreement"). Employers signing the Buy Out Agreement affirmatively waive any rights to challenge the Bureau's determinations regarding premium refunds. (Buy Out Agreement attached as Exhibit B to Defendant's Motion for Summary Judgment; hereafter referred to as "Def. Mtn. at ___").

Employers may switch from one insurance option to another within the State Fund or apply for self-insured status; however, an employer moving out of the Retro program must continue to pay its annual and final adjustment payments for claims or injuries sustained during the Covered Year. This remains true even if the employer becomes self-insured.

3. Premium Rebates

During the period 1995 through 2002, the Bureau determined for each year that the State Fund had an excess of surplus premiums. As a result, the Bureau issued premium rebates on the State Fund premiums paid by employers for the coverage program the employers subscribed to at

the time the premium rebate was declared. (Deposition of Martin Herf at pp. 76-77). The rebates applied to the initial premium and annual and final adjustment payments made by employers in the Retro program only if the employer was in a Covered Year in the Retro program. (Deposition of Vickie Pickens at pp. 108-109, 111). Employers who had become self-insured had chosen to self-insure new claims and were no longer paying premiums for new claims under the State Fund. As a result, such employers did not receive any premium rebates. (Pickens Dep. at pp. 148-149). Instead, for the years the Bureau declared a surplus (and a rebate), any buy-out fee to convert to self-insured status was waived. This allowed approved employers to switch to self-insured status without paying the buy-out fee. (Herf Dep. at pp. 60-61).

4. Appellants' Coverage History

Appellant Frisch's participated in the Retro program from July 1, 1992 to May 30, 1996. (Complaint ¶ 5). The Bureau granted Frisch's request to become self-insured effective June 1, 1996. (Complaint ¶ 5). Accordingly, Frisch's signed a 1995 Buy Out Agreement. (Def. Mtn. at Ex. C). Because a surplus had been declared for 1995, Frisch's did not have to pay a buy-out fee. This was a significant factor in Frisch's decision to become self-insured since before then when Frisch's had looked into becoming self-insured, the buy-out fee was six million dollars, a number Frisch's considered to be cost-prohibitive. (Deposition of Donald Walker at pp. 9-12).

Appellant UDF participated in the Retro program from July 1, 1989 to September 30, 1995 and became self-insured as of October 1, 1995. (Complaint ¶ 6). Accordingly, UDF signed a 1995 Buy Out Agreement. (Def. Mtn. at Ex. D). As with Frisch's, because of the declared surplus, UDF was not required to pay a buy-out fee. (Deposition of Marilyn Mitchell at p. 21).

Appellant Harris participated in the Retro program from July 1, 1992 to June 30, 1996. (Complaint ¶ 7). Thereafter, effective July 1, 1996, Harris became a self-insured employer. (Complaint ¶ 7). Accordingly, Harris signed a 1995 Buy Out Agreement. (Def. Mtn. at Ex. E). Due to the surplus, the buy-out fee was \$0, which was a factor in Harris seeking to become self-insured. (Deposition of David Jacobs at pp. 11-12).

Appellant PH&B participated in the Retro program from July 1, 1995 to June 30, 1998, and from July 1, 2000 to June 30, 2001. (Complaint ¶ 8). Throughout the remainder of time from 1995 to 2002, PH&B was a group-rated State Fund subscriber. (Complaint ¶ 8). During the years PH&B actively participated in the State Fund as a group-rated participant, PH&B received rebates on the group-rated premiums it paid. (Deposition of Jerry Govert at p. 30).

During the years the Bureau declared a surplus, the Bureau found that Frisch's, UDF, and Harris were not eligible for premium rebates because they were self-insured and therefore not active participants in a State Fund retro-rated premium program. PH&B was eligible for premium rebates on the premiums for the group-rated program in which it was covered and not the annual and final adjustment Retro program payments it made for prior Covered Years.

III. ARGUMENT IN SUPPORT OF APPELLEES' PROPOSITIONS OF LAW

A. Proposition of Law No. 1: The Bureau's determination that Appellants were not subscribers eligible to receive premium rebates is reasonable.

Both the Trial Court and Court of Appeals correctly held that the Bureau appropriately exercised its administrative discretion in determining eligibility for premium rebates. These courts recognized that the Administrator did not have to prove that his interpretation of subscribers was the *most* reasonable interpretation, only that it was *reasonable*. The Bureau's interpretation that, for purposes of awarding premium rebates, all state fund employers were

considered to be subscribers in one coverage for the covered year, and only one coverage, was reasonable.

When interpreting statutes and administrative rules, courts defer to the administrative interpretation formulated by the agency that has accumulated substantial expertise, and to which the General Assembly has delegated the responsibility of executing its legislative command. *Northwestern Ohio Bldg. and Constr. Trades Council v. Conrad* (2001), 92 Ohio St. 3d 282; *State, ex rel. McLean v. Indus. Comm.* (1986), 25 Ohio St. 3d 90, 92. The term “subscriber” is not defined in R.C. 4123.32(A) or in any other section of the Ohio Revised Code. Thus, as this Court held in *McLean* and *Northwestern, supra*, the Bureau is empowered with the discretion to interpret the term “subscriber” as used in R.C. 4123.32(A). Accordingly, the Bureau defined “subscriber” to mean a state fund employer who was eligible to receive premium rebates on only one insurance program at a time – the program that covered the employer’s new injuries at the time of the rebate. (Pickens Dep. at pp. 182-183; *see also*, Herf Dep. at pp. 81-82). Thus, employers who had switched from the Retro program to another State Fund program, or to self-insured status, were not considered to be actively participating in the Retro program if they only were paying for previously covered years. (*Id.*).

1. The Bureau’s interpretation of R.C. 4123.23(A) is reasonable

Appellants, however, argue that “subscriber” should be interpreted to mean “state risk,” a choice that neither the General Assembly nor the Bureau made. Instead, the Bureau reasonably determined that Appellants were not eligible for premium rebates for the Retro program because they were not actively participating in the Retro program and were therefore not “subscribers” at the time the premium rebates were declared. Instead, the Appellants were either self-insured or group-rated subscribers, not eligible to receive premium rebates on the annual and final adjustment payments made for prior years’ coverage.

2. The Bureau's interpretation of Ohio Adm. Code 4123-17-10 is reasonable

Additionally, pursuant to *McLean* and *Northwestern, supra*, the Bureau has discretion to determine the subscribers who were eligible for premium rebates under Ohio Adm. Code 4123-17-10. Ohio Adm. Code 4123-17-10 states in pertinent part, that “[t]he administrator, with the advice and consent of the workers’ compensation oversight commission, **shall have the discretion and authority to determine . . . the employers who are subscribers to the state insurance fund who are eligible for 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.” (Emphasis and underscoring added). In exercising this discretion and authority, the Bureau decided “whether to return excess surplus to the employer” and determined “the employers who are subscribers to the state insurance fund who are eligible for the cash refunds or reductions of premiums.” Again, the Trial Court and Court of Appeals properly held that the Bureau appropriately exercised its discretion in finding that the Appellants were not subscribers and were not eligible for premium rebates on their Retro program payments since they were not actively participating in the Retro program.

Appellants bear the burden of demonstrating that the Administrator’s exercise of his duty in this matter was *unreasonable, arbitrary, or unconscionable*; that, in short, he abused his discretion. *State ex rel. Active USA, Inc. v. James Conrad, Administrator, Ohio Bureau of Workers’ Compensation* (Franklin Cty. 2003), 2003 Ohio App. LEXIS 5851. Absent a showing of an unreasonable, arbitrary, or unconscionable interpretation, if a court finds that an agency rule is ambiguous or subject to differing interpretations, it should defer to the agency’s interpretation of its own rule, which is precisely what the Trial Court and Court of Appeals did in this case.

Under the Rule, even if subscribers included Appellants, the Bureau still had the discretion to decide whether Appellants were *eligible* for the premium rebates. In this case, the Bureau acted reasonably in deciding that employers were eligible to receive premium rebates only for the programs in which they were “active participants” during the year in which the premium rebates were declared. In other words, an employer could only be a subscriber to the program from which its *current year’s* coverage obligations derived. The Trial Court and Court of Appeals found that this interpretation – the Bureau’s interpretation – was reasonable. Thus, self-insured employers are active participants in the self-insured program, even if self-insured employers also pay their remaining annual adjustment and final adjustment payments under the Retro program. The reasonable conclusion – no premium rebates except for those actively covered for the year of the premium rebate.

B. Proposition of Law No. 2: The Bureau acted constitutionally.

In this matter all self-insured employers were denied premium rebates, and all state fund employers received premium rebates on premiums for only one program at a time – the program in which they were actively covered or subscribed to at the time the rebate is declared. *See Cuyahoga Metropolitan Housing Authority v. Industrial Commission of Ohio* (Franklin Cty. 1983), 11 Ohio App. 3d 192 (“CMHA”). In CMHA, the court held that, although R.C. 4123.32(A) required that the “Industrial Commission shall promulgate rules for cash refunds when there is a surplus of earned premium over all losses which is larger than necessary to adequately maintain the solvency of the fund,” the statute did not mandate a refund of excess premium paid by a self-insurance applicant. (*Id.* at 194-195). The Bureau’s reasoning in this

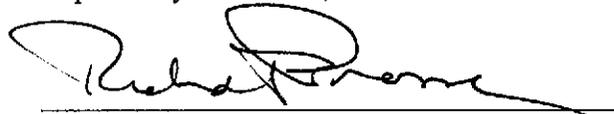
case is rational.⁴ While the statute allows for the rebates, it neither mandates the choice nor requires that all employers receive rebates.

IV. CONCLUSION

Appellants have not shown how this case is of public or great general interest because it is not. Appellants failed to identify any conflicting issues of law in this case because there are none. The Bureau acted constitutionally and reasonably when it acted as authorized by the General Assembly.

Accordingly, because Appellants have failed to demonstrate any basis for jurisdiction in this case, the Court should refuse to hear this appeal.

Respectfully submitted,



Dawn Rae Grauel (0074208)
(COUNSEL OF RECORD)
HAHN LOESER + PARKS LLP
65 East State Street, Suite 1400
Columbus, Ohio 43215
Phone: (614) 221-0240
Telefax: (614) 221-5909
Email: drgrauel@hahnlaw.com

Gerald H. Waterman (0020243)
Assistant Attorney General
Workers' Compensation Section
150 E. Gay Street, 22nd Floor
Columbus, OH 43215-3130
Phone: (614) 466-6696
E-mail: gwaterman@ag.state.oh.us

Richard T. Prasse (0024819)
HAHN LOESER + PARKS LLP
200 Public Square, Suite 3300
Cleveland, Ohio 44114
Phone: (216) 621-0150
Telefax: (216) 241-2824
Email: rtprasse@hahnlaw.com

Attorneys for Appellee

⁴ There is no allegation of a fundamental right or membership in a suspect class which would warrant a higher standard of review.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Appellee's Memorandum in Opposition was sent via first class mail, postage prepaid this 25th day of April 2007 to:

Robert S. Corker, Esq.
Scheuer Mackin & Breslin, LLC
11025 Reed Hartman Highway
Cincinnati, OH 45242

Thomas W. Hill, Esq.
Kegler, Brown, Hill & Ritter
65 East State Street, Suite 1800
Columbus, OH 43215

Attorneys for Appellants

A handwritten signature in black ink, appearing to read "Richard T. Prasse", written over a horizontal line.

Richard T. Prasse