[Cite as *State ex rel. Daily Servs., L.L.C. v. Buehrer*, 2012-Ohio-5490.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Daily Services, LLC,	:	
Relator,	:	
v.	:	No. 11AP-675
[Steve Buehrer], Administrator Bureau of Workers' Compensation,	:	(REGULAR CALENDAR)
Respondent.	:	

D E C I S I O N

Rendered on August 23, 2012

William W. Johnston, for relator.

Michael DeWine, Attorney General, and *John R. Smart*, for respondent.

IN MANDAMUS
ON OBJECTION TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶ 1} In this original action, relator, Daily Services, LLC ("relator" or "Daily Services"), requests a writ of mandamus ordering respondent, Administrator of the Ohio Bureau of Workers' Compensation ("bureau" or "respondent"), to vacate an order determining relator ineligible for participation in the bureau's 100 percent experience modification ("EM") cap program for policy year July 1, 2010 to June 30, 2011, and to enter an order finding that relator is eligible for the program for that policy year.

{¶ 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. In rejecting relator's arguments, the magistrate concluded respondent's determination that relator is ineligible to participate in the 100 percent EM cap program does not constitute a violation of the constitutional prohibition against retroactive laws, nor is it barred by the doctrine of collateral estoppel. Accordingly, the magistrate recommended that this court deny the requested writ of mandamus.

{¶ 3} Relator has filed an objection to the magistrate's decision. In said objection, relator contends the magistrate failed "to address the collateral estoppel effect of two decisions by the Franklin County Court of Common Pleas regarding the BWC's claim that it administratively determined that Daily Services was a successor of I-Force as detailed in Daily Services' reply brief." (Objections, 1.)

{¶ 4} This action concerns relator's challenge to the bureau's determination that relator was not eligible to participate in the bureau's 100 percent EM cap program for policy year July 1, 2010 to June 30, 2011. Though initially permitting relator to participate in the program in prior years, the bureau determined relator could not continue to participate because relator was no longer eligible. Specifically, the bureau determined relator's policy was involved in a combination with I-Force, LLC's policy, which resulted in a change of exposure for relator. However, it is relator's position that because the bureau had already determined in prior matters that relator and I-Force, LLC are the same company, the bureau is precluded from now finding otherwise. In support of its collateral estoppel argument, relator relies on three separate entries from three different cases from the Franklin County Court of Common Pleas, i.e., case Nos. 09CVH-09-13229, 09JG-46435, and 11JG-02-7617.

{¶ 5} The magistrate explained his rejection of relator's contention that case No. 09CVH-09-13229 had a preclusive effect on the issue of whether relator and I-Force, LLC were separate or successor companies. However, because the magistrate did not discuss the two other cases, case Nos. 09JG-46435 and 11JG-02-7617, relator contends the magistrate's decision is flawed. We reject relator's argument for several reasons.

{¶ 6} Initially, we note relator first mentioned case Nos. 09JG-46435 and 11JG-02-7617 in its reply brief to the magistrate. New arguments raised in a reply brief that were not raised in an initial brief are not generally considered. *State ex rel. Community*

Living Experiences, Inc. v. Buehrer, 10th Dist. No. 11AP-132, 2012-Ohio-1757, ¶ 37, citing *Columbus v. Aleshire*, 187 Ohio App.3d 660, 2010-Ohio-2773 (10th Dist.); *State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110, 2008-Ohio-5041; and *State ex rel. Grounds v. Hocking Cty. Bd. of Elections*, 117 Ohio St.3d 116, 2008-Ohio-566. *See also State ex rel. Bellamy v. Pinkerton, Inc.*, 10th Dist. No. 05AP-1308, 2006-Ohio-5870, ¶ 4 (magistrate did not err in addressing only the issues raised in the complaint and merit brief as opposed to new issues raised in a reply brief); *State ex rel. Smith v. Indus. Comm.*, 10th Dist. No. 84AP-274 (Aug. 29, 1985) (no error in magistrate not addressing issues relator failed to raise in the complaint or merit brief).

{¶ 7} Secondly, neither case was mentioned at the administrative level. "[A] party's failure to raise an issue at the administrative level precludes the party from raising it before a reviewing court." *State ex rel. Schlegel v. Stykemain Pontiac Buick GMC, Ltd.*, 120 Ohio St.3d 43, 2008-Ohio-5303, ¶ 17, citing *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78 (1997). Moreover, no reference to these two trial court cases is contained within the stipulated record. Instead, relator merely attached copies of the trial court's entries from those cases to the reply brief relator presented to the magistrate.

{¶ 8} Nevertheless, even consideration of the two court entries attached to relator's reply brief presented to the magistrate results in a rejection of relator's collateral estoppel argument. This is so because neither of the two attached entries demonstrates that the issue of whether relator and I-Force, LLC were a single employer was "actually and directly litigated" and was "passed upon and determined by a court of competent jurisdiction," as is required for application of collateral estoppel. *Thompson v. Wing*, 70 Ohio St.3d 176, 183 (1994), citing *Whitehead v. Gen. Tel. Co.*, 20 Ohio St.2d 108 (1969), paragraph two of the syllabus.

{¶ 9} For the foregoing reasons, relator's objection to the magistrate's decision is overruled.

{¶ 10} Upon review of the magistrate's decision, an independent review of the record, and due consideration of relator's objection, we find the magistrate has properly determined the pertinent facts and applied the appropriate law. We, therefore, overrule relator's objection to the magistrate's decision and adopt the magistrate's decision as our

own, including the findings of fact and conclusions of law contained therein. Accordingly, the requested writ of mandamus is hereby denied.

Objection overruled;
writ of mandamus denied.

BROWN, P.J., and FRENCH, J., concur.

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A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Daily Services, LLC,	:	
Relator,	:	
v.	:	No. 11AP-675
[Steve Buehrer], Administrator Bureau of Workers' Compensation,	:	(REGULAR CALENDAR)
Respondent.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on March 8, 2012

William W. Johnston, for relator.

Michael DeWine, Attorney General, and *John R. Smart*, for respondent.

IN MANDAMUS

{¶ 11} In this original action, relator, Daily Services, LLC ("relator" or "Daily Services"), requests a writ of mandamus ordering respondent, Administrator of the Ohio Bureau of Workers' Compensation ("bureau" or "respondent"), to vacate an order determining relator ineligible for participation in the bureau's 100 percent experience modification ("EM") cap program for policy year July 1, 2010 to June 30, 2011, and to enter an order finding that relator is eligible for the program for that policy year.

Findings of Fact:

{¶ 12} 1. Relator is an Ohio corporation formed in February 2005. Daily Services is owned by Ryan C. Mason and is in the business of providing temporary staffing to its customers.

{¶ 13} 2. Effective February 7, 2009, the bureau promulgated the EM cap pursuant to former Ohio Adm.Code 4123-17-03 which stated:

> (G) Year-to-year cap: Commencing with the rating year beginning July 1, 2009, the bureau shall cap or limit at one hundred per cent the increase to the employer's experience modification (EM%) from the July 1, 2008 published EM%.
>
> * * *
>
> (2) Exclusion to the one hundred per cent EM% cap: Where more than one employer policy's experience is used to develop an EM%, the resulting EM% is not subject to the one hundred per cent year to year cap.

{¶ 14} 3. Currently, the above administrative rule is found at Ohio Adm.Code 4123-17-03(G)(3) with slight modifications not pertinent here.

{¶ 15} 4. On September 1, 2009, the bureau filed a civil action in the Franklin County Court of Common Pleas which was assigned case No. 09CVH-09-13229. The action named four defendants: (1) Ryan C. Mason, (2) Daily Services, LLC, (3) People Who Work Better, LLC, and (4) I-Force, LLC.

{¶ 16} The bureau's complaint alleged that Mason is the sole shareholder, sole member, president, and CEO of the three corporate defendants. It alleged that the three corporate defendants are staffing agencies with the same place of business located in Columbus, Ohio.

{¶ 17} According to the bureau's complaint, I-Force applied for and received workers' compensation coverage in January 2006, and Daily Services first obtained coverage in April 2006. It was further alleged that I-Force ceased operations on March 23, 2009 and that, on or about that date, all of I-Force's contracts, assets, permanent employees, temporary employees, and business operations in their entirety were transferred to Daily Services. When I-Force closed on March 23, 2009, according

to the complaint, I-Force had unpaid workers' compensation premiums. On June 25, 2009, the bureau obtained a judgment against I-Force in the amount of $3,885,389.38.

{¶ 18} Count 1 of the bureau's complaint alleged that the transfer of assets from I-Force to Daily Services was fraudulent as to the bureau.

{¶ 19} Count 2 of the bureau's complaint alleged that, pursuant to R.C. 1701, I-Force "merged into" Daily Services, and that Daily Services is the "statutory successor."

{¶ 20} Count 3 of the bureau's complaint alleged that Daily Services "is a mere continuation" of I-Force and that Daily Services is a common law successor of I-Force.

{¶ 21} Count 5 of the bureau's complaint sought an injunction against Mason to enjoin him from his continued operation of the three corporate defendants.

{¶ 22} The bureau's complaint demanded judgment against Daily Services in the amount of $3,926,605.26, avoidance of the asset transfers, an injunction against Mason, and appointment of a receiver.

{¶ 23} 5. The bureau's civil action (case No. 09CVH-09-13229) was assigned to the Honorable Stephen L. McIntosh ("Judge McIntosh").

{¶ 24} 6. On September 4, 2009, Judge McIntosh held a hearing on the bureau's request for appointment of a receiver.

{¶ 25} 7. On January 5, 2010, Judge McIntosh filed a decision and entry that denied the bureau's request for appointment of a receiver, but, alternatively, ordered that an injunction be put in place.

{¶ 26} Judge McIntosh's January 5, 2010 decision and entry is six pages in length and is divided into a "Statement of Facts," "Law and Analysis," and a "Conclusion."

{¶ 27} Under "Statement of Facts," Judge McIntosh's decision states in part:

> Mason testified that, after closing I-Force, some I-Force clients contracted with his other company, Daily Services. However, Mason denied transferring I-Force assets to Daily Services. The BWC alleges that Mason fraudulently transferred I-Force's assets to Daily Services to prevent BWC from collecting on the judgment.
>
> It is this alleged fraudulent transfer that prompted BWC to seek appointment of a receiver over Daily Services, which it believes to be I-Force's successor. BWC asserts that Mason "has a track record of moving assets to avoid collection,

timing his actions to avoid alerting the BWC to his intent, and providing false information to the BWC." BWC's Memorandum in Support, p. 2. Counsel for BWC suggests that, absent a receiver, Mason would again transfer assets to avoid paying BWC's judgment. Mason counters that appointment of a receiver is too harsh of a remedy that would destroy his business. The issue before this Court is whether I-Force's obligations should be transferred to Daily Services, Inc. and appointment of a receiver is the appropriate remedy to protect BWC's interests.

Notably, following the hearing before the Court, the Adjudicating Committee of the BWC conducted a hearing on October 15, 2009. The hearing was requested by Mason, who protested the transfer of obligations from I-Force to Daily Services by the BWC pursuant to O.A.C. 4123.17-02(B) and (C). At the hearing the BWC presented the following position:

> The owner of I Force is also the owner of Daily Services. The businesses are the same. The clients are the same. The location of the business is the same. The employees of the companies are the same. The employer never notified the Bureau of the transfer of the business when it applied for the policy.

The Committee noted that "[t]he employer representatives indicated at hearing they were in agreement with the BWC position."

{¶ 28} Under "Law and Analysis," the decision states in part:

Upon review, the Court finds that none of the foregoing reasons presented by BWC for appointment of a receiver were established by clear and convincing evidence. True, there is a judgment against I-Force and there is no dispute that I-Force is insolvent. However, BWC's representations regarding the risk of the assets being moved and that the assets were fraudulently conveyed are not supported by the evidence. All of the conflicting testimony is subject to the credibility of the witnesses but lacked sufficient supporting evidence.

This Court is bound by the holding in *American Professional Employer* that the evidence in support of appointing a receiver must go beyond simply establishing the statutory

> requirements. The evidence before the Court in this instance does not rise to the level of clear and convincing. This Court is cognizant of the fact that appointment of a receiver is an extreme remedy, which should not be granted lightly. If, as testified to, the appointment of a receiver would result in the loss of business and potential destruction of Daily Services altogether, then this Court will err on the side of caution against the appointment of a receiver in order to protect not only the interests of the defendants but also of the BWC.
>
> Finally, the Court finds that an alternative and adequate remedy exists in the form of an injunction. The Court notes that Mason has already agreed to subject himself to an injunction and that BWC's allegation that "an injunction would be unenforceable against someone with Mason's track record of deception and self-dealing" is unsupported and without merit.

{¶ 29} Under "Conclusion," the decision reads:

> Based upon the foregoing, the Court hereby DENIES BWC's request for appointment of a receiver. In the alternative the Court ORDERS an injunction to be put in place, the terms of which shall be agreed upon by the parties and submitted to the Court within 20 days from the date of this entry. Until then, the parties are ORDERED to maintain the status quo.

(Emphasis sic.)

{¶ 30} 8. On March 31, 2010, Judge McIntosh filed the injunction as agreed upon by the parties:

> Defendant Ryan Mason owns three separate temporary staffing agencies which are the other defendants in this case: Daily Services LLC, I-Force LLC and People Who Work Better LLC. I-Force received workers' compensation coverage from January 2006 until it ceased operations in March 2009. I-Force is dissolved and insolvent. On June 25th, 2009, Plaintiff Ohio BWC obtained judgment in the amount of $3,885,389.38 against I-Force in Case Number 09 JG 26920. Defendant Ryan Mason has asserted that I-Force was shut down because it was financially impossible to maintain operations and pay delinquent workers' compensation premiums. The BWC alleges that contracts were fraudulently transferred from I-Force, LLC to Mason's other staffing agency, Daily Services, LLC.

> Therefore, to prevent injury to Plaintiff Ohio BWC, and pursuant to Civil Rule 65, this Court enters the following injunction against Defendants which shall be binding upon their heirs, successors, assigns, and all other parties stated in Civil Rule 65(D):
>
> [One] Daily Services LLC, I-Force LLC, People Who Work Better LLC, (the "Mason Companies") and Ryan Mason (collectively with the Mason Companies "Defendants") and any insider (as defined below) of Defendants shall not apply for any new or additional workers' compensation policies in the State of Ohio in their names or the names of any other entity in which they may have any ownership interest. Neither shall Defendants or any of their insiders cause any other party to apply for any new or additional workers' compensation policies in the State of Ohio.
>
> * * *
>
> [Three] Defendants shall not transfer any asset without adequate consideration. The following assets shall not be transferred regardless of consideration without court approval: contracts for staffing services; goodwill; client lists; and business opportunities. Provided, however, that nothing in the foregoing shall prohibit the Mason Companies from transferring accounts in connection with a factoring relationship.
>
> [Four] Defendants shall not transfer any assets among themselves.
>
> * * *
>
> [Six] The Mason Companies shall make monthly payments in the amount of $35,000.00 toward past due premiums or claim costs owed beginning May 1, 2010.
>
> * * *
>
> [Ten] The Mason Companies shall give priority to payment of debts owed to the Ohio BWC above all other debts owed except where a different priority is required by law or credit is extended by a bank or other financial institution pursuant to a line of credit or factoring relationship. Any debts or obligations, other than salary, owed by the Mason Companies to Ryan Mason shall not be paid before or given

> priority over any debts owed by the Mason Companies to the BWC.
>
> [Eleven] The Ohio BWC shall not seek to execute on existing liens it has against the Mason Companies as long as the payments referenced in paragraph 6, that arose from the liens, are being made on a timely basis.

{¶ 31} 9. On March 21, 2011, the bureau filed a notice of dismissal without prejudice in case No. 09CVH-09-13229.

{¶ 32} 10. Earlier, by letter dated October 19, 2009, the bureau informed relator:

> Through recent rate-reform efforts, we have worked to ensure each employer pays a rate that matches the risk they bring to Ohio's workers' compensation system. These efforts have helped us bring greater parity to the rates paid by both group-rated and non group-rated employers.
>
> In a letter dated July 10, 2009, we informed you about one element of these reform efforts – a 100 percent experience modifier (EM) cap designed to prevent excessive volatility for eligible employers' rates. To receive this discount, we asked that you complete and return an *Agreement for 100-Percent EM Cap* (U-18) to us by Sept. 30, 2009.
>
> We did not receive a U-18 from you by the original deadline mentioned above. However, we're giving you one more opportunity to receive this discount. If you'd like to receive the 100-percent EM cap for the July 1, 2009, to June 30, 2010, policy year, you must submit a U-18 to us by Oct. 31, 2009.

{¶ 33} 11. Relator did participate in the bureau's 100 percent EM cap program for policy year July 1, 2009 to June 30, 2010.

{¶ 34} 12. In this action, respondent submitted to this court a May 22, 2009 letter to Daily Services from the bureau's director of underwriting and premium audit department, Michael Glass. The letter is addressed to Daily Services in care of Gates McDonald Company which is in the business of representing employers as their third-party administrator ("TPA") in workers' compensation matters. Relator vigorously disputes that the May 22, 2009 letter was actually mailed to relator. In support, relator has submitted an affidavit from Ryan Mason executed January 10, 2012. Mason avers

that Gates McDonald Company was never the TPA of Daily Services and that the first time Mason ever saw the letter was when his legal counsel sent him a copy on January 5, 2012.

{¶ 35} Relator also submits e-mails obtained from the bureau which, relator argues, prove that the May 22, 2009 letter was held out of a concern that Mason would not cooperate with a bureau audit if he received the letter.

{¶ 36} 13. The disputed May 22, 2009 letter states:

> We received notification of a business acquisition/merger or purchase/sale, and have determined you are the successor employer for Ohio workers' compensation purposes.
>
> As the successor employer for the entire operation, you are responsible for all existing and future financial rights and obligations of the former employer. BWC will base your workers' compensation rate(s) on the former employer's experience or the combined experience of all employers involved in the transaction if you had established coverage prior to acquiring the business. As a result, BWC will re-calculate your premium rates, which may result in a rate change.
>
> Please complete the enclosed final and/or outstanding payroll reporting form(s) for the former employer, and return the form(s) to BWC in the enclosed self-addressed return envelope **within 15 days**. As the successor employer, you are ultimately responsible for submitting these reports and paying any balance due on the former employer's policy. If we do not receive the form(s) by the due date listed on the payroll report(s), BWC will estimate the premium due and assess penalties.

(Emphasis sic.)

{¶ 37} 14. By letter dated August 4, 2010, the bureau informed relator:

> Congratulations on successfully completing year one of the 100-Percent EM Cap. You have completed the required steps of the 10-Step Business Plan for Safety and fulfilled the other program requirements during your fist year.
>
> However, upon review for continued participation beyond the current policy year, it was determined that as of June 1 your company no longer meets the program's eligibility

> requirements. Specifically, you are no longer eligible because:
>
> - Your policy was involved in a combination with policy 1484986 which resulted in a change in your exposure.

{¶ 38} 15. The record contains an undated letter from the bureau to relator, stating:

> The Ohio Bureau of Workers' Compensation (BWC) received your request for Reinstatement in the 100% EM Cap Program dated August 30, 2010. After reviewing the information, BWC must deny your request for the following reason.
>
> More than one employers experience was used to determine an Experience Modification. The resulting EM is not permitted to participate in the 100% EM Cap.
>
> If you would like to appeal this decision to the Adjudicating Committee please complete the attached Employer Adjudication Protest (L-15) to request an appearance in front of The Adjudicating Committee.

{¶ 39} 16. In October 2010, relator filed an "Application for Adjudication Hearing" on bureau form "Legal-15."

{¶ 40} On the form, relator stated the reason for the requested hearing:

> The employer respectfully disagrees with the Administrator's decision to deny our participation in the 2010 EM Capping Program. The employer was invited to and participated in the 2009 EM Capping Program and should be found eligible for the 2010 program. Policy status has not changed from 2009 to 2010.

{¶ 41} 17. On November 4, 2010, a hearing was held before the bureau's three-member adjudicating committee. The proceeding was recorded and transcribed for the record. Thereafter, the committee mailed an order denying relator's protest. The order explains:

> **Background Facts and Issues Presented**: BWC denied the Employer's request to participate in the EM Cap Program for the 2010 program year pursuant to section 4123-17-3 of the Ohio Administrative Code. This section states if more

than one employer's experience is used to determine an Experience Modification then the employer is not permitted to participate in the 100% EM Cap program.

The employer objected to the denial and requested a hearing before the Adjudicating Committee.

* * *

Employer's Position:
The employer's representatives stated the employer was accepted into the EM Cap Program. However, when the combination was discovered the Bureau removed the employer from the EM Cap Program. The combination was not made between two companies. The court has ruled that there was always just one company, not two. The Bureau combined two policies of one company not two policies of two separate companies. Therefore, the rule does not apply to this employer and the employer should be allowed to participate in the program.

Employer relates that on October 19th, 2009, the BWC sent a letter to Daily Services, inviting the company to join the EM Capping Program with the 100 percent Cap. Daily Services was accepted into that program and was in it from July the 1st, '09 to June 30th, 2010 at the BWC's request. Another letter was received dated August the 4th, 2010, congratulating the company for successfully completing the first year of the 100 percent EM Capping Program[ ], but then advising the company that Daily Services cannot participate in this program because in March of 2009, there was a combination of more than one employer. The employer states that we are not dealing with more than one employer. The employer poses this question to the Bureau: "If you had a problem, why in October of '09 did you invite us to join; why did you accept us; why did you let us go through a year and then say, oh, you can't do that anymore because you're not one company?"

Employer takes the position that the rule came into effect in February of 2009 regarding use of more than one employer's experience as disqualifying the employer in EM Capping, that the rule was in effect prior to the combination of the policies, which was March 23rd of 2009, and prior to the invitation into the program for July 1, 2009 through

June 30, 2010, and therefore they are entitled to continue participation in the program.

Bureau's Position:
BWC's representative stated the employer combined policies and the employer seeks the use of combined policies to determine the EM of the employer requesting the EM Cap Program. This is not permitted by the rule. The employer was removed from the program when the combination of policies was discovered by the unit responsible for this program.

The Bureau explains that the policies were combined during, not before, the first year of participation in the 100 percent EM Cap period. Eligibility for the upcoming year is determined as of December 31st. The "snapshot" to determine eligibility taken for each experience period is December 31st for the upcoming year of the program, which begins the following July 1. For the first year of participation the BWC took the snapshot December 31st of 2008. Once BWC took the snapshot, the rates were set for July 1, 2009 so therefore, the company was allowed into the Cap Program for the first year. The employer did not affect the transfer (the combine) until March of 2009. So, for the second policy year, the year at issue in this appeal, the 2010 year, the company became ineligible.

Findings of Fact and Conclusion of Law:

Based on the testimony presented at the hearing and the materials submitted with the protest, the Adjudicating Committee Denies the Employer's request to participate in the EM Cap Program for the 2010 program year.

The employer has consistently maintained that the business entities I Force and Daily Services are *not* the same company. The Bureau has consistently maintained that Daily Services is a *successor* company and that I Force is the *predecessor* company.

In support of the employer's position, employer presented the Adjudicating Committee with a copy of a court decision on the Plaintiff's Motion to Appoint a Receiver in Case Number 09 CVH 9 13229, Common Pleas Court of Franklin County, *State of Ohio, Bureau of Workers' Compensation v. Ryan C. Mason, et al.* That decision is dated December 31,

2009 and time stamped January 5, 2010. Employer suggests that in this decision the court has ruled that there was "always" just one company, not two.

The employer's characterization of the decision by Judge McIntosh is inaccurate. While the court recites statements made in administrative proceedings on October 15, 2009, the court was not *asked* to decide and did not decide that the two companies were "always" one company. The employer relies most heavily on one sentence on page 2 of that Order, "the businesses are the same." Read in context, and read fairly, the allegation was and is that the nature of the businesses is the same and that the businesses *became* the same business – after Defendants closed I Force and made certain transfers to Daily Services to avoid unpaid assessments. With the language on which Plaintiff principally relies, the court has merely recited statements made at a different level, specifically an Adjudicating Committee Hearing held on October 15, 2009. The Bureau has consistently maintained that Daily Services is a successor to the company I Force. To say that the businesses were one business as of the time of the October 15, 2009 hearing is not to say that they were always one business. The proceedings in litigating a Motion for Receivership also carry a different and higher burden of proof.

In further reviewing the Order from the October 15, 2009 administrative hearing, the following language appears:

> "Employer's Position:
>
> The experience combination was proper. The Bureau properly applied the rules. *The two companies started as separate businesses. They had separate contracts and customers. However, I Force was closed and certain employees and contracts were transferred to Daily Services, LLC.*" (emphasis added)

This was the *employer's* position as of October 15, 2009. In fact, on page 1 of the court's decision of 12/31/2010 denying receivership the trial judge states the following:

> "The undisputed facts are as follows. Defendant, Ryan Mason, owns *three separate* temporary staffing agencies. I Force, LLC, Daily Services, LLC and People Who Work Better, LLC. All *three agencies* are located

> at 1100 Morse road, Columbus, Ohio" (emphasis added.)

This language was pointed out to the employer in the Adjudicating [C]ommittee Hearing on 11/4/2010, who offered no meaningful rebuttal to the clear meaning of the above. (Transcript, BWC Adjudicating Committee 11/4/2010, Page 26, Line 10)

The employer admits that the second company, Daily Services, received transfers of employees and contracts from I Force. Outstanding premiums have been assessed and reduced to Judgment which stood at $3,885,389.38 as of June 25, 2009. Specifically, the December 31, 2009 decision by Judge McIntosh includes the following language on page 2, 1st full paragraph:

> "According to Mason's testimony, he shut down I-[F]orce in March 2009 after it became financially impossible to maintain operations and pay on the delinquent premiums."

In support of its position, employer presents to the Adjudicating Committee the Complaint in Case Number 09 CVH 9 13229, Common Pleas Court of Franklin County, State of Ohio, *Bureau of Workers' Compensation v. Ryan C. Mason, et al*. Contrary to the employer's suggestion, in that Complaint the BWC takes the position that the multiple entities owned by the Defendant Ryan Mason are separate entities under his control and used in a scheme to avoid responsibilities by moving contracts to Daily Services upon ceasing business operations of I Force. (Complaint, Paragraphs 9 – 12)

The employer, for current purposes, conveniently ignores the fact that the employer has admitted that the predecessor company I Force ceased operations due to the unpaid workers' compensation premiums. In addition to the above, this fact is also recited in the language of the Injunction issued by the common pleas court, and signed as an Agreed matter by counsel for the Employer. Outstanding premiums have been assessed and reduced to Judgment which stood at $3,885,389.38 as of June 25, 2009.

Finally, in issuing an injunction for the Bureau and against the Defendants on March 31, 2010 in the same case

> discussed above, the common pleas court again addresses the notion that the companies owned by Ryan Mason are one company and makes the following finding in the first sentence of the (agreed) Injunction:
>
> > "Defendant Ryan owns *three separate staffing agencies* which are the other defendants in this case: Daily Services LLC, I [F]orce LLC, and People [W]ho Work Better LLC." (emphasis added)
>
> * * *
>
> While employer asserts that the common pleas court has made a Finding that the companies I Force and Daily Services were always one company, the language of the court's orders does not support this proposition. The combine of polices was proper and the employer agreed to it. The companies began as separate companies, but transferred employees and contracts from the predecessor I Force LLC to the successor Daily Services LLC. The Bureau is correct in concluding that this represents a change in exposure and also that the Employer failed to meet the program requirements. The Bureau applied the rule properly.
>
> The employer's appeal is Denied.

(Emphasis sic.)

{¶ 42} 18. Relator administratively appealed the decision of the adjudicating committee to the administrator's designee.

{¶ 43} 19. On January 6, 2011, relator's appeal was heard by the administrator's designee. The proceeding was recorded and transcribed for the record.

{¶ 44} 20. Following the January 6, 2011 hearing, the administrator's designee issued an order that affirms the decision of the adjudicating committee. The January 6, 2011 order of the administrator's designee explains:

> Pursuant to Ohio Revised Code Section 4123.291, this matter came on for hearing before the Administrator's Designee on the employer's appeal of the Adjudicating Committee order dated November 4, 2010. At issue before the Administrator's Designee, the Employer protested its disqualification from the EM Cap Program. The employer was rejected from the program because of Ohio Administrative Code Section 4123-

17-03(G)(3). This section states that if more than one employer's experience is used to determine an experience modification then the employer is not permitted to participate in the 100% EM Cap program.

* * *

The Administrator's Designee adopts the statement of facts contained in the order of the Adjudicating Committee.

Based on the testimony and other evidence presented at the hearing, the Administrator's Designee adopts the findings of fact and conclusions of law of the Adjudicating Committee with the exception of any reference to an injunction in the Franklin County Court of Common Pleas. The Administrator's Designee in conducting this de novo Hearing in this matter does not find the injunction to be relevant to the issues presented in the instant appeal.

The Administrator's Designee makes the additional findings of fact and conclusions of law:

Kimberley D. Competti, a BWC, ESS testified persuasively about her decision in the BWC employer complaint process that the listing of two separate BWC policy numbers lead to her conclusion that two separate employers were involved, I-Force and Daily Services.

Ms. Competti testified persuasively that she had applied the appropriate BWC rule to the facts presented to her in her handling of the employer complaint.

Heidi Pack, BWC Supervisor, persuasively testified that there were two employers with different federal ID numbers, I-Force and Daily Services, involved in the matter that Ohio BWC chose to combine on March 23, 2009.

Mr. Scott Holland testified credibly for the employer as to Federal Internal Revenue Service returns filed by the employer.

Mr. Ryan Mason testified credibly for the employer as to the Ohio Department of Taxation filing of the employer.

The Administrator's Designee is not persuaded that the treatment of I-Force and Daily Services for Federal and State

> of Ohio Tax return purposes should lead the Administrator's Designee to conclude that only one business enterprise (employer) should be found for the purposes the Ohio BWC 100 percent EM Cap Program prior to the combine on March 23, 2009.
>
> The Administrator's Designee denies the employer's appeal and affirms the decision of the Adjudicating Committee, with the qualification that any reference to an injunction shall be not deemed to be a basis for the upholding of the Adjudicating Committee order.
>
> Further, the Administrator's Designee finds the arguments of the employer regarding collateral estoppel to be not well taken. The prior court action is not determinative as to whether there exists one employer or two employers for the purpose of the matter before the Administrator's Designee.

{¶ 45} 21. On August 10, 2011, relator, Daily Services, LLC, filed this mandamus action.

Conclusions of Law:

{¶ 46} Several issues are presented: (1) whether the bureau violated the constitutional prohibition against retroactive laws when it determined relator ineligible to participate in the 100 percent EM cap program, and (2) whether the doctrine of collateral estoppel barred the bureau from determining that there was "more than one employer policy's experience" used to develop the EM such that the exclusion of former Ohio Adm.Code 4123-17-03(G)(2) was not applicable to render relator ineligible for the 100 percent year-to-year cap.

{¶ 47} Turning to the first issue, Ohio Constitution, Article II, Section 28, states that "[t]he general assembly shall have no power to pass retroactive laws." *State v. Williams*, 129 Ohio St.3d 344, 346, 2011-Ohio-3374, ¶ 8, a case relied upon by relator. When analyzing whether a statute is unconstitutionally retroactive, the courts use a two-part test. *Id*. The first part of the test asks whether the general assembly expressly made the statute retroactive. *Id*. The issue of whether a statute may constitutionally be applied retrospectively does not arise unless there has been a prior determination that the general assembly specified that the statute so apply. *Id*. The second part of the test

requires the court to determine whether the statutory provisions are substantive or remedial. *Id*.

{¶ 48} Here, there is no contention that former Ohio Adm.Code 4123-17-03(G)(2)'s exclusion to the 100 percent EM cap effective February 7, 2009 is expressly made retroactive by the terms of the administrative rule. Rather, the question posed by relator is whether the bureau acted to apply the rule in a retroactive manner.

{¶ 49} Here, respondent's brief succinctly and correctly explains why relator is incorrect in contending that the administrative rule was retroactively applied by the bureau in violation of the constitutional provision:

> To determine eligibility of state fund private employers, the Bureau considers the employer's policy experience in the oldest four of the last five calendar years. Ohio Adm.Code 4123-17-03(D)[.] The most recent of the five calendar years is often referred to as the "green year" because the claims in that year are too recent to be useful in projecting claim costs. The premium year ("PY") for state fund private employers is July 1st to June 30th of the following year. So, in determining an employer's EM Cap eligibility for the 2009 PY (July 1, 2009, to June 30, 2010), the Bureau will consider the employer's experience in the four calendar years ending on December 31, 2008.
>
> In the first year of the program, the Bureau automatically applied the EM Cap to eligible employers, and sent affected employers an agreement (Form U-18) to complete and return. Employers that did not return the completed form would be removed from the program and have their initial published EM applied. Daily Services' policy experience in the four calendar years ending on December 31, 2008, made it eligible for the EM Cap for PY 2009 (i.e., July 2009 – June 2010). * * * In July 2009, and again in October 2009, the Bureau reminded Daily Services that to obtain this discount it needed to complete and return the U-18 form, which it eventually did. Id.
>
> The following year, PY 2010 (July 2010 - June 2011), the Bureau looked to the four calendar years ending in December 31, 2009, in considering Daily Services' EM Cap eligibility, and found that on May 22, 2009, the Bureau had combined the policies of Daily Services and I-Force, and was treating Daily Services as a successor for Ohio workers'

> compensation purposes. * * * As a successor, Daily Services was deemed responsible for all existing and future financial rights and obligations of I-Force's experience or the combined experience of all employers involved in the transaction. Id. This policy combine made Daily Services ineligible for the EM Cap for PY 2010 (July 2010 – June 2011).
>
> It is important to emphasize that, because the Bureau evaluates participation in the program based on the oldest four of the past five calendar years, Daily Services was eligible to participate in PY 2009, even though the combine occurred in early 2009. For PY 2009, the calendar year 2009 was a green year and events in that year were not considered in the evaluation. However, for PY 2010, the oldest four of the past five calendar years included 2009, and so the Bureau did consider the 2009 combine in its evaluation.
>
> It is also important to note that although the rule creating the program was codified in February 2009, before Daily Services' initial participation, Ohio Adm.Code 4123-17-03 had been amended three times by mid-2010 when the Bureau considered Daily Services' PY 2010 participation. But the specific provision excluding employers with combined policy experience had not been changed by the amendments, beyond renumbering section (G)(2) to (G)(3), removing the two "%" symbols and adding a comma.

(Respondent's brief, at 2-3.)

{¶ 50} Accordingly, it is clear that the bureau has not violated the constitutional prohibition against retroactive laws.

{¶ 51} Turning to the second issue, collateral estoppel (issue preclusion) prevents parties or their privies from relitigating facts and issues in a subsequent suit. Collateral estoppel applies when the fact or issue: (1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a court of competent jurisdiction, and (3) when the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action. *Thompson v. Wing*, 70 Ohio St.3d 176 (1994), citing *Whitehead v. Gen. Telephone Co.*, 20 Ohio St.2d 108 (1969), paragraph two of the syllabus.

{¶ 52} In the magistrate's view, respondent succinctly summarizes relator's argument as follows:

> Daily Services argues that the Bureau may have found two policies existed, but that the Bureau failed to prove there were two employers, and the rule excludes employers where "more than one employer's policy experience" is used to develop the EM. * * * Daily Services then claims that the Bureau is estopped from finding Daily Services and I-Force were two separate employers because of the position the Bureau took in an earlier Franklin County Common Pleas [C]ourt case.

(Respondent's brief, at 8.)

{¶ 53} The issue of whether Daily Services and I-Force were a single employer was not directly litigated in the common pleas court case (No. 09CVH-09-13229). In that common pleas court action, the bureau alleged that I-Force assets were fraudulently transferred to Daily Services to prevent the bureau from collecting on its judgment against I-Force. The bureau sought the appointment of a receiver over I-Force and Daily Services to protect its judgment against I-Force. The common pleas court, through Judge McIntosh, denied the request for appointment of a receiver, but granted an injunction to prevent further transfer of assets. In fact, the injunction treated I-Force and Daily Services as two separate corporations as both entities were enjoined from the transfer of assets without adequate consideration or without court approval. Also, I-Force and Daily Services each were enjoined from the transfer of assets between themselves.

{¶ 54} Accordingly, based upon the above analysis, the magistrate concludes that the bureau's decision was not barred by the doctrine of collateral estoppel.

{¶ 55} As earlier noted, relator vigorously disputes that the May 22, 2009 letter to Daily Services was actually mailed to relator. In the magistrate's view, this court need not determine whether the letter was actually mailed because relator can show no prejudice even if the letter was not mailed on May 22, 2009. Clearly, the August 4, 2010 bureau letter informed relator that it was not eligible for the 100 percent EM cap program for policy year beginning July 1, 2010, and that letter prompted relator's request for a hearing before the adjudicating committee. Presumably, had relator timely

received the May 22, 2009 letter, it could have requested a hearing months earlier. However, relator has shown no prejudice from any delay caused by the failure to mail the May 22, 2009 letter.

{¶ 56} Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/s/ Kenneth W. Macke
KENNETH W. MACKE
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).