[Cite as *State ex rel. Par Acquisition Co. v. Bur. of Workers' Comp.*, 2015-Ohio-499.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.
Par Acquisition Company,
Custom Air Conditioning
and Heating Company,

Relators,

v. : No. 13AP-933

Ohio Bureau of Workers' Compensation, : (REGULAR CALENDAR)

Respondent.

NUNC PRO TUNC[1]

D E C I S I O N

Rendered on February 12, 2015

Darrell N. Markijohn, Esq., LLC, and *Darrell N. Markijohn*, for relator.

Michael DeWine, Attorney General, and *Andrew Alatis,* for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

TYACK, J.

{¶ 1} PAR Acquisition Company ("PAR"), and Custom Air Conditioning and Heating Company ("Custom Air"), have filed this action in mandamus seeking a writ to compel the Ohio Bureau of Workers' Compensation ("BWC") to allow the companies to

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[1] This Nunc Pro Tunc Decision was issued to correct a clerical error contained in original decision released on February 10, 2015.

participate in the BWC Safety Counsel Rebate Incentive Program and receive the rebates which accompany such participation.

{¶ 2} In accord with Loc.R. 13(M) of the Tenth District Court of Appeals, the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the evidence to be presented and filed briefs. The magistrate then issued a magistrate's decision, appended hereto, which includes detailed findings of fact and conclusions of law. The magistrate's decision includes a recommendation that we deny the request for a writ.

{¶ 3} Counsel for PAR and Custom Air has filed objections to the magistrate's decision. Counsel for the BWC has filed a memorandum in response. The case is now before the court for a full, independent review.

{¶ 4} Apparently PAR and Custom Air are part of or enrolled in a Professional Employers Organization, commonly referred to as a PEO. The full extent of the relationship is not apparent from the record before us. PAR and Custom Air claim they are in a "partial PEO relationship" with Group Management Services ("GMS") for purposes of workers' compensation, but still maintained coverage under their own individual policy numbers.

{¶ 5} Our magistrate viewed as critical the assertion that PAR and Custom Air maintained their individual policy numbers which were not subject to the PEO agreement. Our magistrate found that PAR and Custom Air failed to prove the accuracy of that assertion during the administrative proceedings before the BWC and therefore cannot be granted a writ of mandamus.

{¶ 6} Not surprisingly, counsel for PAR and Custom Air disagree with the outcome recommended by our magistrate. Counsel's formal objection reads:

> The Magistrate's conclusion that the merits of Relators' challenge to Respondent's decision is not before this court, because Relators failed to submit any evidence to support that Relators reported payroll during 2011 with respect to manual classifications that were not subject to a PEO agreement creates a nonexistent issue. In fact, the payroll was reported to Respondent so Respondent cannot deny for lack of knowledge whether or not the payroll was reported. Further, this evidence was not presented administratively because it was not challenged by Respondent.

{¶ 7} The last sentence of the objection is fatal to counsel's argument. Counsel admits that the evidence was not presented at the administrative level. The issue is not whether at some level of the bureaucracy which is the BWC, someone knew that PAR and Custom Air reported payroll in 2011. The issue is what did counsel prove at the administrative hearings on the pertinent issues.

{¶ 8} The objections to the magistrate's decision are overruled. We adopt the findings of fact and conclusions of law contained in the magistrate's decision. We, therefore, deny the request for a writ of mandamus.

Objections overruled; writ denied.

BROWN and KLATT, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.
PAR Acquisition Company
and Custom Air Conditioning
and Heating Company,

Relators,

v. No. 13AP-933

Ohio Bureau of Workers' Compensation, (REGULAR CALENDAR)

Respondent.

MAGISTRATE'S DECISION

Rendered on November 17, 2014

Fisher & Phillips LLP, Steven M. Loewengart and *Kevin E. Hess,* for relators.

Michael DeWine, Attorney General, and *Andrew J. Alatis,* for respondent.

IN MANDAMUS

{¶ 9} In this original action, relators, PAR Acquisition Company ("PAR") and Custom Air Conditioning and Heating Company ("Custom Air"), request a writ of mandamus ordering respondent Ohio Bureau of Workers' Compensation ("bureau" or "respondent") to vacate the August 6, 2013 order of the administrator's designee that denies requests for participation rebates under Ohio Adm.Code 4123-17-56.2, and to enter an order granting participation rebates.

Findings of Fact:

{¶ 10} 1. On December 16, 2013, relators filed their amended complaint for a writ of mandamus. On December 18, 2013, respondent answered the amended complaint.

{¶ 11} 2. Attached to the amended complaint is the affidavit of Alan Groedel executed December 12, 2013. Groedel is the president of PAR.

{¶ 12} 3. According to the Groedel affidavit, on July 1, 2011, Groedel filed with the bureau, form UA-3 captioned "Professional Employer Organization Client Relationship Notification." The completed UA-3 form dated June 1, 2011 is also attached to the amended complaint.

{¶ 13} The UA-3 form indicates that PAR, as the client company, entered into an agreement with Group Management Services, Inc. ("GMS"), who is a professional employer organization ("PEO"). The completed UA-3 form is signed by Groedel and David Couture, a representative of GMS. The completed form lists the policy number (1084333) for GMS and the policy number (1479522) for PAR.

{¶ 14} 4. Under a section of the form captioned "Employee Reporting (Payroll & Claims)," the form asks that one of three boxes be marked. On the form, the box is marked aside the pre-printed statement "A portion under the PEO Policy." That section of the form also asks for a listing of client classifications reportable by the PEO. In the space provided, manual numbers 7370, 8742, and 8810 are listed.

{¶ 15} According to the Groedel affidavit:

> [Six] Pursuant to a PEO agreement between PAR Acquisition Company and Group Management Services Inc., PAR Acquisition Company maintained manual classification 7382 under risk number 1479522.
>
> [Seven] PAR Acquisition Company reported payroll to the Ohio BWC in 2011 under policy number 1479522.

{¶ 16} 5. Attached to the amended complaint is the affidavit of T. Patrick Halaiko executed December 11, 2013. Halaiko is the president of Custom Air.

{¶ 17} 6. According to the Halaiko affidavit, on March 22, 2010, Custom Air filed with the bureau a completed form UA-3. The completed form dated February 10, 2010 is also attached to the amended complaint.

{¶ 18} The completed UA-3 form indicates that Custom Air, as the client company, entered into an agreement with GMS who is the PEO. The completed UA-3 form is signed by Halaiko and David Couture, a representative of GMS. The completed form lists policy number (1084333) for GMS and policy number (666607) for Custom Air.

{¶ 19} Under a section of the form captioned "Employee Reporting (Payroll & Claims)," the form asks that one of three boxes be marked. On the completed form, the box is marked aside the pre-printed statement "A portion under the PEO Policy." That section of the form also asks for a listing of client classifications reportable by the PEO. In the space provided, manual numbers 5605, 5606, 8742, and 8810 are listed.

{¶ 20} 7. According to the Halaiko affidavit:

> [Six] Pursuant to a PEO agreement between Custom Air Conditioning and Heating Company and Group Management Services Inc., Custom Air Conditioning and Heating Company maintained manual classification 5537 under risk number 666607.
>
> [Seven] Custom Air Conditioning and Heating Company reported payroll to the Ohio BWC in 2011 under policy number 666607.

{¶ 21} 8. The affidavits of Groedel and Halaiko are not referenced in the amended complaint as exhibits to the amended complaint. The amended complaint identifies eight exhibits, but the two affidavits are not among the exhibits identified.

{¶ 22} 9. In its answer to the amended complaint, the bureau does not address the Groedel and Halaiko affidavits.

{¶ 23} 10. The Groedel and Halaiko affidavits are not stipulated by the parties in the parties' stipulation of evidence filed with this court on June 30, 2014.

{¶ 24} 11. While the January 9, 2013 order of the adjudicating committee (Stipulated Record, 13) indicates that relators were "in a partial relationship with the PEO" and the August 6, 2013 order of the administrator's designee (Stipulated Record, 24) indicates that relators were "in a partial lease arrangement with a PEO," the stipulated record fails to provide the information contained in paragraphs six and seven of the Groedel affidavit and paragraphs six and seven of the Halaiko affidavit. That is, the stipulated record fails to support the specific averments of the Groedel affidavit that PAR

"maintained manual classification 7382 under risk number 1479522" and that PAR "reported payroll to the Ohio BWC in 2011 under policy number 1479522."

{¶ 25} 12. Likewise, the stipulated record fails to support the specific averments of the Halaiko affidavit that Custom Air "maintained manual classification 5537 under risk number 666607" and that Custom Air "reported payroll to the Ohio BWC in 2011 under policy number 666607."

{¶ 26} 13. In the amended complaint, relators aver as follows:

> [Eight] Under the PEO Agreement between PAR and GMS, PAR maintained manual classification 7382 under policy number 1479522 with the BWC.
>
> [Nine] PAR reported payroll to the BWC in 2011 under policy number 1479522.
>
> * * *
>
> [Fourteen] Under the PEO Agreement between Custom Air and GMS, Custom Air maintained manual classification 5537 under risk number 666607 with the BWC.
>
> [Fifteen] Custom Air reported payroll to the BWC in 2011 under policy number 666607.

{¶ 27} 14. In its answer to the amended complaint, respondent denies paragraphs 8, 9, 14, and 15, "for lack of knowledge sufficient to form a belief as to the truth or veracity thereof."

{¶ 28} 15. Accordingly, neither the stipulated record nor the pleadings show or prove that relators reported payroll in 2011 under their respective policy numbers for the specific manual numbers alleged to have been maintained or kept by relators that were not covered by the PEO agreement. That is, neither the stipulated evidence nor the pleadings show or prove that PAR reported payroll for manual 7382 under its policy number or that Custom Air reported payroll for manual 5537 under its policy number in the year 2011.

{¶ 29} 16. The stipulation of evidence shows that, by letter dated September 22, 2011, PAR was informed by Greater Cleveland Safety Council, Inc., that the bureau had informed it that PAR cannot participate in the Safety Council Rebate Incentive Program.

The letter did not explain why PAR was ineligible for the rebate, but did urge PAR to contact the bureau to find out the reason.

{¶ 30} 17. The stipulation of evidence shows that, by letter dated October 31, 2011, Custom Air was informed by the Safety Council of Greater Columbus, that Custom Air was ineligible to participate in the Safety Council Rebate Program. The letter explains:

> I was informed that because Custom Air is enrolled in a Professional Employer Association (PEO), and because all companies in that PEO did not enroll/meet the requirements, you were not eligible for the rebate.
>
> I can verify that Custom Air did meet all of the SCGC requirements for the 2010-2011 BWC year including: attending 10 meeting[s], completing two Semi-Annual Reports, and earning a CEO credit.
>
> All eligibility is determined by the Ohio Bureau of Workers' Compensation. The SCGC is not privy to the status of individual firms beyond meeting attendance and submission of Semi-Annual Reports. If you need more detailed information, you can contact your Employer Services Specialist with the Ohio BWC.

{¶ 31} 18. On July 23, 2012, GMS filed an "Application for Adjudication Hearing" on a form provided by the bureau. On the form, counsel for GMS wrote:

> The BWC is denying BWC Safety Council rebates to employers who are in a partial PEO relationship. The BWC is applying this rule to manual classes that are on the client employer's policy. GMS does not agree with this policy. GMS requests that the rebates be available to client policy manual classes.

{¶ 32} 19. Apparently, the July 23, 2012 application did not prompt a hearing.

{¶ 33} 20. By letter dated November 1, 2012, bureau Employer Services Specialist Dennis Taddeo, informed GMS the rebate requests were denied. The letter explained:

> On 10/17/2012, the Ohio Bureau of Workers' Compensation (BWC) received your company's request for your clients that are in a partial PEO relationship with you be allowed to participate in and receive the rebate incentive for the safety council rebate incentive program. Regrettably, BWC must deny your request.

> **<u>Safety Council Rebate Incentive Program</u>**
>
> **Legal Background:** Legal references are found in Ohio Revised Code (ORC) 4123.29 - Duties of the Administrator of the Ohio Bureau of Workers' Compensation (BWC) and Ohio Administrative Code (OAC) 4123-17-56.2 Safety Council Rebate Incentive Program.

(Emphasis sic.)

{¶ 34} 21. On November 6, 2012, GMS's legal counsel completed another "Application for Adjudication Hearing," on the bureau form. This was filed November 13, 2012. GMS explained:

> The BWC is denying BWC Safety Council rebates to employers who are in a partial PEO relationship. The BWC is applying this rule to manual classes that are on the client/employer's policy. GMS requests that the rebates be available to client policy manual classes.

{¶ 35} 22. Following a January 9, 2013 hearing before the bureau's three-member adjudicating committee, the committee mailed an order denying the protest. The order explains:

> **Background Facts and Issues Presented:** The employer is protesting its ineligibility for the 2011 Safety Council Incentive Program. The Bureau denied the employer's request because the employer was in a PEO relationship during the program year.
>
> * * *
>
> **<u>The Employer Position:</u>** There is no Bureau rule or program requirements which state the PEO can only get the discount. The rule does not address what happens when the employer is with a PEO for a partial PEO relationship. The calculation of the experience is not done solely because it would be too difficult for the Bureau to calculate. Administrative ease is not a valid reason to deny the discount to the employer.
>
> **<u>The Bureau's Position:</u>** Three clients of a PEO applied for the SCIP discount but were denied because the PEO received the discounts. These clients were only in a partial PEO relationship. The clients did participate in SCIP and became

> eligible for the discount, but the discount only went to the PEO. It was additionally noted that application of the program to PEO clients in a partial relationship with the PEO do not have a complete experience upon which a performance rebate could be judged.
>
> **Findings of Fact and Conclusions of the Law:**
> 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. Therefore, the employer is not eligible to receive the 2011 Safety Council incentive discount. The Bureau policy with regard to PEOs and its client companies speaks only of receipt of a rebate for the PEO and provides no basis for the client employer who maintains a partial payroll to receive any rebate for either participation or performance.

(Emphasis sic.)

{¶ 36} 23. By letter dated February 1, 2013 on behalf of GMS, PAR, and Custom Air, staff counsel for GMS appealed the January 9, 2013 decision of the adjudicating committee to the administrator's designee.

{¶ 37} 24. Following an August 6, 2013 hearing, the administrator's designee issued an order that denies the protest. The order explains:

> Pursuant to R.C. 4123.291, this matter came on for hearing before the Administrator's Designee on the employer's appeal of the Adjudicating Committee order dated January 9, 2013. At issue before the Administrator's Designee is the employer's protest of the employer's ineligibility for the 2011 Safety Council Incentive Program. The Bureau denied the employer's request because the employer was in a PEO relationship during the program year.
>
> * * *
>
> The Administrator's Designee adopts the statement of facts contained in the order of the Adjudicating Committee, except to the extent that testimony at the hearing noted errors in the order.
>
> Based on the testimony and other evidence presented at the hearing, the Administrator's Designee AFFIRMS the

Adjudicating Committee's findings, decision, and rationale set forth in the order.

Group Management Services ("GMS") risk no. 1084333, is a registered PEO under Chapter 4125. of the Revised Code. Custom Air Conditioning and Heating Co. ("Custom Air"), risk no. 666607, and PAR Acquisition Co. ("PAR"), risk no. 1479522, are two employers who have PEO relationships with GMS.

The Administrator's Designee notes that GMS objected to portions of the Adjudicating Committee order because the order contained errors of fact. GMS stated that contrary to the order, GMS did not receive Safety Council Incentive Program discounts on behalf of or in lieu of client employers. These errors do not bear on the Administrator's Designee's determination of this appeal.

The essential argument by GMS is that Custom Air and PAR were in a partial lease agreement with GMS, and that therefore they continued to report and pay some premium to the Bureau under their own risk accounts. GMS argued that when a PEO is the employer of record for determining claim eligibility, the client employer is also the co-employer, creating a joint liability that should permit joint eligibility for Bureau discount programs. GMS argued that the Bureau rules on program eligibility do not differentiate between employers in a PEO relationship who use either a full or partial agreement.

Counsel for the Bureau stated that the resolution of this appeal lies in the Revised Code statutes governing PEOs. R.C. 4125.04(A) states:

When a client employer enters into a professional employer organization agreement with a professional employer organization, the professional employer organization is the employer of record and the succeeding employer for the purposes of determining a workers' compensation experience rating pursuant to Chapter 4123. of the Revised Code.

As the succeeding employer, the PEO is the employer for which the Bureau will evaluate all Bureau program and discount rules. For example, the Complaint Policy for the Safety Council Program states that for a PEO to qualify for

> the Safety Council rebate/bonus, each of its individual clients must fulfill the Safety Council eligibility requirements in the local Safety Council in which they enroll. If all individual clients of the PEO do not meet the Safety Council eligibility requirements, no rebate will be extended.
>
> Based on R.C. 4125.04(A) and Bureau policy, the Administrator's Designee is persuaded that the individual employers do not qualify for the discount programs in question. The application of and eligibility for these programs is at the PEO level. GMS argued that the Bureau rules for the discount programs in question are silent on whether an employer in a partial lease arrangement with a PEO may qualify for such programs. However, the Bureau is limited in the rules i[t] may adopt.
>
> Rules must be based on statutory authority. While the law provides deference and discretion to an agency to adopt rules within its statutory authority, a basic limitation on this authority is that "an administrative agency may not legislate by enacting rules which are in excess of legislative policy, or which conflict with the enabling statute." *P.H. English, Inc. v. Koster,* 61 Ohio St.2d 17, 19, 399 N.E.2d 72 (1980). Considerable deference should be accorded to an agency's interpretation of rules the agency is required to administer, and an administrative rule that is issued pursuant to statutory authority has the force of law unless it is unreasonable or conflicts with a statute covering the same subject matter. *State ex rel. Celebrezze v. Natl. Lime & Stone Co.,* 68 Ohio St.3d 377, 627 N.E.2d 538, 1994-Ohio-486. Here, R.C. 4125.04(A) establishes the boundaries of the Bureau's authority in rulemaking, and the statute prevails over the rules. Thus, the Bureau policy to deny the program discounts in this case is consistent with the statute.
>
> Therefore, the Administrator's Designee DENIES the employer's appeal and AFFIRMS the decision of the Adjudicating Committee.

(Emphasis sic.)

{¶ 38} 25. On November 4, 2013, relators filed this mandamus action.

Conclusions of Law:

{¶ 39} In this original action, relators allege they each maintained or kept a manual classification under their respective policy numbers that was not subject to a PEO agreement and that during the year 2011 each relator reported payroll to the bureau under their own policy number for employees under the maintained or kept manual classification. That factual allegation is critical to relators' claim that respondent abused its discretion in denying the requests for a participation rebate under Ohio Adm.Code 4123-17-56.2.

{¶ 40} Because there was no evidence submitted at the administrative proceedings at issue upon which respondent could have relied to support the critical factual allegation, relators clearly failed to meet their burden of proof at the administrative proceedings at issue. Moreover, relators cannot unilaterally supplement the record of the administrative proceedings by filing affidavits with their amended complaint when those affidavits, or affidavits of similar import, were not submitted at the administrative proceedings at issue.

{¶ 41} Accordingly, it is the magistrate's decision that this court deny relators' request for a writ of mandamus, as more fully explained below.

{¶ 42} R.C. 4125.01 et seq. sets forth law regarding PEO agreements.

{¶ 43} R.C. 4125.01 provides definitions:

> (A) "Assurance organization" means an independent and qualified entity approved by the administrator of workers' compensation to certify the qualifications of a professional employer organization or professional employer organization reporting entity.
>
> (B) "Client employer" means a sole proprietor, partnership, association, limited liability company, or corporation that enters into a professional employer organization agreement and is assigned shared employees by the professional employer organization.
>
> (C) "Coemploy" means the sharing of the responsibilities and liabilities of being an employer.
>
> (D) "Professional employer organization" means a sole proprietor, partnership, association, limited liability company, or corporation that enters into an agreement with one or more client employers for the purpose of coemploying

all or part of the client employer's workforce at the client employer's work site.

(E) "Professional employer organization agreement" means a written contract to coemploy employees between a professional employer organization and a client employer with a duration of not less than twelve months in accordance with the requirements of this chapter.

{¶ 44} R.C. 4125.02 provides:

The administrator of workers' compensation shall adopt rules in accordance with Chapter 119. of the Revised Code to administer and enforce this chapter.

{¶ 45} R.C. 4125.03 provides:

(A) The professional employer organization with whom a shared employee is coemployed shall do all of the following:

(1) Pay wages associated with a shared employee pursuant to the terms and conditions of compensation in the professional employer organization agreement between the professional employer organization and the client employer;

* * *

(3) Maintain workers' compensation coverage, pay all workers' compensation premiums and manage all workers' compensation claims, filings, and related procedures associated with a shared employee in compliance with Chapters 4121. and 4123. of the Revised Code.

* * *

(5) Maintain complete records separately listing the manual classifications of each client employer and the payroll reported to each manual classification for each client employer for each payroll reporting period during the time period covered in the professional employer organization agreement;

(6) Maintain a record of workers' compensation claims for each client employer;

* * *

> (9) Within fourteen days after receiving notice from the bureau of workers' compensation that a refund or rebate will be applied to workers' compensation premiums, provide a copy of that notice to any client employer to whom that notice is relevant.
>
> R.C. 4125.04 provides:
>
> (A) When a client employer enters into a professional employer organization agreement with a professional employer organization, the professional employer organization is the employer of record and the succeeding employer for the purposes of determining a workers' compensation experience rating pursuant to Chapter 4123. of the Revised Code.

{¶ 46} Supplementing R.C. 4125.01 et seq., Ohio Adm.Code 4123-17-15(C) effective February 17, 2014 provides:

> Partial leases.
>
> (1) A PEO may enter into a PEO agreement to coemploy part of a client employer's workforce for workers' compensation purposes only to the extent wages are paid by and reported under the tax identification number of the PEO for federal tax purposes.
>
> (2) Under such partial lease agreement, the PEO shall report under its workers' compensation risk number the payroll associated with the wages paid by and reported by the PEO for federal tax purposes under the PEO's tax identification number. The client employer shall report under its workers' compensation risk number all payroll associated with wages not paid by and not reported under the PEO's tax identification number.
>
> (3) All of a client employer's payroll within a manual classification must be reported in its entirety under either the workers' compensation risk number of the PEO or client employer; such payroll may not be split between the PEO and client employer.

{¶ 47} Ohio Adm.Code 4123-17-56.2 is captioned "Safety council rebate incentive program." Thereunder, the rule provides:

(A) Definitions.

For the purposes of this rule,

(1) "Local safety council" means an entity contracted with the bureau to provide a safety campaign in accordance with standards set forth by the superintendent of the division of safety and hygiene.

(2) "Program year" means July first to June thirtieth, inclusive.

(3) "Superintendent" means the superintendent of the division of safety and hygiene or the superintendent's designee.

(B) For each program year, the administrator may establish the following incentives for employer participation in a local safety council:

(1) Participation rebate.

(a) The superintendent shall determine the participation requirements for each program year and publish such program requirements no later than sixty days prior to the start of the program year.

(b) The participation bonus shall be equal to the amount identified in the appendix to rule 4123-17-75 of the Administrative Code times the employer's pure premium costs during the program year.

* * *

(C) Eligibility requirements.

(1) To receive a rebate as set forth in paragraph (B)(1) or (B)(2) of this rule the employer must meet the following criteria:

(a) The employer must be current with respect to all payments due the bureau, as defined in paragraph (A)(1)(b) of rule 4123-17-14 of the Administrative Code.

(b) Except as provided for in paragraphs (C)(1)(b)(i) and (C)(1)(b)(ii) of this rule, the employer must not have

> cumulative lapses in workers' compensation coverage in excess of forty days within the prior twelve months.
>
> * * *
>
> (2) An employer shall not be eligible to receive a rebate as set forth in paragraph (B)(1) or (B)(2) of this rule if:
>
> (a) The employer is a self-insuring employer providing compensation and benefits pursuant to <u>section 4123.35 of the Revised Code</u>.
>
> (b) The employer is a state agency.
>
> (c) The employer is participating in a discount program designated as incompatible with the rebate under rule 4123-17-74 of the Administrative Code.
>
> (3) A PEO shall not be eligible to receive benefits under this rule unless all of the following requirements are met:
>
> (a) The PEO and each of the PEO's client employers meet all eligibility and program requirements.
>
> (b) The PEO electronically submits affirmation that the PEO and each of the PEO's client employers has enrolled in a local safety council as of July thirty-first of the applicable program year.
>
> (c) The PEO submits a list of each of the client employers with whom it has an agreement as of May first of the applicable policy year.

{¶ 48} Here, after much discussion regarding R.C. 4125.04(A) and Ohio Adm.Code 4123-17-56.2, relators conclude:

> Therefore, the plain language of both R.C. § 4125.04 and O.A.C. § 4123-17-56.2(C) permit program eligibility to an employer engaged in a partial PEO relationship under circumstances where, as here, Relators maintain and report payroll under an active workers' compensation policy for employees who are not coemployed by a PEO and not subject to the partial PEO relationship, and otherwise meet the program's stated eligibility requirements. The Order of the Administrator's Designee in essence makes a new rule where established law is silent in order to bar Relators from

> receiving the Safety Council rebate for which they were admittedly eligible in 2011.

(Relators' Brief, 21-22.)

{¶ 49} Also, relators challenge the reliance on R.C. 4125.04(A) by the Administrator's Designee, stating:

> This reasoning is flawed because the PEO certainly cannot be the employer of record for manual classifications that are not subject to the PEO agreement. As previously explained, Relators remained the employers of record for certain manual classifications maintained on their respective Bureau policies.

(Relators' Brief, 18.)

{¶ 50} Again, it is clear that relators' challenge to the order of the administrator's designee denying the request for a participation rebate is premised upon factual allegations that lack support in the administrative record.

{¶ 51} Relators have the burden here of proving they presented sufficient evidence upon which respondent could have relied to grant their requests for the participation rebates. As this court recently stated in *State ex rel. Casto v. Indus. Comm.,* 10th Dist. No. 12AP-205, 2013-Ohio-1017:

> [I]n this case, there is no evidence in the record to support relator's claim that it raised the issue of voluntary abandonment before the SHO. However, by asserting in its brief that it raised the issue at the hearing, relator seeks to shift the burden to claimant and the commission to prove that voluntary abandonment was not raised. It appears that relator did not take any steps to complete the record, such as requesting an admission regarding what transpired at the hearing, filing an affidavit with respect to what transpired at the hearing, or taking a deposition of someone who was present at the hearing and could describe what transpired. * * * A silent record does not change the applicable burden of proof in this case. Relator, not respondent, bears the burden of proving that it is entitled to mandamus relief by clear and convincing evidence. Absent clear and convincing proof that relator raised the issue of voluntary abandonment before the SHO, relator cannot establish that the SHO had a clear legal duty to address that issue in her opinion. A mere assertion in

> its brief that it raised the issue of voluntary abandonment is insufficient to meet the standard of clear and convincing evidence.

(Citation omitted.) (*Id.* at ¶ 11.)

{¶ 52} Relators in effect, argue that R.C. 4125.04(A) allows and requires relators to be the employers of record with respect to employees who are not coemployed under the respective PEO.

{¶ 53} Clearly, the merits of relators' challenge to respondent's decision is not before this court in this action because the relators have failed to meet their burden of proof at the administrative proceedings. *Casto.* That is, relators failed to submit any evidence upon which respondent could rely to support a finding that relators reported payroll during 2011 with respect to manual classifications that were not subject to a PEO agreement.

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

/S/ MAGISTRATE
KENNETH W. MACKE

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).