

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Community Living Experiences, Inc.,	:	
	:	
Relator,	:	No. 11AP-132
	:	
v.	:	(REGULAR CALENDAR)
	:	
Stephen Buehrer, Administrator, Ohio	:	
Bureau of Workers' Compensation,	:	
	:	
Respondent.	:	

D E C I S I O N

Rendered on April 19, 2012

David M. Buda, for relator.

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

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶ 1} In this original action, relator, Community Living Experiences, Inc., requests a writ of mandamus ordering respondent, Ohio Bureau of Workers' Compensation ("BWC"), to reinstate relator's original manual classification for purposes of workers' compensation premiums.

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings

of fact and conclusions of law, which is appended hereto. The magistrate determined that BWC did not abuse its discretion by reclassifying relator from code 8864 (titled "Social Services Organization—All Employees & Salespersons, Drivers") to codes 8835 ("Home, Public and Traveling Healthcare—All Employees") and 8842 ("Group Homes—All Employees & Salespersons, Drivers"). The magistrate also found that BWC provided an adequate explanation for the reclassification. Accordingly, the magistrate recommended that this court deny the requested writ of mandamus.

{¶ 3} Relator now presents the following four objections for our consideration:

A. IN FINDING OF FACT NUMBER 2, THE MAGISTRATE ERRONEOUSLY FOUND THAT THE RELATOR PROVIDES HOME HEALTH CARE.

B. THE MAGISTRATE'S CONCLUSIONS OF LAW FAILED TO ADDRESS THE ISSUE OF WHETHER THE RESPONDENT ADEQUATELY EXPLAINED ITS REASON FOR RECLASSIFYING RELATOR'S EMPLOYEES UNDER MANUAL 8835.

C. THE MAGISTRATE ERRONEOUSLY CONCLUDED THAT THE RESPONDENT DID NOT ABUSE HIS DISCRETION IN RECLASSIFYING RELATOR USING MANUAL 8835.

D. THE MAGISTRATE ERRONEOUSLY CONCLUDED THAT RELATOR'S ARGUMENT WAS BASED UPON AN NAICS CODE RATHER THAN A NCCI CODE.

{¶ 4} For ease of discussion, we will address relator's objections out of order.

{¶ 5} Relator's second objection argues that the magistrate failed to address whether the BWC adequately explained the reason for its decision to reclassify relator under code 8835. We disagree. In its decision, the magistrate expressly found that the BWC's "explanation and rationale were sufficient" based on the order issued by the adjudicating committee, which was later affirmed by the administrator's designee. (Magistrate's Decision, ¶ 35.) According to the magistrate, the order explained why relator's operations were best described in code 8835 because relator provided its clients the same services as those defined in the code, such as skill development, transportation,

personal hygiene, dressing, feeding, cooking, shopping, cleaning, laundry, and companion care. Thus, relator's second objection is overruled.

{¶ 6} Relator's third objection raises the same argument that was presented to, and sufficiently addressed by, the magistrate, i.e., that its reclassification under code 8835 was an abuse of discretion. Specifically, relator claims that code 8835 applies only to "well trained, licensed employees who routinely perform minor surgical procedures engendering contact with bodily fluids and infectious situations." (Relator's Objections, 5.) However, as the magistrate properly concluded, code 8835 also governs businesses that provide assistance in the activities of daily living, such as personal hygiene, dressing, cooking, shopping, and housekeeping. Because relator does not dispute the definition relied on by the magistrate, and because relator admittedly assists its clients with activities such as hygiene, cooking, and cleaning, we agree with the magistrate and find no abuse of discretion in the BWC's reclassification. Relator's third objection is therefore overruled.

{¶ 7} Relator's fourth objection disputes the magistrate's comment that relator mistakenly relied on a version of code 8835 established by the North American Industry Classification System ("NAICS") rather than the statutorily required categories established by the National Council on Compensation Insurance ("NCCI").¹ However, whether or not relator quoted from the NAICS code rather than the NCCI code, relator does not challenge the portion of code 8835 relied on by the magistrate. Because we agree with the magistrate's analysis of NCCI code 8835, relator's fourth objection is overruled.

{¶ 8} Finally, we turn to relator's first objection, which purports to challenge the magistrate's factual finding that relator "also provides private home health care." (Magistrate's Decision, ¶ 17.) Relator argues that its services do not constitute "health care" and, without providing an alternate definition of the phrase, seems to rely on the definition set forth in code 8835. For the reasons stated above, we agree that the BWC did not abuse its discretion in reclassifying relator under that code. Accordingly, relator's first objection is overruled.

¹ See R.C. 4123.29(A)(1) (requiring such classifications to be based on the categories established by the NCCI).

{¶ 9} Upon review of the magistrate's decision, an independent review of the record, and due consideration of relator's objections, we find the magistrate has properly determined the pertinent facts and applied the appropriate law. We therefore adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein.

{¶ 10} Accordingly, relator's objections to the magistrate's decision are overruled, and the requested writ of mandamus is hereby denied.

*Objections overruled;
writ of mandamus denied.*

TYACK and DORRIAN, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Community Living Experiences, Inc.,	:	
Relator,	:	
v.	:	No. 11AP-132
Stephen Buehrer, Administrator, Ohio	:	(REGULAR CALENDAR)
Bureau of Workers['] Compensation,	:	
Respondent.	:	

MAGISTRATE'S DECISION

Rendered on November 16, 2011

David M. Buda, for relator.

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

IN MANDAMUS

{¶ 11} Relator, Community Living Experiences, Inc., has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Stephen Buehrer, Administrator, Ohio Bureau of Workers' Compensation ("BWC"), to return relator to its original classification for purposes of determining premiums instead of allocating relator's payroll to two different classifications.

Findings of Fact:

{¶ 12} 1. The codes referred to are from the National Council on Compensation Insurance ("NCCI") and are used by the BWC to place employers under the proper code for purposes of determining the premiums the employer owes.

{¶ 13} 2. Relator owns and operates group homes and also provides private home health care. Relator serves clients both on-site as well as in the clients' homes. Relator's original classification was Code 8864.

{¶ 14} 3. The BWC audited relator for the period January 1 to December 31, 2008.

{¶ 15} 4. In September 2009, the BWC notified relator its Code 8864, Social Services Organization, had been inactivated as of July 1, 2009 and replaced with Codes 8842 Group Homes and 8835 Home-Public & Traveling Healthcare as of January 1, 2009. Because relator provided services both on-site and in the clients' homes, Code 8842 would no longer be proper for those employees servicing clients in their homes. Code 8835 applies to providers who assist clients in their own homes. Relator's employees were to be classified under two codes instead of one. Code 8835 carried with it a higher rate applicable to relator's premiums.

{¶ 16} 5. In March 2010, relator requested that BWC remove Code 8835 from its payroll, and assign only Code 8842 since it was comparable to relator's original code designation.

{¶ 17} 6. The BWC's adjudicating committee held a hearing on March 4, 2010. Relator argued that the home health care aides do not administer medications and are neither nurses nor physical therapists. The BWC argued that while relator owns and

operates group homes, relator also provides private home health care. The BWC argued that, because the private home health care was performed outside the group home, it could not be rated with the group home classification, but must be classified with the code which describes the work done at the client's location.

{¶ 18} 7. The adjudicating committee held that the classification of Code 8835 was appropriate, finding, as follows:

* * * The employer's operations are best described by this classification. The services provided by the home health care aid [sic] are, skill development, transportation of clients, helping clients with personal hygiene, dressing, feeding, cooking, shopping and light duty cleaning, laundry, and companion care, at the client's home. These operations are best described in manual 8835. The Committee finds that the bureau has properly applied NCCI classifications pursuant to RC 4123.29. While the title of the section does not include all of the occupations described within the section, the descriptions in the body of the manual classification clearly do. This is the appropriate classification for the work activity described. The appeal is denied.

{¶ 19} 8. Relator appealed pursuant to R.C. 4123.291 and, on May 18, 2010, the administrator's designee held a hearing. The administrator's designee mailed a final order on May 20, 2010, affirming the adjudicating committee's "findings, decision, and rationale set forth in the order."

{¶ 20} 9. Relator filed the instant mandamus action in this court on February 11, 2011, arguing that the BWC abused its discretion when it classified relator under Code 8835 and failed to adequately explain its reasoning for the reclassification.

Conclusions of Law:

{¶ 21} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to

the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28.

{¶ 22} For workers' compensation premiums, every business is classified by the degree of hazard and placed into a corresponding category, commonly referred to as a manual classification. In 1993, the legislature required the BWC to replace its system and to categorize employer operations with the classifications used by the NCCI. See R.C. 4123.29(A)(1); Am.Sub.H.B. No. 107. 145 Ohio Laws, 3113. R.C. 4123.29 provides:

(A) The administrator of workers' compensation, subject to the approval of the bureau of workers' compensation board of directors, shall do all of the following:

(1) Classify occupations or industries with respect to their degree of hazard and determine the risks of the different classes according to the categories the national council on compensation insurance establishes that are applicable to employers in this state[.]

{¶ 23} Ohio Adm.Code 4123-17-08(A) provides that the purpose of the classification system is to group employers with similar operations into classifications to reflect the exposure common to those employers and the rate charged reflects the exposure to loss common to those employers. Ohio Adm.Code 4123-17-08(D) provides as follows:

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.

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

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).

* * *

* * * "The 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. * * *

Id. at ¶17-20.

{¶ 25} In *State ex rel. Progressive Sweeping Contrs., Inc. v. Ohio Bur. of Workers' Comp.*, 68 Ohio St.3d 393, 396, 1994-Ohio-303. the Supreme Court of Ohio stated, as follows:

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.

In spite of this deference, the court in *Progressive Sweeping* issued a writ of mandamus against the BWC. 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.*

{¶ 26} Subsequently, in *State ex rel. Ochs v. Indus. Comm.*, 85 Ohio St.3d 674, 675, 1999-Ohio-294, the court stated, as follows:

* * * The bureau claims that it has no duty to explain its decision because no statute specifically imposes one. It seeks to distinguish cases such [as] *State ex rel. Mitchell v. Robbins & Myers, Inc.* (1983), 6 Ohio St.3d 481, 6 OBR 531, 453 N.E.2d 721; *State ex rel. Noll v. Indus. Comm.* (1991) 57 Ohio St.3d 203, 567 N.E.2d 245; and *State ex rel. Yellow Freight Sys., Inc. v. Indus. Comm.* (1994), 71 Ohio St.3d 139, 642 N.E.2d 378, by observing that those cases involved the Industrial Commission of Ohio, which did, and continues to, have a statutory duty under former R.C. 4123.515 to explain its decisions.

{¶ 27} The court in *Ochs* held that the absence of a statute imposing a duty on the BWC to explain its reasoning does not excuse the BWC from having to explain its decision. As such, the duty to explain its decision applies to the BWC, as well as the commission, which does have a statutory duty.

{¶ 28} Relator contends that Code 8842 more accurately describes the activities of relator's employees rather than Code 8835. Relator asserts that virtually none of the

principle health care activities described in Code 8835 apply to relator's employees. As such, relator argues that the BWC abused its discretion when relator's code designation was changed without an appropriate explanation.

{¶ 29} Code 8842 is titled "Group Homes—All Employees & Salespersons, Drivers" and "[i]ncludes group homes, group foster homes, halfway houses that provide rehabilitation services, shelters, and independent supportive living homes for mentally, physically or emotionally challenged individuals. Juvenile detention centers, "boot camps," and halfway houses for convicts are to be separately rated to Code 7720. Detoxification, treatment, and rehabilitation of alcoholics or narcotic addicts are separately rated to the appropriate hospital classification codes." The description for Code 8842 includes the following:

One of the key components of Code 8842 is the client's need to stay overnight at the facility for the duration of the program or until they no longer need living assistance. Clients are placed into or referred to the group home that can provide assistance for their specific hardships. House parents or counselors live with a limited number of clients in the group home setting and manage the facility. The counselors may also supervise the clients during the day or check in with them periodically throughout the day.

Group homes, orphans' or children's homes, rescue missions, temporary shelters for abused persons, and training centers for youths, adults, or physically, mentally, or emotionally handicapped clients are included in Code 8842. The clients are taught how to live with one another and perform daily living chores such as laundry, housekeeping, and meal preparation. Services provided include but are not limited to counseling, limited medical treatment, and occupational or scholastic training for job placement. These services may be provided in the group home or at another location (medical or psychiatric). Clients may be sent to another location during the day to work. Any services provided away from the group home must be separately rated.

Employees include but are not limited to house parents; counselors; cooks; drivers; housekeepers; laundry, security, and maintenance personnel; personal care attendants; nurses' aides; job coaches or demonstrators; and trainers for work performed in the group home settings. Employees may perform multiple duties at the group home as needed.

{¶ 30} The evidence demonstrates that some of relator's activities include helping clients on-site, at relator's facility. Because Code 8842 pertains to on-site care of clients, relator does not challenge the applicability of Code 8842. Relator argues that none of its services can be classified under Code 8835.

{¶ 31} Code 8835 is titled "Home, Public and Traveling Healthcare—All Employees" and is described, as follows:

Code 8835 is assigned to both public and privately owned businesses that provide physical assistance in the activities of daily living such as physically assisting a household member with walking or using prescribed equipment; physically assisting a household member with bowel or bladder needs; physically assisting a household member with bathing, personal hygiene, dressing, or grooming; physically assisting a household member with meal preparation, eating, and clean-up; physically assisting in transferring a household member in and out of bed; and physically assisting in the body repositioning of a household member. Duties may also include performing household duties such as cooking, laundry, shopping, and housekeeping. The home healthcare aide or personal care provider may occasionally check patients' pulse rates and temperatures, organize medications, empty bedpans, and clean catheters.

{¶ 32} The BWC is afforded a wide range of discretion in assigning code classifications. *State ex rel. Aaron Rents, Inc. v. Ohio Bur. of Workers' Comp.*, 129 Ohio St.3d 130, 132, 2011-Ohio-3140, ¶10, quoting *Progressive Sweeping* at 396. A single employer may have multiple classifications assigned to it, and a single classification may contain multiple occupations. If that were not so, the number of classifications would be

unmanageable. *Progressive Sweeping* at 395. Further, even if two separate classification codes might be applicable, the decision as to which to assign remains within the discretion of the BWC. *State ex rel. RMS of Ohio, Inc. v. Ohio Bur. of Workers' Comp.*, 113 Ohio St.3d 154, 2007-Ohio-1252. In the absence of arbitrary, capricious or discriminatory decisions, the court will uphold them. *State ex rel. Cafaro Mgt. Co. v. Kilmeyer*, 113 Ohio St.3d 1, 2007-Ohio-968.

{¶ 33} Relator argues that "[a] reading of 8835 supports that conclusion since that manual, on its face, clearly states that it applies to licensed health care workers such as nurses and therapists who provide actual medical services such as wound care, intravenous medication and physical therapy." (Relator's brief, at 7.) However, the language quoted by relator does not come from NCCI Code 8835. It appears that relator is mistakenly referring to the North American Industry Classification System ("NAICS") Code, which is not to be used for workers' compensation purposes and not from the NCCI code description. There is no evidence in the record to indicate that the BWC mistakenly utilized the NAICS designation. To the contrary, the BWC applied the proper NCCI Code 8835, which applies to off-site activities, to relator's operations. As stated in the order from the Adjudicating Committee following the hearing:

* * * The employer's operations are best described by this classification. The services provided by the home health care aid [sic] are, skill development, transportation of clients, helping clients with personal hygiene, dressing, feeding, cooking, shopping and light duty cleaning, laundry, and companion care, at the client's home. These operations are best described in manual 8835. The Committee finds that the bureau has properly applied NCCI classifications pursuant to RC 4123.29. While the title of the section does not include all of the occupations described within the section, the descriptions in the body of the manual

classification clearly do. This is the appropriate classification for the work activity described. The appeal is denied.

As quoted, the NCCI description applies to relator's employees.

{¶ 34} One of the key components of Code 8842 is the client's need to stay overnight at the facility for the duration of the program. That code is clearly appropriate for a group home. The clients come to the facility where relator's employees work. However, Code 8835 applies to a provider who travels to a client's home to provide health care services. The employees leave the facility and provide services in the home of the client. Relator describes its workers' activities by acknowledging that "our Consumers may receive our services in either a Group Home (company leased) setting, or Supportive Living (the Consumers' personal residence) site." The administrator in the order acknowledged that relator's workers provided care for the clients in the clients' homes. Thus, Code 8842 cannot cover all of relator's employees. The magistrate finds that relator has not established that the administrator abused its discretion in choosing two manual codes to describe the different services provided by relator.

{¶ 35} Relator also argues that the administrator abused his discretion in reclassifying relator without an adequate explanation. However, the administrator's designee affirmed the Adjudicating Committee's decision based on the rationale set forth in that order which did set forth that some of relator's operations are best described by Code 8835. That order explained that certain services provided by some of relator's employees include skill development, transportation of clients, helping clients with personal hygiene, dressing, feeding, cooking, shopping, cleaning, laundry, and

companion care. These duties are completed at the client's home. The magistrate finds that the explanation and rationale were sufficient and no abuse of discretion occurred.

{¶ 36} Finally, relator argues in passing that all its employees should be returned to Code 8864, the code under which it was previously classified. Code 8864 is titled "Social Services Organization—All Employees & Salespersons, Drivers," and is described, as follows:

Code 8864 applies to institutions that provide charitable, welfare, or social services to mentally, physically, or emotionally challenged persons, troubled youth, children in crisis, abused persons, persons with financial and employment hardships, and individuals performing drug-or alcohol-related community service. Charitable, welfare, or social service organizations may offer these individuals meals, on-site counseling, case management or client assessments, education, vocational training, and employment. Risks classified to Code 8864 may offer limited medical services such as first aid but not significant medical treatment typically found in hospitals.

Employees assigned to Code 8864 include but are not limited to counselors; resource and referral specialists; case managers who coordinate services of organizations to benefit an individual or family; volunteer coordinators; outside welfare workers; classroom teachers who teach or demonstrate in a classroom environment; cooks; drivers; housekeepers; laundry, security, and maintenance personnel; and medical professionals such as physicians and nurses.

However, Code 8864 specifically excludes group homes with overnight accommodations and sets forth that group homes with overnight accommodations should be classified to Code 8842. Thus, we find no abuse of discretion in the new classification. To prevail in mandamus, relator must show a clear legal right to inclusion only in Codes 8864 or 8842 and has not done so.

{¶ 37} In its reply brief, relator makes several new arguments. New arguments raised in a reply brief that were not raised in an initial brief are not generally considered. See *City of Columbus v. Aleshire*, 187 Ohio App.3d 660, 2010-Ohio-2773; *State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110, 2008-Ohio-5041; *State ex rel. Grounds v. Hocking Cty. Bd. of Elections*, 117 Ohio St.3d 116, 2008-Ohio-566.

{¶ 38} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the BWC has abused its discretion in reclassifying relator or briefly explaining why relator's operations are best described by the reclassified codes. Accordingly, for all of the above reasons, this court should deny relator's request for a writ of mandamus.

/s/ Stephanie Bisca Brooks

STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

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