

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Aaron Rents, Inc., :  
Relator, :  
v. : No. 09AP-232  
Ohio Bureau of Workers' Compensation, : (REGULAR CALENDAR)  
Respondent. :

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D E C I S I O N

Rendered on January 26, 2010

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*Millisor & Nobil Co., L.P.A., Daniel P. O'Brien and Nicole H. Farley*, for relator.

*Richard Cordray*, Attorney General, and *Gerald H. Waterman*, for respondent.

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IN MANDAMUS  
ON OBJECTIONS TO MAGISTRATE'S DECISION

TYACK, P.J.

{¶1} Aaron Rents, Inc. ("Aaron Rents"), filed this action in mandamus seeking a writ to compel the Ohio Bureau of Workers' Compensation ("BWC") to vacate its order which required Aaron Rents to report product technicians under a different manual and which allowed the BWC to collect additional funds for the two-year period prior to the reclassification.

{¶2} In accord with Loc.R. 12, the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued a magistrate's decision containing detailed findings of fact and conclusions of law, which is appended to this decision. The magistrate's decision includes a recommendation that we uphold the BWC's reclassification of the product technicians but allow the reclassification to be billed only prospectively.

{¶3} The office of the Attorney General, as counsel for the BWC, has filed objections to the magistrate's decision insofar as the magistrate's decision recommends only a prospective application of the reclassification. Counsel for Aaron Rents has filed a memorandum contra the objections. The parties were permitted oral argument before the court.

{¶4} Since no party has objected to the portions of the magistrate's decision which address the facts and conclusions with respect to the actual reclassification and since no error of law or fact is present on the face of the magistrate's decision with respect to that issue, we adopt the findings of fact and conclusions of law with respect to that issue and deny the request for a writ of mandamus with respect to that issue.

{¶5} With respect to the issue of when the BWC can collect additional funds based upon the reclassification, counsel for the BWC has submitted two objections:

the Magistrate's finding and conclusion that the BWC abused its discretion in denying relator Aaron Rents, Inc.'s "request" that the audit findings be applied prospectively only;

the Magistrate's recommendation that the court issue a writ of mandamus ordering the BWC to adjudicate Aaron Rents "request" for a prospective only application of the audit findings, and render a determination in compliance with

*State ex rel. Craftsmen Basement Finishing Sys., Inc. v. Ryan*, 121 Ohio St.3d 492, 2009-Ohio-1676.

{¶6} As indicated in the magistrate's decision, the issues before us were submitted to the BWC's adjudicating committee. The adjudicating committee issued a detailed order with respect to the reclassification of some of the employees of Aaron Rents, but limited its comments as to when the reclassification should be deemed effective to the following:

\* \* \* Regarding the back billing period of the audit, the Committee finds in light of the delay of processing the audit findings and the lack of proof that the Bureau ever provided written notice of the initial April 2006 audit or findings, the Bureau shall only make the audit findings limited to the payroll periods from January 1, 2006 through December 31, 2007.

{¶7} The adjudicating committee did not explicitly find that the results of the audit should not be prospective only, but implicitly found the reclassification should not be prospective only by finding the BWC could collect for two years before the audit.

{¶8} Our magistrate found the BWC abused its discretion in denying the request of Aaron Rents that the audit findings be applied prospectively only, but at the same time found that "it is not the duty of this court to determine whether a prospective only application of the audit findings can be justified. That was the duty of the bureau in its adjudication of this matter."

{¶9} We find that the BWC through its adjudication committee did deny the request of Aaron Rents for prospective application of the reclassification by stating an express starting date for the reclassification which was not prospective only. Further, the

adjudicating committee's order, as affirmed by the administrator of BWC's designee, is clearly in accord with Ohio Adm.Code 4123-17-17(C), which reads:

\* \* \* The bureau shall also have the right to make adjustments as to classifications, allocation of wage expenditures to classifications, amount of wage expenditures, premium rates or amount of premium. \* \* \* Except as provided in rule 4123-17-28 of the Administrative Code, no adjustments shall be made in an employer's account which result in increasing any amount of premium above the amount of contributions made by the employer to the fund for the periods involved, except in reference to adjustments for the semi-annual or adjustment periods ending within twenty-four months immediately prior to the beginning of the current payroll reporting period. The twenty-four month period shall be determined by the date when such errors affecting the reports and the premium are brought to the attention of the bureau by an employer through written application for adjustment or from the date that the bureau provides written notice to the employer of the bureau's intent to inspect, examine, or audit the employer's records.

{¶10} Aaron Rents for several years used product technicians to go to the homes and businesses of its customers to assist customers in handling issues related to products rented or sold by Aaron Rents. By putting these employees on the road, Aaron Rents increased the risks for these employees, as compared to employees who worked solely in an office setting. The increased risks made an increase in the rate assessed by the BWC appropriate. Simple common sense dictates this result. Aaron Rents knew what its product technicians did and benefited from the lower than to be expected rate. The BWC is seeking only two years worth of increased payment. What the BWC seeks is not unfair to Aaron Rents and does not make the two year look back unreasonable or inequitable. We see no reason to remand the matter to the BWC for further adjudication.

{¶11} We have carefully reviewed *State ex rel. Craftsmen Finishing Sys., Inc. v. Ryan*, 121 Ohio St.3d 492, 2009-Ohio-1676 cited by the magistrate and find nothing in that case which enlightens us as to the effective date of reclassifications. The *Craftsmen* case clearly does not conflict with or modify Ohio Adm.Code 4123-17-17(C) and its allowance of a two-year retrospective application.

{¶12} As a result, we sustain the objections to the magistrate's decision filed on behalf of the BWC. We adopt the findings of fact with respect to the issue of prospective applications of the reclassification but not the conclusions of law. As a result, we deny, in toto, the request of Aaron Rents for a writ of mandamus.

*Objections sustained; writ denied.*

KLATT and McGRATH, JJ., concur.

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State of Ohio ex rel. Aaron Rents, Inc., :  
 Relator, :  
 v. : No. 09AP-232  
 Ohio Bureau of Workers' Compensation, : (REGULAR CALENDAR)  
 Respondent. :

MAGISTRATE'S DECISION

Rendered on September 29, 2009

*Millisor & Nobil Co., L.P.A., Daniel P. O'Brien and Nicole H. Farley, for relator.*

*Richard Cordray, Attorney General, and Gerald H. Waterman, for respondent.*

IN MANDAMUS

{¶13} In this original action, relator, Aaron Rents, Inc. ("Aaron Rents" or "relator"), requests a writ of mandamus ordering respondent, Ohio Bureau of Workers' Compensation ("bureau" or "respondent"), to vacate its order holding that relator must report the payroll of its product technicians under manual 7380 rather than 8017. Relator also requests that the writ order respondent to only prospectively apply its audit findings to the reporting of relator's payroll.

Findings of Fact:

{¶14} 1. Relator is a Georgia corporation that provides retail services involving rental and lease ownership of residential office furniture, consumer electronics, and home appliances. Relator initially established its business in Ohio about 1992. Currently, relator operates about 300 retail stores in Ohio. Relator maintains an administrative office in Columbus, Ohio.

{¶15} 2. When relator began its business in Ohio in the early 1990s, its business consisted primarily of renting furniture. Around the year 2000, its business began to evolve into primarily a rent-to-own operation.

{¶16} 3. When relator initially applied to the bureau for workers' compensation coverage as a state-fund employer, relator's entire workforce was assigned manual 8810 with the exception of its product technicians who were assigned manual 8044.

{¶17} 4. Manual 8810 is captioned "Clerical Office Employees NOC [Not-Otherwise Classified]." Manual 8044 is captioned "Store: Furniture & Drivers."

{¶18} 5. One of the duties of a "product technician" is the delivery of merchandise to a customer's home or business. Delivery of merchandise involves the driving of a vehicle.

{¶19} 6. In April 2006, the bureau initiated an audit. However, the individual auditor assigned to perform the audit did not prepare an audit report until January 2007. His audit report covered the period July 1, 2004 through December 31, 2006. That audit report was rejected by the bureau on grounds that it failed the bureau's "quality review process."

{¶20} 7. In early 2008, the bureau initiated a new audit.

{¶21} 8. On March 17, 2008, the bureau issued a draft audit report covering the period July 1, 2004 through December 31, 2007.

{¶22} 9. Manual 8017 is captioned "Store: Retail NOC." Manual 7380 is captioned "Drivers, Chauffeurs, Messengers, and Their Helpers NOC-Commercial."

{¶23} 10. On March 20, 2008, relator's counsel e-mailed Charles Goellnitz, a regional supervisor of the bureau's Underwriting and Premium Auditing Department.

Counsel's e-mail stated:

I have looked over the audit and talked to my client. At this point we have very little comment on the assignment of classifications with the exception of the 7380 code. I noted that nationally [T]ravelers has put the Product Techs in 8017 and the Long haul drivers in 7380. Travelers audits the account every year and has maintained that position.

In reading the Scopes Manual I noted the following part of the description "Code 7380 is a "not otherwise classified" (NOC) classification. This means that Code 7380 shall apply to an insured's operation(s) only when no other classification more specifically describes the insured's operations or when a classification applicable to an insured's operation that includes driving does not include the type of driving performed."

I am hoping you can re-think the assignment of 7380 to the Product Techs.

{¶24} 11. On March 24, 2008, Goellnitz responded to counsel's March 20, 2008

e-mail:

\* \* \* I have taken your question concerning allowing your client to use manual 8017 rather than 7380 under advisement and I feel that allowing it would not be correct.

Based on rule 4123-17-08 and the Ohio revised code the BWC is required to follow the NCCI system of classifications. Travelers Insurance may not have the same statutory restriction and has some additional latitude with how they rate or approach their larger clients. In Ohio we simply do not have such latitude.

\* \* \*

\* \* \* Code 7380 does not apply when the basic classification code includes drivers.

\* \* \*

A manual such as 8017: Its phraseology states Store Retail NOC: You will note that this manual does not include drivers in its phraseology and thus if the store had drivers the rating of them would need to be rated under manual 7380.

In regard to Aaron Rents the job description for Product Technicians (PT) lists as of one of their primary duties the delivery of merchandise to customers homes and businesses. A review of the employer claims also supports that this group of workers are the primary group doing delivery of goods from the stores to the customer.

Therefore based on NCCI rule – I feel that manual 7380 must be considered applicable to the time that the Product Technicians are involved with driving and delivery of goods.

NCCI by rule will allow the division of these workers labor between 8017 and 7380 if the employer desires to segregate and maintain actual time records by employee between the time they spend doing driving and delivery versus their other duties. If no actual time is maintained then by rule the highest rated classification pertains.

I therefore feel by rule we can not grant your request to allow your client to place the Product Technicians into manual 8017.

(Emphasis sic.)

{¶25} 12. In April 2008, the bureau issued its final audit report covering the period July 1, 2004 through December 31, 2007.

{¶26} 13. By letter dated April 16, 2008, relator objected to the final audit report and requested a hearing before the bureau's adjudicating committee.

{¶27} 14. On September 24, 2008, the bureau's adjudicating committee heard relator's objections to the audit findings. In a unanimous decision, the three-member committee issued the following order:

The facts of this case are as follows: The Bureau audited the employer for the period from July 1, 2004 through December 31, 2007. The auditor transferred payroll from NCCI manual code 8810 to Code 8017. Further drivers were moved from manual 8044 to manual 7380. The audit also added manual codes 8742 and 9519.

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

\* \*

At the hearing the employer representative gave a brief history of the employer's business. Originally, the nature of the operation provided equipment and furniture for rent to rent customers. Around 1998, the employer's operation changed to a rent to own business and established retail outlets or store fronts for direct business with customers in several locations throughout Ohio and nationwide. The employer is a Georgia corporation which reports having yearly audits from their insurance company in other jurisdictions. In April 2006, the Bureau contacted employer for an audit; however, the Bureau failed to timely complete the audit. It was not until March 2008, that a second audit was completed and the audit findings provided to the employer. The employer has two objections to the audit. First, the employer objects to the assignment of manual 7380 and contends the employees assigned to this manual would be better placed under manual 8017. Manual 7380 is an NOC (not otherwise classified) classification and manual

8017 are more specific to the operation of the business. The employer representative conveyed that Travelers Insurance Company, which provides coverage for this employer in other jurisdictions and also utilizes NCCI, has classified the same drivers under manual 8017. The second objection to the audit involves the employer position that the audit findings should be prospective only from the date of the second completed audit of March 2008. Under OAC 4123-17-17(C) the Bureau may go back 24 months immediately prior to the current payroll period. The rule states the 24 is calculated for the date the employer puts BWC on notice of errors or that BWC provides written notice to the employer of the bureaus intent to inspect examine or audit the employer's records. The employer representative contends the Bureau cannot go back 24 months from the date of the initial audit since it was never finalized. The employer representative argued the \$2 million audit findings would unjustly enrich the Bureau and that the loss runs show the Bureau has already made an underwriting profit from this employer. The employer representative further noted the employer was reporting using the manuals assigned by the Bureau and payroll reports do not provide an opportunity to change the manual classifications assigned to the policy. The employer representative also argued that with the Bureau going back to 2004, yet never having conveyed the audit findings in 2006, the employer lost the opportunity to pursue other alternatives (e.g. self insurance, retrospective rating) which would have resulted in less liability. The delay in processing the initial audit in 2006 has harmed the employer.

The Bureau representative stated the employer was originally assigned manual 8044 and 8810. Audit findings indicated the employer sells and rent furniture and other household items. The employer changed the operation of their business from selling mostly furniture to mostly electronics therefore manual 8017 were assigned. There is a regional headquarters in Columbus. There are drivers who deliver and set up the equipment for the business as well as drivers that are also service techs for the equipment. Manual 8017 do not include drivers and therefore the driver classification was assigned. Significant payroll was moved from manual 8810 to manual 8017. Under the direction of NCCI and Ohio law, the drivers need to be placed under manual 7380. As to the audit findings being attributed back

to July 1, 2004, the Bureau gave notice to the employer in 2006 of the need for an audit. The Bureau historically goes back two years from the date of notice of the audit to determine the two year period.

Given the information provided at the hearing, the Adjudicating Committee upholds the assignment of manual 8017 and manual 7380 to the policy. The NCCI Scopes Manual is clear that drivers are reportable to manual 7380 and that other operational employees are reportable to the store class of manual 8017. The employer's operations are best described by these classifications. The Bureau must report as classified under the Scopes Manual. The Bureau is bound by not only the NCCI Scopes Manual, but also Ohio law. The manner in which a private insurance carrier in a jurisdiction other than Ohio classifies drivers is not a consideration for this Committee. Therefore, the assigned manual classifications are affirmed. Regarding the back billing period of the audit, the Committee finds in light of the delay of processing the audit findings and the lack of proof that the Bureau ever provided written notice of the initial April 2006 audit or findings, the Bureau shall only make the audit findings limited to the payroll periods from January 1, 2006 through December 31, 2007.

(Sic passim.)

{¶28} 15. Relator administratively appealed the September 24, 2008 order of the adjudicating committee to the administrator's designee pursuant to R.C. 4123.291.

{¶29} 16. Following a February 10, 2009 hearing, the administrator's designee issued an order affirming the findings and decision of the adjudicating committee.

{¶30} 17. On March 6, 2009, relator, Aaron Rents, Inc., filed this mandamus action.

#### Conclusions of Law:

{¶31} Two issues are presented: (1) whether the bureau abused its discretion by holding that relator must report the payroll of its product technicians under manual 7380;

and (2) whether the bureau abused its discretion in denying relator's request that the audit findings be applied prospectively only.

{¶32} The magistrate finds: (1) the bureau did not abuse its discretion by holding that relator must report the payroll of its product technicians under manual 7380; and (2) the bureau did abuse its discretion in denying relator's request that the audit findings be applied prospectively only.

{¶33} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶34} In *State ex rel. Ohio Aluminum Industries, Inc. v. Conrad*, 97 Ohio St.3d 38, 2002-Ohio-5307, ¶17-20, the Supreme Court of Ohio decided a case involving an employer's mandamus challenge to the bureau's manual reclassification that resulted in a higher premium to the employer. In *Ohio Aluminum*, the court set forth law applicable to the instant case:

Section 35, Article II of the Ohio Constitution authorizes the board to "classify all occupations, according to their degree of hazard \* \* \*." Implemented by what is now R.C. 4123.29(A)(1), the result is the Ohio Workers' Compensation State Fund Insurance Manual. The manual is based on the manual developed by NCCI and has hundreds of separate occupational classifications. See Ohio Adm.Code 4123-17-04, Appendix A. It also specifies the basic rate that an employer must pay, per \$100 in payroll, to secure workers' compensation for its employees. See Ohio Adm.Code 4123-17-02(A).

\* \* \*

\* \* \* "[T]he bureau is afforded a 'wide range of discretion' in dealing with the 'difficult problem' of occupational classification." *State ex rel. Roberds, Inc. v. Conrad* (1999), 86 Ohio St.3d 221, 222, 714 N.E.2d 390, quoting *State ex*

*rel. McHugh v. Indus. Comm.* (1942), 140 Ohio St. 143, 149, 23 O.O. 361, 42 N.E.2d 774. Thus, we have "generally deferred to the [bureau's] expertise in premium matters" and will find an abuse of discretion "only where classification has been arbitrary, capricious or discriminatory." *State ex rel. Progressive Sweeping Contrs., Inc. v. Ohio Bur. of Workers' Comp.* (1994), 68 Ohio St.3d 393, 396, 627 N.E.2d 550. \* \* \*

{¶35} In *State ex rel. Progressive Sweeping Contrs., Inc. v. Bur. of Workers' Comp.* (1994), 68 Ohio St.3d 393, 396, the Supreme Court of Ohio pronounced:

Judicial intervention in premium matters has traditionally been warranted only where classification has been arbitrary, capricious or discriminatory. *Id.*; [*State ex rel. Minutemen, Inc. v. Indus. Comm.* (1991), 62 Ohio St.3d 158]. See, generally, 4 Larson, *Workmen's Compensation Law* (1990), Section 92.67. Given this high threshold, we have been—and will continue to be—reluctant to find an abuse of discretion merely because the employer's actual risk does not precisely correspond with the risk classification assigned.

{¶36} However, in *Progressive Sweeping*, the court issued a writ of mandamus against the bureau. The court explained:

\* \* \* The bureau should not be permitted under the guise of administrative convenience to shoehorn an employer into a classification which does not remotely reflect the actual risk encountered.

*Id.*

{¶37} The parties to this action have stipulated to relevant portions of the NCCI Manual Classification Codes which is used by the bureau in determining the manual to assign for purposes of determining the premium to be set for workers' compensation coverage.

{¶38} Because relator contends that its product technicians should be assigned manual 8017 rather than 7380, those two NCCI manual descriptions shall be set forth, in pertinent part:

PHRASEOLOGY STORE: RETAIL NOC

Description:

Code 8017 applies to retail stores that are principally engaged in selling merchandise that is not described by a specialty retail store classification in the Basic Manual. Stores assigned to this classification sell items such as art supplies, bakery products, beer and soft drinks, cigars and cigarettes, computers (personal or home-type), confectionery, cosmetics and toilet items, floor coverings, giftware, greeting cards, household appliances (small), housewares, lamps and lighting fixtures, musical instruments, paint and related supplies, photographic supplies and equipment, pocketbooks, radios, televisions, stereophonic or high-fidelity equipment (see Code 8072 for records, audio or videocassettes, computer software and other magnetic media), stationery and related items, toys, typewriters and office machines, wines and liquors.

Merchants are assigned to classifications in part based on the type of merchandise sold that constitutes principal receipts for the merchant. Each separate location operated by the merchant is classified independently based on principal receipts for the type of merchandise sold at that location. The term "principal receipts" has been defined as more than 50% of gross receipts. The terms "retail" has been defined, with certain exceptions, as the sale of merchandise to the general public for personal for household consumption or use and not for resale.

NCCI manual 7380 states, in pertinent part:

PHRASEOLOGY            DRIVERS,            CHAUFFEURS,  
MESSENGERS,    AND    THEIR    HELPERS    NOC—  
COMMERICAL

\* \* \*

**Description:**

Code 7380 is applied to commercial drivers, chauffeurs, messengers, and their helpers provided they are not otherwise classified in the Basic Manual. These employees are common to many businesses and are Standard Exceptions assigned to Code 7380 unless they are specifically included within the phraseology of a basic classification applicable to a risk.

The term "drivers" refers to employees who engage in duties on or in connection with vehicles and includes drivers, chauffeurs, messengers, drivers' helpers, garage employees, stable hands, and employees using bicycles in their operations.

Code 7380 is not intended for drivers (chauffeurs) employed by insureds engaged in the business of transporting the public.

Code 7380 is applied to messengers or couriers who deliver mail, parcels, or packages by driving or bicycling. Drivers, chauffeurs, messengers, and/or their helpers may perform these duties for more than one classification that is applicable to their employer's operations. Provided the conditions of Basic Manual Rule 2-G are met, pay earned for these duties may be allocated between each applicable classification for which these employees earn pay. If drivers, chauffeurs, messengers, and/or their helpers perform these duties for a classification that does not include drivers, pay earned for work performed for that classification is assigned to an appropriate drivers, chauffeurs, messengers, and helpers classification such as Code 7380. If drivers, chauffeurs, messengers, and/or their helpers perform these duties for a classification that does include drivers, pay earned for these duties is assigned to such classification.

{¶39} Ohio Adm.Code 4123-17-08 is captioned "Classifications according to National Council on Compensation Insurance." It states in part:

In accordance with division (A)(1) of section 4123.29 of the Revised Code, the purpose of this rule is for the bureau of

workers' compensation to conform the classifications of industries according to the categories the National Council on Compensation Insurance (NCCI) establishes that are applicable to employers in Ohio. This rule is based upon "Rule 1, Classification Assignment," effective January 1, 2002, of the classification rules of the NCCI and "Rule 2G, Interchange of Labor." The rule is used with the permission of the NCCI and is modified to conform to the requirements of the Ohio administrative code and the bureau of workers' compensation. Where the NCCI scopes of basic manual classifications contains additional rules and information relating to the reporting of payroll or classification of industries under the manual classifications, such scopes and rules shall apply under the rules of the bureau of workers' compensation, unless otherwise specifically excepted.

#### Classification system.

The purpose of the classification system is to group employers with similar operations into classifications so that:

The assigned classification reflects the exposures common to those employers.

The rate charged reflects the exposure to loss common to those employers.

Subject to certain exceptions, it is the business of the employer within a state that is classified, not separate employments, occupations or operations within the business.

#### Explanation of classifications.

Classifications are divided into two types – basic classifications and standard exception classifications.

#### Basic classifications.

Basic classifications describe the business of an employer. This term is applied to all classifications listed in this manual, except for the standard exception classifications.

Examples of classifications that describe the business of the employer include:

Business: manufacture of a product = classification: furniture manufacturing.

Business: a process = classification: engraving.

Business: construction or erection = classification: carpentry.

Business: a mercantile business = classification: hardware store.

Business: a service = classification: beauty salon.

Standard exception classifications.

Standard exception classifications describe occupations that are common to many businesses. These common occupations are not included in a basic classification unless specified in the classification working. The standard exception classifications are described below.

Clerical office or drafting employees NOC (code 8810); clerical office or drafting telecommuter employees (code 8871).

The above classifications are assigned when all the following conditions are met: the basic classification(s) wording applicable to the business does not include clerical office, drafting or telecommuting employees; other rules do not prohibit the assignment of code 8810 or code 8871; and the employee meets the duties, site and other requirements listed below:

Duties.

Duties must be limited to one or more of the following work activities:

Creation or maintenance of employer records, correspondence, computer programs, files.

Drafting.

Telephone duties, including telephone sales.

Data entry or word processing.

Copy or fax machine operations, unless the insured is in the business of making copies or faxing for the public.

General office work similar in nature to the above.

Site.

Code 8810 – the duties above must take place in a work station that is separated from the operative hazards of:

\* \* \*

(b) Drivers, chauffeurs and their helpers NOC – commercial (code 7380).

This classification is assigned to employees who perform work on or in connection with a vehicle. This code includes garage employees and employees using bicycles as part of their work duties. Duties include, but are not limited to, delivering goods owned by the employer.

Code 7380 does not apply when the basic classification wording includes drivers.

\* \* \*

(C) Classification wording.

\* \* \*

"NOC" means "not otherwise classified." If the classification wording uses the term "NOC", that classification applies only if no other classification more specifically describes the insured's business.

\* \* \*

(D) Classification procedures.

The purpose of the classification procedure is to assign the one basic classification that best describes the business of

the employer within a state. Subject to certain exceptions described in this rule, each classification includes all the various types of labor found in a business.

It is the business that is classified, not the individual employments, occupations or operations within the business.

\* \* \*

(F) Payroll assignment: interchange of labor.

Some employees may perform duties directly related to more than one properly assigned classification according to paragraph (D)(3) of this rule. Their payroll may be divided among the properly assigned classifications provided that:

The classifications can be properly assigned to the employer according to the rules of the classification system, and

The employer maintains proper payroll records, which show the actual payroll by classification for that individual employee.

Records must reflect actual time spent working within each job classification and an average hourly wage comparable to the wage rates for such employees within the employer's industry.

Estimated or percentage allocation of payroll is not permitted.

**Note:** if payroll records do not show the actual payroll applicable to each classification, the entire payroll of the individual employee must be assigned to the highest rated classification that represents any part of his or her work.

{¶40} As earlier noted, relator contends that the bureau abused its discretion by ordering that relator report the payroll of its product technicians under manual 7380 rather than 8017. More specifically, relator argues:

The Bureau incorrectly classified Relator's production technicians under Code 7380 Drivers, Chauffeurs,

Messengers and Their Helpers NOC-Commerical. \* \* \* Pursuant to the Scopes Manual, the description of Code 7380 is a "not otherwise classified" ("NOC") classification. \* \* \* An NOC classification means that Code 7380 "shall apply to an insured's operation(s) only when no other classification more specifically describes the insured's operation(s) or when a classification applicable to an insured's operation that includes driving does not include the type of driving being performed." \* \* \* The Bureau classification of Relator's production technicians under Code 7380 is in error because Code 8017 more specifically describes the work performed by Relator's production technicians. \* \* \*

Relator's production technicians are involved in the retail sale of items that do not fall within one of the specialty store classifications. \* \* \* Their duties primarily involve the set-up and display of sale items in the store, such as residential and office furniture and household electronics and appliances, as well as maintenance and repair of those items. \* \* \* The delivery of merchandise is only ancillary to the [sic] these primary duties, as the Bureau itself recognized in the early 1990s when it assigned Aaron Rents' production technicians the manual classification code 8810.

Relator agrees that assigned manual classification codes can and should change based on changes in the business or the law. However, a catch-all "NOC" classification is still not proper when there currently exists a more specific classification applicable to an employee's job duties.

Although not controlling, it is also instructive to note that Relator's national carrier, Travelers Insurance Company ("Travelers"), utilizes the more appropriate Code 8017 for classification of the Company's production technicians. Travelers is familiar with Relator's business as a result of conducting audits nationwide. As a result of Travelers' annual audits, its has maintained the classification of Relator's production technicians under 8017 due to the fact that the majority of Relator's revenues, in the last ten years, have been generated through electronic sales rather than furniture sales, and as such, furniture delivery has correspondingly decreased.

The Bureau cannot simply apply the default manual classification code 7380 when code 8017, by definition, encompasses Relator's production technicians. The danger in permitting this type of misclassification is that Ohio employers will be charged higher workers' compensation premiums because the incorrect code carries a higher risk value than what the employer actually qualifies for; as is the case with Aaron Rents.

(Relator's brief, at 5-6. Emphasis sic.)

{¶41} In response to relator's argument, respondent argues:

Aaron's contention that the BWC has incorrectly classified its "product technicians" under Code 7380 is completely unsubstantiated. Aaron indicates that the duties of the "product technicians" "primarily involve the set-up and display or sale items in the store, such as residential and office furniture and household electronics and appliances, as well as maintenance and repair of those items" and the "delivery of merchandise." \* \* \* In support of its argument, Aaron relies on its own past history of reporting and upon Code 8017 being used by Travelers Insurance Company, Aaron's national carrier, for the workers' compensation premium it pays in other states. Neither argument has merit.

Aaron had been reporting its "product technicians" under Code 8044, that for furniture stores and their drivers. \* \* \* The auditor for the 2008 audit reported:

The risk was not reporting correctly – it had placed into manual 8044 its Production Techs, Warehouse, long haul drivers, warehouse manager and Service Techs. Under 8810 it had placed all other employees. This included all the store managers and employees who worked in the store, as well as all the regional staff.

\* \* \* The BWC, thus, discontinued the Code 8044 since the nature of Aaron's business had changed: the business was in a "trend toward the electronics and items which would be rated under manual 8017," e.g., stereos, VCRs, big screen televisions, computers, etc. \* \* \* Aaron does not dispute the assignment of Code 8017, over Code 8044, for its primary business pursuit. It, however, maintains that all of the payroll

for its product technicians should be reported under Code 8017.

The BWC acknowledges that, generally, the product technicians would fall under Code 8017. However, NCCI and BWC rules require that "delivery" be separately rated. \* \* \*

\* \* \*

\* \* \* Aaron's product technicians' payroll can, in fact, be reported under Code [8017] for the time that they are not performing delivery functions.

Aaron, nonetheless, contends that, since Code 7380 is designated as an "NOC" ("not otherwise classified") classification, the total payroll of these employees must be reported under Code 8017 which, it claims, more specifically describes the work they do. This, however, ignores the obligatory requirements of usage of Code 7380. Code 7380 is described as:

[C]ommercial drivers, chauffeurs, messengers, and their helpers provided they are not otherwise classified in the Basic Manual. These employees are common to many businesses and are Standard Exceptions assigned to Code 7380 unless they are specifically included within the phraseology of a basic classification applicable to a risk.

(Emphasis added.) \* \* \* Ohio Adm.Code 4123-17-08(B)(2)(b), one of the standard exception classifications, lists Code 7380 for drivers, chauffeurs and their helpers, whose "[d]uties include, but are not limited to, delivering goods owned by the employer." Again, the BWC has afforded Aaron the opportunity to segregate out the payroll of these employees only for the time in which they are engaged in delivery. Otherwise, the product technicians' payroll is reported under Code 8017.

Regarding Aaron's suggestion that Travelers Insurance Company utilizes Code 8017 for the coverage provided for other states, a BWC representative had explained to counsel for Aaron:

Based on rule 4123-17-08 and the Ohio revised code the BWC is required to follow the NCCI system of classifications. Travelers Insurance may not have the same statutory restriction and has some additional latitude with how they rate or approach their larger clients.

\* \* \* In its order, the Adjudicating Committee rightly remarked: "The manner in which a private insurance carrier in a jurisdiction other than Ohio classifies drivers is not a consideration for this Committee." \* \* \* Clearly, Travelers' standards and practices cannot be imposed on the BWC for the workers' compensation coverage maintained by Aaron for its Ohio operations.

(Respondent's brief, at 5-8.)

{¶42} The magistrate agrees entirely with respondent on this matter on the issue of manual 7380.

{¶43} As respondent acknowledges, generally, the product technicians would fall under manual 8017, but NCCI and bureau rules require that delivery be separately rated. Relator does not dispute respondent's point but here attempts to minimize the delivery component of the product technicians' job by characterizing the delivery component as "ancillary" to their primary duties. (Relator's brief, at 5.) The magistrate notes that relator fails to point to any portion of the Ohio Administrative Code or the NCCI code that permits all of the payroll of a product technician to be reported under manual 8017 when the delivery component of the job can be factually determined to be "ancillary" to the primary duties. But as respondent is careful to point out, the bureau's rules do permit the employer an opportunity to segregate the payroll based on actual delivery time.

{¶44} The magistrate agrees with respondent that the NCCI manual assigned by Travelers Insurance Company ("Travelers") for the workers' compensation coverage provided to relator in its non-Ohio operations is not germane to the question here of whether the bureau abused its discretion. Even relator concedes here that what Travelers is doing is "not controlling." (Relator's brief, at 6.)

{¶45} As earlier noted, the second issue is whether the bureau abused its discretion in refusing relator's request that the audit findings be applied prospectively only.

{¶46} Ohio Adm.Code 4123-17-17(C) states:

\* \* \* The bureau shall also have the right to make adjustments as to classifications, allocation of wage expenditures to classifications, amount of wage expenditures, premium rates or amount of premium. \* \* \* Except as provided in rule 4123-17-28 of the Administrative Code, no adjustments shall be made in an employer's account which result in increasing any amount of premium above the amount of contributions made by the employer to the fund for the periods involved, except in reference to adjustments for the semi-annual or adjustment periods ending within twenty-four months immediately prior to the beginning of the current payroll reporting period. The twenty-four month period shall be determined by the date when such errors affecting the reports and the premium are brought to the attention of the bureau by an employer through written application for adjustment or from the date that the bureau provides written notice to the employer of the bureau's intent to inspect, examine, or audit the employer's records.

{¶47} At oral argument before this magistrate, it was respondent's position that the bureau had the discretion to grant relator's request that the audit findings be applied only prospectively, but that, in the instant case, the bureau simply chose not to grant the

request even though Ohio Adm.Code 4123-17-17(C) permits "back billing" by the bureau within the two-year retrospective period described in that rule.

{¶48} Accepting the bureau's position that it has this discretion, the magistrate notes that the order of the adjudicating committee fails to address relator's request that the audit findings be applied only prospectively. What the adjudicating committee did was limit the retrospective application of the audit findings to the payroll period from January 1, 2006 through December 31, 2007.

{¶49} Recently, in *State ex rel. Craftsmen Basement Finishing Sys., Inc. v. Ryan*, 121 Ohio St.3d 492, 2009-Ohio-1676, ¶15, 18, the court states:

{¶15} We have long recognized the bureau's considerable expertise and experience in premium-related matters. *State ex rel. Reagh Constr. Co. v. Indus. Comm.* (1928), 119 Ohio St. 205, 209, 162 N.E. 800; *State ex rel. Minutemen, Inc. v. Indus. Comm.* (1991), 62 Ohio St.3d 158, 161, 580 N.E.2d 777. That expertise, however, does not supersede the duty this court has imposed upon the Industrial Commission and the bureau to adequately explain their decisions. In *State ex rel. Mitchell v. Robbins & Myers, Inc.* (1983), 6 Ohio St.3d 481, 6 OBR 531, 453 N.E.2d 721, we held that the Industrial Commission of Ohio must properly explain its decisions, and in *State ex rel. Ochs v. Indus. Comm.* (1999), 85 Ohio St.3d 674, 710 N.E.2d 1126, we imposed that same duty on the bureau.

{¶18} The administrator's position seems to imply that in premium-related matters, if the bureau says something is so, it is so, and that is explanation enough. Ochs, however, reiterated that "[t]he purpose of an explanation requirement is 'to inform the parties and potentially a reviewing court of the basis for the [agency's] decision.'" 85 Ohio St.3d at 675, 710 N.E.2d 1126, quoting *State ex rel. Yellow Freight Sys., Inc. v. Indus. Comm.* (1994), 71 Ohio St.3d 139, 142, 642 N.E.2d 378. The sufficiency of the bureau's order must, therefore, be measured against a larger audience than just

that agency, and what may be self-explanatory to the bureau may not be self-explanatory to others.

{¶50} Here, respondent attempts to provide this court with an explanation of why the bureau denied relator's request for a prospective only application of the audit findings:

Aaron \* \* \* was reporting the payroll of its store managers and employees who worked in the store, and its regional staff, under Code 8810. It should have been obvious to Aaron that it was not accurately reporting a considerable portion of its payroll for many, many years, and it has no legitimate reason to now complain about having to make up only two of those years.

(Respondent's brief, at 11.)

{¶51} While respondent invites this court to conclude that relator was at fault in reporting its payroll under manual 8810 and 8044 for many years, that is not a finding made by the bureau's adjudicating committee nor the administrator's designee. Accordingly, this court must decline respondent's invitation to make such a finding for respondent in this action.

{¶52} The magistrate notes that respondent has quite accurately pointed out that the NCCI code and bureau rules permit the employer "the opportunity to segregate out the payroll of these employees only for the time in which they are engaged in delivery."  
(Respondent's brief, at 7.)

{¶53} However, during the audit period at issue here, i.e., January 1, 2006 through December 31, 2007, it is at least arguable that relator had no opportunity to segregate its payroll for the delivery time because during that period relator was not

reporting any of its payroll under manual 7380. On the other hand, prospectively, relator is afforded this opportunity that respondent points out.

{¶54} It is not the duty of this court to determine whether a prospective only application of the audit findings can be justified. That was the duty of the bureau in its adjudication of this matter.

{¶55} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering respondent to adjudicate relator's request for a prospective only application of the audit findings, and to enter an amended order that renders a determination in compliance with the law set forth in *Craftsmen*, as quoted above.

/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).