[Cite as *State ex rel. Access/GWC, Inc. v. Ohio Bur. of Workers' Comp.*, 2010-Ohio-5076.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Access/GWC, Inc.,	:	
Relator,	:	
v.	:	No. 09AP-958
Ohio Bureau of Workers' Compensation,	:	(REGULAR CALENDAR)
Respondent.	:	

D E C I S I O N

Rendered on October 19, 2010

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

Richard Cordray, Attorney General, and *Andrew J. Alatis,* for respondent.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

BRYANT, J.

{¶1} Relator, Access/GWC, Inc., is an Ohio Adm.Code 4123-17-62 sponsoring organization that applied for and obtained from respondent, Ohio Bureau of Workers' Compensation, a group experience rating for the 2005 rating year on behalf of its employer clients participating in group No. A NBC3 CS. In 2008, the bureau re-rated the group for the 2005 rating year. Relator requests a writ of mandamus that orders respondent to vacate its orders denying its protest of the re-rate and to enter an order that vacates the group re-rate for the 2005 rating year.

{¶2} Relator premises its request on claims respondent promised not to re-rate the group for the 2005 rating year, as evidenced by the block or override respondent imposed. Relator asserts respondent, contrary to its promise, reneged on its promise and re-rated the group for the 2005 rating year.

I. Procedural History

{¶3} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended to this decision. Although the magistrate questioned whether "the bureau had the authority to determine the existence of a binding oral contract or promissory estoppel and to enforce a promise through its administrative proceedings," the magistrate concluded that on the evidence presented "the bureau was not compelled to find a binding oral contract or promissory estoppel," the bases on which relator sought mandamus relief. (Mag. Dec., ¶40.) Accordingly, the magistrate determined the requested writ should be denied.

II. Objections

{¶4} Relator filed two objections to the magistrate's conclusions of law:

> 1. The Magistrate Erred by Finding that Relator was Asking the Court to Create the Legal Duty Under Which the Writ of Mandamus was Sought.
>
> 2. The Magistrate Erred by Permitting the BWC to Breach an Oral Contract with Relator and to Avoid its Promise to Relator, and Then to Use Its Own Administrative Proceedings to Validate the Re-Rating of Relator's Group Without the Required Adequate Explanation For Doing So.

We address the objections out of order for ease of discussion.

A. Second Objection—Oral Contract and Promissory Estoppel

{¶5} Relator's second objection reargues the matters adequately addressed in the magistrate's decision. The second objection contends the magistrate wrongly allowed the bureau to breach an oral contract with relator and to avoid a promise made to relator that a re-rate of the 2005 rating year would not occur.

{¶6} As the magistrate noted, "relator concedes there is no relevant correspondence (such as letters or e-mails etc.) or other documentation of discussions between relator and the bureau during the time that the bureau placed" the block or override. (Mag. Dec., ¶30.) Similarly, "none of the individuals who may have allegedly participated in any relevant discussions during the placement" of the block or override "appeared to testify before the bureau[;] nor was any witness subpoenaed to testify." (Mag. Dec., ¶30.) Rather, relator sought to establish an oral contract or promissory estoppel simply by virtue of the block or override itself.

{¶7} The magistrate properly pointed out that relator, in effect, "argues that the only inference to be drawn from the undisputed fact" that a block or override was placed "is that, for valid consideration, the bureau promised" the block or override "would be permanent, thus creating a binding oral contract." (Mag. Dec., ¶32.) Neither the adjudicating committee nor the administrative designee drew such an inference, and neither was required to do so on the evidence relator presented. Accordingly, the magistrate properly concluded the evidence was insufficient to demonstrate an oral contract or promise that could preclude the bureau from re-rating relator's clients. Relator's second objection is overruled.

B. First Objection—Legal Duty

{¶8} Relator's first objection contends the magistrate erred in concluding relator was asking the court to create the legal duty under which relator sought a writ of mandamus.

{¶9} We need not resolve relator's first objection. As the magistrate observed, "even if it could be argued that the bureau had the authority to determine the existence of a binding oral contract or promissory estoppel" and to enforce either the contract or promise through its administrative proceedings, the bureau did not find such a promise and "was not compelled to find a binding oral contract or promissory estoppel." (Mag. Dec., ¶40.) Because the bureau found no binding oral contract or promissory estoppel, we need not determine whether either a contract or promise would be enforceable through mandamus. Accordingly, our disposition of relator's second objection renders its first objection moot.

III. Disposition

{¶10} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the salient law to them insofar as the magistrate concludes the bureau was not compelled to find a binding oral contract or promissory estoppel on the evidence presented. Accordingly, we adopt the magistrate's decision to that extent and, in accordance with the magistrate's decision, we deny the requested writ of mandamus.

First objection moot; second objection overruled; writ denied.

KLATT and McGRATH, JJ., concur.

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Access/GWC, Inc.,	:	
Relator,	:	
v.	:	No. 09AP-958
Ohio 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 June 16, 2010

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

Richard Cordray, Attorney General, and *Andrew J. Alatis*, for respondent.

IN MANDAMUS

{¶11} Relator, Access/GWC, Inc., is an Ohio Adm.Code 4123-17-62 sponsoring organization that applied for and obtained from respondent, Ohio Bureau of Workers' Compensation ("bureau"), a group experience rating for the 2005 rating year on behalf of its employer clients participating in group No. A NBC3 CS ("the group"). In 2008, the bureau rerated the group for the 2005 rating year.

{¶12} In this original action, relator requests a writ of mandamus ordering respondent to vacate its orders denying its protest of the rerate and to enter an order that vacates the group rerate for the 2005 rating year.

Findings of Fact:

{¶13} 1. In 2006, the bureau completed an audit of several of relator's employer clients ("the Snider Blake Companies") participating in the group for the 2005 rating year. The audit determined that the Snider Blake Companies had improperly reported injury claims. Based upon the audit, the bureau transferred the injury claims to the correct policies. The transfer caused an adverse impact on the group's merit rating, resulting in a reduction in the group's discount rate from a 95 percent credit to an 84 percent credit.

{¶14} 2. Following the 2006 audit, relator successfully requested that the bureau remove the Snider Blake Companies from the group for the 2005 and 2006 rating years.

{¶15} 3. It is undisputed that, at the time the bureau granted relator's request to remove the Snider Blake Companies from the group, the bureau also placed a so-called EM[1] block/override on the group's 2005 rating year. The EM block/override had the effect of retaining the 95 percent credit for the 2005 rating year despite the adverse impact of the bureau's transfer of injury claims to their proper policies.

{¶16} 4. In 2008, the bureau conducted a statewide audit of all group rating pools. At that time, the bureau removed the EM block/override and retroactively rated the 2005 group. The rerate of the 2005 group requires the group members to pay additional sums of money to the bureau for their 2005 premiums.

[1] Apparently, "EM" refers to the term "experience modification." See Ohio Adm.Code 4123-17-62(G)(1)(a) and (b).

{¶17} 5. In March 2009, relator, acting as a third-party administrator ("TPA") for the group, filed a protest to be heard by the bureau's three-member adjudicating committee.

{¶18} 6. By letter dated April 3, 2009, the adjudicating committee coordinator scheduled a hearing for April 22, 2009.

{¶19} 7. Prior to the hearing, relator filed a "Position Statement" stating:

> I. Statement of Facts
>
> Access/GWC, Inc. ("Access") is an Ohio corporation located in Mason, Ohio and is engaged in third party administration of workers' compensation of Ohio employers. One of Access' functions is to facilitate group rating programs for employers. In July 2005, the Bureau of Workers' Compensation ("BWC") conducted an audit of one of Access' clients, a member of Group No. A NBC3 CS ("the group") sponsored by Access. The BWC's audit was not completed until May 2006. Pursuant to the audit, the BWC found the client was incorrectly reporting their claims. A transfer of claims occurred from one company to a number of companies that were represented by Access. When the claims transfer occurred, Access faced a dilemma in that the transfer of claims had a significant adverse impact on the merit rates of their group(s). Access requested that the employer be removed from the group. After negotiations with the BWC, the employer agreed to voluntarily withdraw from the group. After removal from the group, the removed member corrected their payroll reports and paid their corresponding premium obligations to the BWC.
>
> For the 2005 policy year, the removal of the now former client from the group created a problem for Access and its group member clients. Because this employer had a great deal of payroll, the group suffered a significant reduction in expected losses. This reduction caused the group to go from what was a maximum credibility position to a significantly reduced credibility. The result was that the group's discount dropped from a 95% credit to an 84% credit.
>
> Because of these changes, Access sought assurances from the BWC that the group discount would not be retroactively

changed. Because this occurred in early 2006, the 2005 group rate had already been published. However, at the time of the audit, the BWC auditor assured Access that their group program would not be re-rated as a result of the removal of a group member. Nearly three years later, despite the BWC's assurances, the BWC conducted a state-wide audit of all group rating pools and in fact went back and retroactively re-rated the group. The retroactive re-ratings of the 2005 groups have resulted in the Access group members paying significant amounts of additional premiums. Access and its member clients were penalized in this situation for something that was completely beyond their control. Access had no reason to know that the member client admitted to its groups would be audited by the BWC and that such a significant amount of claim liability would be transferred in. Faced with a "Catch-22" involving a claims transfer that would cause a catastrophic reduction in discount or a reduction in expected losses that would result in a significant reduction in discount, Access chose the only appropriate course of action and had the client withdraw from the group. Access sought reassurance from the BWC that the solution would not impact the existing program and actually received an assurance. However[,] that assurance did not survive the state-wide re-rate of the program.

II. Argument

Access respectfully requests that the Adjudicating Committee reverse the retroactive re-rate of the BWC relative to the 2005 policy year. In 2006, the "removed" member corrected its payroll reports and paid its back premium obligations to the BWC. Further, the BWC auditor assured Access that a re-rate of the 2005 rating year would not occur. The retroactive re-rate of the group caused a significant merit rate issue which was an unintended consequence of the member's removal from the group. Access requests that the BWC make good on its assurances to Access and vacate the retroactive re-rate of the group.

The BWC auditor represented to Access that the group would not be re-rated. Access relied on the BWC's representations and did not rearrange their groups to lessen the impact of the one member being removed from the group. True to the BWC's representations, the BWC did not process a re-rate initially nor did it do so in 2006 and 2007. However, in May 2008, the BWC processed a re-rate and as a result, all of the group's members have been penalized

> inappropriately. The inequity caused by the BWC's re-rate two years after the audit began can only be avoided by the BWC vacating the re-rate.
>
> The statutes and rules set forth in Chapter 4123 of the Ohio Revised Code and Ohio Administrative Code provide that the administrator has discretionary authority to act in the best interest of the fund. R.C. 4123.34 provides that "the administrator, in the exercise of the powers and discretion conferred upon the administrator…shall fix and maintain…the lowest possible rates of premium consistent with the maintenance of a solvent state insurance fund and the creation and maintenance of a reasonable surplus." R.C. 4123.30 further provides that premium monies paid by employers to the administrator constitutes a "public fund" and that "…and any amounts set aside to reinsure the liability of the respective insurance funds for the following payments, constitute a trust fund for the benefit of employers and employees." The fund that the administrator is entrusted with is comprised of all employers, including Access' group members. By law and as trustee of the fund, the administrator shall act in the best interest of the fund and not in a way which results in detrimental impact on the funds' beneficiaries—Access' members, especially when Access' member had no reason to know of the audit which would lead to the detrimental impact. In the instant matter, the fund would have been best served if the BWC would have allowed Access to transfer members from one group to another in order to protect such members.
>
> For all of the foregoing reasons, we request the Adjudicating Committee vacate the re-rate for the 2005 group or not bill or otherwise penalize the 2005 group members as a result of the re-rate by the BWC.

(Emphasis sic.)

{¶20} 8. Following an April 22, 2009 hearing, the adjudicating committee issued an order denying the protest. The adjudicating committee order explains:

> The facts of this case are as follows: The employer was removed from the 2005 group rating program. This removal was voluntary on the part of the employer and TPA. However, the removal caused the EM of the entire group's rates to go up. The TPA is now requesting a new employer

> be added to the group in order to make the group 100% credible.
>
> * * *
>
> The employer's representative stated that he represents Access-GWC and the employer. In 2005, there was a Bureau audit. The audit was completed in 2006. The audit found that the employer had filed claims. The auditor moved the claims to the policy where the employer had reported the payroll. The policies where the claims were transferred had an EM claim which impacted the groups in which the employer was participating. The Bureau agreed to not re-rate the 2005 group because of the audit findings against Snider Blake. The employer left the 2005 group rating. However, when S[ni]der Blake voluntarily left the 2005 group rating program, the group was not 100% credible and the rates went up for the entire group. The employer is therefore asking that a new employer be allowed entry into the 2005 group in order to get the group up to 100% credibility.
>
> The Bureau does not have any written correspondence [which] indicated the Bureau agreed not to re-rate the 2005 group. The only evidence the Bureau has was an agreement to remove the employer from the 2005 group rating program. Under OAC 4123-17-62, the Bureau does not have the authority to allow an employer to switch groups after the deadline date for group rating.
>
> Based upon the information submitted and the testimony elicited at the hearing, it is the decision of the Adjudicating Committee to DENY the employer's protest. There is no evidence that the Bureau promised not to re-rate this employer. Further, OAC 4123-17-62(A) does not allow the Bureau to add an employer into group rating after the deadline date. Therefore, the re-rate of the group after the removal of the referenced employer shall occur.

(Emphasis sic.)

{¶21} 9. Pursuant to R.C. 4123.291, relator administratively appealed the decision of the adjudicating committee to the administrator's designee.

{¶22} 10. Following a July 14, 2009 hearing, the administrator's designee issued an order affirming the decision of the adjudicating committee. The order explains:

> * * * At issue before the Administrator's Designee was the TPA's request that the removal of policy 1328607 not negatively impact the group's EM for the 2005 rating year.
>
> * * *
>
> 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 affirms the decision, findings, and rationale set forth in the order of the Adjudicating Committee.

{¶23} 11. On October 14, 2009, relator, Access/GWC, Inc., filed this mandamus action.

Conclusions of Law:

{¶24} It is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶25} Relator puts forth three propositions in support of its request for a writ of mandamus. Those propositions are captioned by relator in its brief:

> A. RESPONDENT BREACHED ITS ORAL PROMISE NOT TO RE-RATE RELATOR'S GROUP
>
> * * *
>
> B. RELATOR RELIED TO ITS DETRIMENT ON RESPONDENT'S PROMISE NOT TO RE-RATE AND SHOULD BE ESTOPPED FROM IMPLEMENTING THIS RETROACTIVE RE-RATE OF RELATOR'S GROUP
>
> * * *
>
> C. RESPONDENT FAILED TO ADEQUATELY EXPLAIN ITS DECISION TO REMOVE THE EM OVERRIDE AND THEN RETROACTIVELY RE-RATE THE ACCESS GROUP

(Relator's brief at 3, 4, and 6.)

{¶26} Relator's arguments under captions A and B shall be addressed together, as they are interrelated propositions.

{¶27} Relator asserts that it entered into a binding oral agreement or contract with the bureau or, alternatively, that the bureau is bound by the doctrine of promissory estoppel such that the bureau took on the duty to permanently maintain the EM block/override that would, in effect, permanently preclude a rerate of the 2005 rating period for the group.

{¶28} Relator cites to *McCroskey v. State* (1983), 8 Ohio St.3d 29, 30, wherein the court adopted the following definition of promissory estoppel:

> "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

{¶29} As for relator's oral contract theory, relator contends that "[a]s consideration for the BWC 'blocking' a re-rate, the offending member employer voluntarily removed itself from the Access Group." (Relator's brief at 3.) As for relator's promissory estoppel theory, relator contends that "BWC's promise not to re-rate the Access Group induced the offending group member to voluntarily withdraw from the Group without the BWC needing to resort to administrative proceedings to accomplish this." (Relator's brief at 4.)

{¶30} As for both theories, relator concedes there is no relevant correspondence (such as letters or e-mails etc.) or other documentation of discussions between relator and the bureau during the time that the bureau placed the EM block/override. Moreover, none of the individuals who may have allegedly participated in any relevant discussions

during the placement of the EM block/override appeared to testify before the bureau nor was any witness subpoenaed to testify.

{¶31} The key evidence of an oral contract or promissory estoppel put forth by relator is the EM block/override itself. According to relator, "[t]he only logical explanation for this block is that the BWC was living up to its end of an oral agreement it had with Access not to re-rate the Group, with the consideration for the BWC being that the offending employer voluntarily remove itself from the Access Group." (Reply brief at 1.)

{¶32} In effect, relator argues that the only inference to be drawn from the undisputed fact that the EM block/override was placed is that, for valid consideration, the bureau promised that the EM block/override would be permanent, thus creating a binding oral contract. In effect, alternatively, relator argues that the only inference to be drawn from the placement of the EM block/override itself is that the bureau promised that it would be permanent and reasonably expected that such promise would induce action or forbearance.

{¶33} Obviously, neither the adjudicating committee nor the administrator's designee drew such inference. Apparently, relator would argue that the inference is compelled rather than a matter of discretion—an argument that lacks merit. See *State ex rel. Supreme Bumpers, Inc. v. Indus. Comm.*, 98 Ohio St.3d 134, 2002-Ohio-7089, ¶69 (the commission may draw reasonable inferences and rely on common sense in evaluating evidence).

{¶34} A reading of Ohio Adm.Code 4123-17-62(G) may be helpful:

> (G) After the group application deadline but before the end of the policy year for the group, the sponsoring organization may notify the bureau that it wishes to remove an employer from participation in the group. The sponsoring organization

> may request that the employer be removed from the group after the application deadline only for the employer's gross misrepresentation on its application to the group.
>
> (1) "Gross misrepresentation" is an act by the employer that would cause financial harm to the other members of the group. Gross misrepresentation is limited to any of the following:
>
> (a) Where the sponsoring organization discovers that the employer applicant for group rating has recently merged with one or more entities, such that the merger adversely affects the employer's experience modification and adversely affects the experience modification of the group, and the employer did not disclose the merger on the employer's application for membership in the group.
>
> (b) Where the sponsoring organization discovers that the employer applicant for group rating has failed to disclose the true nature of the employer's business pursuit on its application for membership in the group, and this failure adversely affects the experience modification of the group.
>
> (2) Where the sponsoring organization requests that an employer be removed from the group, the burden of proof is on the sponsoring organization to provide documentation. The bureau shall review the request to remove the employer from the group, and the employer shall be removed from the group only upon the bureau's consent.

{¶35} While arguably Ohio Adm.Code 4123-17-62(G) provided the bureau authority to grant relator's request to remove the offending employer from the group for the 2005 and 2006 rating years, nothing in Ohio Adm.Code 4123-17-62 addresses the bureau's authority to place a so-called EM block/override, or to enter into an agreement to do so.

{¶36} Relator, however, does not rely upon any bureau rule nor any statute to support its administrative protest, or to support its request for a writ of mandamus. Rather, in order to establish the clear legal right and clear legal duty upon which

mandamus must be premised, relator relies entirely upon its theory that the bureau entered into a binding oral contract or, alternatively, that the doctrine of promissory estoppel compels the bureau to permanently retain the EM block/override. That relator's claim for relief relies upon contract theory or the doctrine of promissory estoppel rather than a statute or administrative rule is significant.

{¶37} "It is axiomatic that in mandamus proceedings, the creation of the legal duty that a relator seeks to enforce is the distinct function of the *legislative branch of government*, and courts are not authorized to create the legal duty enforceable in mandamus." *State ex rel. Pipoly v. State Teachers Retirement Sys.,* 95 Ohio St.3d 327, 2002-Ohio-2219, ¶18 (emphasis sic); see *State ex rel. Gessner v. Vore*, 123 Ohio St.3d 96, 2009-Ohio-4150, ¶14 (quoting *Pipoly*); see also *State ex rel. Lucas Cty. Republican Party Executive Commt. v. Brunner*, ___ Ohio St.3d ___, 2010-Ohio-1873 (slip opinion) (quoting *Pipoly*).

{¶38} In effect, relator is asking this court to create the legal duty by determining the existence of a binding contract or a promissory estoppel. But, in mandamus, this court is not authorized to create the legal duty that relator seeks to enforce. Clearly, this court has no authority in an original action to determine the existence of a binding contract or promissory estoppel and, then, on that basis, enforce the promises of the contract or estoppel by writ of mandamus.

{¶39} Accordingly, based upon the above analysis, relator cannot show that the bureau is under a clear legal duty and, thus, relator's request for a writ of mandamus must be denied.

{¶40} Moreover, even if it could be argued that the bureau had the authority to determine the existence of a binding oral contract or promissory estoppel and to enforce a promise through its administrative proceedings, the bureau was not compelled to find a binding oral contract or promissory estoppel. Clearly, the bureau was not compelled to draw the inference that relator apparently invited it to make based upon the undisputed fact that the bureau did place an EM block/override on the group's 2005 rating year.

{¶41} Citing *State ex rel. Craftsmen Basement Finishing Sys., Inc. v. Ryan*, 121 Ohio St.3d 492, 2009-Ohio-1676, relator also argues, as earlier noted, that the bureau failed to adequately explain its decision to remove the EM block/override and then retroactively rerate the group.

{¶42} Given that relator is asking this court to create the clear legal duty to be enforced by writ of mandamus and, on that basis, this action must be denied, any issue regarding the bureau's alleged failure to explain its decision is rendered moot.

{¶43} Moreover, the bureau had no duty to explain what the evidence fails to explain. As the bureau determined, there is no "written correspondence" indicating the bureau agreed not to rerate the 2005 group, even though an EM block/override was placed. And again, the bureau was not compelled to draw the inference from the EM block/override that relator invited the bureau to make.

{¶44} Accordingly, 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).