

[Cite as *State ex rel. K&D Group, Inc. v. Ryan*, 2011-Ohio-5051.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. The K&D Group, Inc., :
Relator, :
v. : No. 10AP-608
Marsha P. Ryan, Administrator, : (REGULAR CALENDAR)
Ohio Bureau of Workers' Compensation, :
Respondent. :
:

D E C I S I O N

Rendered on September 30, 2011

Calfee, Halter & Griswold LLP, William L.S. Ross, and Christopher M. Ward, for relator.

Michael DeWine, Attorney General, and Stephen D. Plymale, for respondent.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶1} Relator, The K&D Group, Inc., commenced this original action in mandamus seeking an order compelling respondent, the Ohio Bureau of Workers' Compensation ("BWC"), to vacate its final order that transferred to relator a portion of the experience rating of Mid-America Management Corp. ("Mid-America"). Contrary to the

BWC's determination, relator contends that it is not a successor-in-interest of a business transferred by Mid-America.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that the BWC did not abuse its discretion when it transferred a portion of Mid-America's experience rating to relator based upon a determination that relator is a successor-in-interest.

{¶3} Relator has filed objections to the magistrate's decision. In its first objection, relator contends that it cannot be a successor-in-interest because it did not acquire a portion of a business or legal entity having established coverage or having had experience in the most recent experience period. We disagree.

{¶4} It is undisputed that Mid-America is the legal entity that formerly managed the apartment complex now known as Parkside Garden Apartments. It is also undisputed that Mid-America established workers' compensation coverage and had claim experience in the most recent experience rating. An entity affiliated with relator purchased Parkside Garden Apartments and then entered into a contract with relator. Pursuant to that contract, relator acquired the right to manage the Parkside Garden Apartments. Relator assumed the existing leases, retained approximately half of Mid-America's former employees, and operated under the same manual numbers. The day-to-day operation of the apartments also remained the same.

{¶5} Because an affiliate of relator purchased the Parkside Garden Apartments and relator assumed possession and control of the apartments, we agree with the

magistrate that relator has not shown that the BWC abused its discretion in determining that relator acquired a portion of Mid-America's business. Therefore, we overrule relator's first objection.

{¶6} In its second objection, relator argues that it is not a successor-in-interest because it is not the direct transferee of any business interest, asset, or contractual right from Mid-America. Relator relies upon *State ex rel. Valley Roofing, L.L.C. v. Ohio Bur. of Workers' Comp.*, 122 Ohio St.3d 275, 2009-Ohio-2684 and *State ex rel. Bodine, Carr, Perry, L.L.C. v. Ohio Bur. Workers' Comp.*, 10th Dist. No. 08AP-294, 2009-Ohio-3234 to support its argument. Because these cases are factually distinguishable and because they focus on an element of the statutory standard not disputed here, we find these cases unpersuasive.

{¶7} R.C. 4123.32 provides, in relevant part:

The administrator of workers' compensation, with the advice and consent of the bureau of workers' compensation board of directors, shall adopt rules with respect to the collection, maintenance, and disbursements of the state insurance fund including all of the following:

* * *

(C) Such special rules as the administrator considers necessary to safeguard the fund and that are just in the circumstances, covering the rates to be applied where one employer takes over the occupation or industry of another or where an employer first makes application for state insurance, and the administrator may require that if any employer transfers a business in whole or in part or otherwise reorganizes the business, the successor in interest shall assume, in proportion to the extent of the transfer, as determined by the administrator, the employer's account and shall continue the payment of all contributions due under this chapter[.]

{¶8} Pursuant to this statutory authority, the BWC adopted Ohio Adm.Code 4123-17-02, which states in relevant part:

(B) Succeeding employers — experience.

* * *

(3) Where a legal entity succeeds in the operation of a portion of a business of one or more legal entities having an established coverage or having had experience in the most recent experience period, the successor's rate shall be based on the predecessor's experience within the most recent experience period, pertaining to the portion of the business acquired by the successor.

{¶9} R.C. 4123.32(C) and Ohio Adm.Code 4123-17-02(B) contemplate a two-step analysis. First, the BWC must assess and determine whether a predecessor-employer transferred a business in whole or in part or otherwise reorganized the business. Second, the BWC must assess and determine whether a subsequent employer is a "successor-in-interest" of that business. If the BWC finds that both steps have been satisfied, the successor-in-interest shall assume, in proportion to the extent of the transfer, the prior employer's experience rating.

{¶10} In *Valley Roofing*, a bank foreclosed on the assets of the predecessor-employer. Thereafter, the bank sold the assets to a purported successor-in-interest. The court focused on the first step of the successor-in-interest analysis to determine if any employer transferred a business in whole or in part. The court held that the language contained in R.C. 4123.32(C) "clearly refers to a voluntary act of the [predecessor] employer and not the involuntary transfer of the employer's business through an intermediary bank." *Valley Roofing* at ¶5. Because the predecessor-employer in *Valley Roofing* did not voluntarily transfer its assets, it did not satisfy the first step in the

successor-in-interest analysis. Therefore, the court held that the subsequent employer was not a successor-in-interest.

{¶11} Relying on *Valley Roofing*, this court in *Bodine*, reached the same conclusion where the predecessor-employer filed for bankruptcy and its assets were acquired by a bank. Thereafter, the purported successor-in-interest employer purchased the assets from the bank. Again, because the prior employer did not voluntarily transfer its assets, the *Bodine* court granted a writ of mandamus ordering the BWC to vacate its order finding the subsequent employer to be a successor-in-interest.

{¶12} In the case at bar, neither party has argued, nor does the record reflect, that this matter involved a involuntary transfer. The property at issue was not purchased following a bankruptcy or foreclosure. Nor was the property purchased from an intermediary bank. There is nothing in the record to suggest that the purchase of the property was anything other than arm's-length commercial transaction between a willing seller and a willing buyer. Therefore, this case is distinguishable from *Valley Roofing* and *Bodine*.

{¶13} Nor does *Valley Roofing* stand for the proposition that a subsequent employer can only be a successor-in-interest if there is a direct transfer of the business. The absence of a direct transfer between the predecessor-employer and the subsequent employer was not the basis of the *Valley Roofing* decision. Rather, as noted above, the decision turned on the first step of the analysis—the involuntary nature of the transfer of assets between the predecessor-employer and the bank.

{¶14} Nothing in R.C. 4123.32(C) and Ohio Adm.Code 4123-17-02(B) require that the transfer be direct. As the magistrate correctly notes, "a successor in interest * * * is

simply a transferee of a business in whole or in part" for workers' compensation purposes.

State ex rel. Lake Erie Constr. Co. v. Indus. Comm. (1991), 62 Ohio St.3d 81, 83-84.

{¶15} Here, an entity affiliated with relator purchased Parkside Garden Apartments and then immediately entered into a contract with relator for relator to operate and manage the apartments. Relator assumed the existing leases, retained approximately half of Mid-America's former employees, and operated under the same manual numbers. The day-to-day operation of the apartments remained the same. Because an affiliate of relator purchased the property and relator immediately assumed possession, control, and management of the apartments, we agree with the magistrate that relator has not shown that the BWC abused its discretion in determining that relator is a successor-in-interest. For these reasons, we overrule relator's second objection.

{¶16} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein, as amplified and explained by this decision. In accordance with the magistrate's decision, we deny relator's request for a writ of mandamus.

Objections overruled; writ of mandamus denied.

BRYANT, P.J., and BROWN, J., concur.

APPENDIX A

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. The K&D Group, Inc.,	:	
Relator,	:	
v.	:	No. 10AP-608
Marsha P. Ryan, Administrator,	:	(REGULAR CALENDAR)
Ohio Bureau of Workers' Compensation,	:	
Respondent.	:	

MAGISTRATE'S DECISION

Rendered on April 11, 2011

Calfee, Halter & Griswold LLP, William L.S. Ross, and Christopher M. Ward, for relator.

Michael DeWine, Attorney General, and Stephen D. Plymale, for respondent.

IN MANDAMUS

{¶17} Relator, The K&D Group, Inc. ("K&D Group"), has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Ohio Bureau of Workers' Compensation ("BWC"), to vacate its final order which transferred to K&D Group a portion of the experience rating of Mid-America Management Corp. ("Mid-America") on the basis that K&D Group was the successor in interest.

Findings of Fact:

{¶18} 1. K&D Group is a property management company which manages several condominiums, apartments and other properties located in northeast Ohio. K&D Group employs over 300 people. K&D Group itself owns no real property. Mid-America is also a property management company. Mid-America managed the apartments which are the subject property of this mandamus action.

{¶19} 2. K&D Enterprises, Inc. ("K&D Enterprises") is a holding company whose real property is managed by certain property management companies.

{¶20} 3. "K&D" stands for Karen Harrison and Doug Price who, although now divorced, began buying and managing properties in 1984.

{¶21} 4. The Fame-Midamco Company ("Fame-Midamco") is also a property management company that manages certain real property owned by other companies.

{¶22} 5. Euclid-Richmond Garden Apartments ("Euclid-Richmond Apartments") is the subject property involved in this action.

{¶23} 6. Euclid-Richmond Apartments was owned by Fame-Midamco and was managed by Mid-America.

{¶24} 7. On February 23, 2004, Fame-Midamco entered into a purchase agreement for the sale of the Euclid-Richmond Apartments to K&D Enterprises. Prior to the closing date, K&D Enterprises assigned its portion of the purchase agreement to an entity known as Euclid-Richmond Gardens, Ltd. ("Euclid-Richmond, Ltd."). Euclid-Richmond, Ltd. is the sole member of a company called Old Village Properties ("Old Village").

{¶25} 8. Following the closing, the Euclid-Richmond Apartments were renovated and renamed Parkside Garden Apartments ("Parkside Gardens").

{¶26} 9. Thereafter, Euclid-Richmond, Ltd., through Old Village, contracted with K&D Group to be the property management company for these apartments.

{¶27} 10. Following an audit, the BWC found a partial transfer of experience from Mid-America to K&D Group pursuant to Ohio Adm.Code 4123-17-02(B)(3).

{¶28} 11. K&D Group filed a protest of the audit findings and requested a hearing before the BWC adjudicating committee.

{¶29} 12. The hearing was conducted on August 12, 2009.

{¶30} 13. The BWC adjudicating committee denied K&D Group's protest. In its order mailed September 9, 2009, the adjudicating committee noted that the facts were not in dispute and that the question to be addressed is "a question of law as to whether or not Mid-American [sic] Management Company's (Mid-American) [sic] experience, rights and obligations were properly transferred under the law into K&D Group as a successor of Mid-American [sic]." The Adjudicating Committee summarized the facts as follows:

By way of background, both Mid-American [sic] and K&D Group are property management companies. On February 23, 2004, Fame-Midamco Company, by and through Mid-America, sold the Euclid-Richmond Garden Apartment Complex to K&D Enterprises. K&D Enterprises is a holding company for various properties throughout northeast Ohio. In an addendum to the purchase agreement, K&D Enterprises assigned its rights to Euclid-Richmond Gardens LTD. After the purchase, the management of the apartment complex was taken over by K&D Group, the name of the complex was changed to Parkside Gardens and renovations were undertaken which included painting and a general "sprucing up" of the property. The K&D Group kept approximately half of the employees from Mid-America. The tenant leases in place at the time of the purchase were assumed by K&D. All the

manual numbers in place prior to the purchase remained in place after the purchase.

{¶31} 14. The adjudicating committee set out the arguments of both K&D Group and the BWC as follows:

The employer argued that the K&D Group did not purchase anything from Mid-American [sic] and that they were not a party to the purchase agreement. The employer argued that [*State ex rel. Valley Roofing, L.L.C. v. Ohio Bur. of Workers' Compensation*, 122 Ohio St.3d 275, 2009-Ohio-2684] is controlling and under that authority, the BWC cannot transfer the experience from Mid-America to the K&D Group as there was not a direct transfer from the predecessor to the successor employer.

The BWC representative stated that the K&D Group took over the management of the apartment complex from Mid-American [sic] and therefore the transfer was proper. Mid-American [sic] Management Company had a significant claim which was transferred to the K&D Group experience rating as a result of the transfer of experience.

Thereafter, the adjudicating committee set out the provisions of R.C. 4123.32(C) and Ohio Adm.Code 4123-17-02(B) and (C). R.C. 4123.32(C) specifically states:

(C) Such special rules as the administrator considers necessary to safeguard the fund and that are just in the circumstances, covering the rates to be applied where one employer takes over the occupation or industry of another or where an employer first makes application for state insurance, and the administrator may require that *if any employer transfers a business in whole or in part* or otherwise reorganizes the business, the successor in interest shall assume, in proportion to the extent of the transfer, as determined by the administrator the employer's account and shall continue the payment of all contributions due under this chapter. (emphasis added).

Promulgated under this law is O.A.C. §4123-17-029(B) and (C) which state in pertinent part:

B) Succeeding employers - - experience.

(3) Where a legal entity succeeds in the operation of a portion of a business of one or more legal entities having an established coverage or having had experience in the most recent experience period, the successor's rate shall be based on the predecessor's experience within the most recent experience period, pertaining to the portion of the business acquired by the successor.

(C) Succeeding employers - - risk coverage transfer.

(I) Whenever one employer succeeds another employer in the operation of a business in whole or in part, the successor shall notify the bureau of the succession. Where one employer wholly succeeds another in the operation of a business, the bureau shall transfer the predecessor's rights and obligations under the workers' compensation law. The successor shall be credited with any credits of the predecessor, including the advance premium security deposit of the predecessor. This paragraph shall apply where an employer wholly succeeds another employer in the operation of a business on or after September 1, 2006.

{¶32} 15. Thereafter, the adjudicating committee determined that the BWC's

decision was proper:

Based on the testimony at the hearing and the materials submitted with the protest, the Adjudication Committee DENIES the Employer's protest of the transfer/combination. The BWC correctly transferred and/or combined the predecessor's experience and/or rights and/or obligations to the K&D Group under the rule. The day to day operations of the apartment complex remained the same after the purchase. The K&D Group assumed the prior leases, retained some of the former employees and operated under the same manual numbers.

The employer's reliance on Valley Roofing as well as [*State ex rel. Bodine v. Ohio Bur. of Workers' Compensation*, 10th Dist. No. 08AP-294, 2009-Ohio-3234] for the proposition that there must be a *direct* transfer between entities in order for there to be a "successor in interest" relationship sufficient to transfer an experience rating is misplaced. The Court in both Valley Roofing and Bodine found there was no "successor in interest" relationship for workers compensation

purposes where the transfer was *involuntary*. As explained by the court in Valley Roofing:

We have defined "successor in interest," for workers' compensation purposes, as a "transferee of a business in whole or in part." State ex rel. Lake Erie Constr. Co. v. Indus. Comm. (1991), 62 Ohio St.3d 81, 83-84, 578 N.E.2d 458. This definition, however, does not apply if the business assets of the predecessor entity have been purchased from a bank and not directly from that employer. As we stated in [State ex rel. Crosset Co., Inc. v. Conrad, 87 Ohio St.3d 467, 2000-Ohio-464], "the specific language of R.C. 4123.32(D) [now R.C. 4123.32(C)] * * *, *i.e.*, 'employer transfers his business in whole or in part or otherwise reorganizes the business,' is plain and unambiguous. *The language of the statute clearly refers to a voluntary act of the employer and not the involuntary transfer of the employer's business through an intermediary bank.*" Crosset, 87 Ohio St.3d at 471, 721 N.E.2d 986. (emphasis added)

In the case at issue, there was no evidence presented to demonstrate that the transfer of apartment complex was anything other than a voluntary transfer. The fact that the purchase was effectuated through the use of one or more holding companies is not sufficient to remove the transaction from the definition of a "successor in interest" pursuant to O.R.C. 4123.32(C).

(Emphases sic.)

{¶33} 16. The K&D Group appealed the order of the adjudicating committee to the BWC administrator's designee and the matter came on for hearing on January 19, 2010.

{¶34} 17. In an order mailed April 6, 2010, the administrator's designee adopted the statement of facts contained in the order of the adjudicating committee and affirmed the adjudicating committee's findings, decision, and rationale.

{¶35} 18. Thereafter, K&D Group filed the instant mandamus action in this court.

Conclusions of Law:

{¶36} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28.

{¶37} K&D Group argues that it cannot be a "successor in interest" under R.C. 4123.32 because it did not acquire anything. K&D Group's argument is based on the fact that the transfer of the subject property was between Fame-Midamco and K&D Enterprises which transferred its interest in the subject property to Euclid-Richmond, Ltd.

{¶38} The BWC argues that the decision in this case is proper. Because K&D Group, as a property management company, now manages the subject property which was formerly managed by Mid-America, and since K&D Group assumed the day-to-day operations of the subject property, assumed the prior leases, retained some of the former employees, and operated under the same manual numbers, a portion of Mid-America was indeed transferred to K&D Group and the transfer of experience was appropriate.

{¶39} It is this magistrate's decision that the BWC order transferring a portion of the experience of Mid-America to K&D Group does not constitute an abuse of discretion, because the BWC properly determined that K&D Group had assumed the obligations of Mid-America in the subject property sold to K&D Enterprises.

{¶40} R.C. 4123.32(C), formerly R.C. 4123.32(B), states in part:

The administrator of workers' compensation, with the advice and consent of the bureau of workers' compensation board

of directors, shall adopt rules with respect to the collection, maintenance, and disbursements of the state insurance fund including all of the following:

* * *

(C) Such special rules as the administrator considers necessary to safeguard the fund and that are just in the circumstances, covering the rates to be applied where one employer takes over the occupation or industry of another or where an employer first makes application for state insurance, and the administrator may require that if any employer transfers a business in whole or in part or otherwise reorganizes the business, the successor in interest shall assume, in proportion to the extent of the transfer, as determined by the administrator, the employer's account and shall continue the payment of all contributions due under this chapter[.]

{¶41} Ohio Adm.Code 4123-17-02(B) is captioned "succeeding employers—experience" states in part:

(3) Where a legal entity succeeds in the operation of a portion of a business of one or more legal entities having and established coverage or having had experience in the most recent experience period, the successor's rate shall be based on the predecessor's experience within the most recent experience period, pertaining to the portion of the business acquired by the successor.

Further, Ohio Adm.Code 4123-17-02(C) provides that, where one employer succeeds another in a portion of a business in whole or in part, the successor shall assume the predecessors obligation under the workers' compensation law and the transfer may be retroactive to the date of succession.

{¶42} For workers' compensation purposes, a "successor in interest * * * is simply a transferee of a business in whole or in part." *State ex rel. Lake Erie Constr. Co. v. Indus. Comm.* (1991), 62 Ohio St.3d 81, 82. See also, *State ex rel. Valley Roofing, L.L.C. v. Ohio Bur. of Workers' Compensation*, 122 Ohio St.3d 275, 2009-Ohio-2684.

{¶43} This case is distinguishable from the other cases dealing with successors in interest. The majority of those cases involve the purchase of a company where the purchaser is found to be the successor in interest of the former owner of the purchased company. The purchased company ceases to exist. One notable exception is the case of *State ex rel. Lynnhaven XIV, LLC v. Conrad*, 10th Dist. No. 02AP-36, 2003-Ohio-825. In that case, Lynnhaven entered into a sublease agreement with University Manor whereby Lynnhaven agreed to lease from University Manor a 208-bed nursing home facility. The lease was for a 10-year period with an option to renew the lease or to purchase the facility prior to the expiration of the 10-year term.

{¶44} Lynnhaven agreed to retain all University Manor employees covered by a collective bargaining agreement, but Lynnhaven did not retain the key management personnel. Further, it was undisputed that, under Lynnhaven's management, the claims experience of the nursing home facility improved.

{¶45} Following an audit conducted by the BWC, Lynnhaven was notified that University Manor's experience was being transferred to Lynnhaven. Lynnhaven filed a protest which was denied.

{¶46} The BWC ultimately concluded that the experience transfer was proper because the operations, employees, and facilities remained continuous from predecessor to successor and that the court's definition of successor in interest from Lake Erie—simply a transferee of a business in whole or part—applied.

{¶47} Lynnhaven filed a mandamus action and this court, in adopting the decision of the court's magistrate, stated that "neither R.C. 4123.32 as supplemented by Ohio Adm.Code 4123-17-02(B), nor any case interpreting the same, instructs or holds that

there can be no finding of a successor in interest when the facility is leased rather than purchased." Id. at ¶55.

{¶48} K&D Group argues that it cannot be the successor in interest because, on its face, Ohio Adm.Code 4123-17-02 required that the alleged successor must acquire something from some entity in order to be covered under the rule. K&D Group also argues that the Supreme Court of Ohio has limited the scope of successorship for transfer of experience rating to those situations involving a direct transfer from transferor to transferee and argues that it is not a transferee of a business in whole or in part. For the reasons that follow, this magistrate disagrees.

{¶49} K&D Group argues that it did not acquire any portion of any business from Mid-America or from any other entity. However, K&D Group ignores the fact that it did acquire the right to manage the subject property at issue here which was transferred from Fame-Midamco to K&D Enterprises which then assigned its interest to Euclid-Richmond Ltd. Stated another way: Parkside Gardens, formerly known as ("fka") Euclid-Richmond Apartments were managed by Mid-America. Following the sale of Parkside Gardens fka Euclid-Richmond Apartments from Fame-Midamco to K&D Enterprises and following K&D Enterprise's assignment of its interest to Euclid-Richmond, Ltd., Parkside Gardens fka Euclid-Richmond Apartments are now managed by K&D Group. Clearly, something was acquired by K&D Group following this transaction. Further, as the BWC found, the day-to-day operations of the apartment complex remained the same after the purchase, K&D Group assumed the prior leases, retained some of the former employees, and operated under the same manual numbers.

{¶50} K&D Group attempts to argue that the scope of successorship is limited to direct transfers from transferor to transferee and, thus, the BWC's order here would violate the intent of the legislation, the courts' decisions, and the spirit of the law. The simple fact that other cases involve either the sale of businesses or the purchase of assets following the bankruptcy of an entity should not be permitted to allow K&D Group to evade responsibility. Because K&D Group did acquire the right to manage the subject property, assume the prior leases, retain some of the former employees, operate under the same manual numbers, and maintained the day-to-day operations of the subject property in the same manner in which Mid-America had previously, the BWC did not abuse its discretion that K&D Group was a successor in interest and in transferring a portion of Mid-America's experience rating to K&D Group.

{¶51} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the BWC abused its discretion and this court should deny relator's request for a writ of mandamus.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).